No. 05-74350

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLAVIO NUNEZ-REYES,
(A078 181 648)
Petitioner,
v.

ERIC H. HOLDER, JR., United States Attorney General,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

AMICI CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, AND IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER FLAVIO NUNEZ-REYES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* National Association of Criminal Defense Lawyers, California Attorneys for Criminal Justice, and Immigrant Defense Project state that they are not-for-profit corporations that have no parent companies, subsidiaries, or affiliates who have issued shares to the public.

STATEMENT OF INTEREST OF AMICI

Amici are defense associations with members who represent immigrants in federal criminal cases, as well as an immigrant defense organization that advises immigrants and their criminal defense lawyers on the intersection of criminal and immigration law. Amici urge the Court to interpret the 8 U.S.C. § 1101(a)(48)(A) definition of "conviction" at issue in this case after considering the federal criminal applications of this definitional provision.[1] If the Court reads Section 1101(a)(48)(A) to cover state-expunged first-time drug possession dispositions, the Court's decision will have potential repercussions for the thousands of individuals charged each year with the federal crime of illegal reentry into the United States after removal, given the applicability of the "conviction" definition in Section 1101(a)(48)(A) to the illegal reentry statute. In 2009 alone, federal courts handled approximately 30,000 illegal reentry cases.[2] Amici offer this brief to ensure that the Court considers these criminal law applications of Section 1101(a)(48)(A).

Amicus National Association of Criminal Defense Lawyers ("NACDL") is a not-for-profit professional organization of more than 12,000 direct members and an additional 40,000 affiliate members in all 50 states and 30 nations, including

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[1] The definitional provision in 8 U.S.C. § 1101(a)(48)(A) applies to the entirety of the Immigration and Nationality Act, which encompasses both criminal and noncriminal statutes. *See infra* Part I.A.

[2] Transactional Records Access Clearinghouse, Syracuse Univ., Criminal Immigration Prosecutions Are Down, But Trends Differ by Offense (2010), http://trac.syr.edu/immigration/reports/227/.

private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. Founded in 1958, NACDL is considered the preeminent organization in the United States advancing the institutional mission of the nation's criminal defense bar to ensure the proper and fair administration of justice, and justice and due process for all persons charged with crimes.

Amicus California Attorneys for Criminal Justice ("CACJ") is an organization of approximately 2,000 persons, most of whom practice criminal defense in California. According to its by-laws, one of CACJ's purposes is to defend the rights of individuals guaranteed in the United States and California Constitution. CACJ often appears as an amicus curiae in matters of importance to its membership.

Amicus Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to defending the legal, constitutional, and human rights of immigrants. A national expert on the intersection of criminal and immigration law, IDP supports, trains, and advises both criminal defense and immigration lawyers, as well as immigrants themselves, on issues that involve the immigration consequences of criminal convictions.

SUMMARY OF ARGUMENT

The Court's decision in this case will have immediate repercussions in the criminal context because the definition of "conviction" in 8 U.S.C. § 1101(a)(48)(A) governs illegal reentry proceedings in federal criminal courts. The definition of "conviction" in Section 1101(a)(48)(A) controls the meaning of the term in the illegal reentry statute in 8 U.S.C. § 1326 and affects the sentencing guidelines connected with that statute. The Court's interpretation of "conviction" thus impacts not only whether an individual may be penalized for certain offenses under Section 1326(b), but also the sentence he may face as a result.

Given the criminal applications of Section 1101(a)(48)(A), the Court should exercise its independent duty to interpret the meaning of a term employed in a federal criminal statute, without deferring to the Board of Immigration Appeals ("BIA"), which considered only the immigration implications of the statute.[3] The BIA lacks ultimate interpretative authority over Section 1101(a)(48)(A) given its criminal applicability because "a criminal statute[] is not administered by any agency but by the courts." *Crandon v. United States*, 494 U.S. 152, 177 (1990)

[3] Although other circuits have concluded that state-expunged first-time drug possession dispositions count as convictions for immigration purposes, they have failed to consider the applicability of the definition of "conviction" in 8 U.S.C. § 1101(a)(48)(A) to criminal statutes and the inapplicability of agency deference in these circumstances. *See Nunez-Reyes v. Holder*, 602 F.3d 1102, 1106 (9th Cir. 2010) (Graber, J., concurring) (collecting cases), *reh'g en banc pending*, No. 05-74350 (9th Cir. 2010).

(Scalia, J., concurring). Deference under *Chevron USA, Inc, v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is therefore inapplicable here. Because the Court's interpretation of "conviction" in the present case will also dictate its interpretation of "conviction" in criminal cases, *see Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004), the Court's interpretation of "conviction" must be guided instead by the criminal rule of lenity. *See infra* Part I.

Regardless of whether the Court decides that the *Chevron* framework applies here, the meaning of Section 1101(a)(48)(A) is clear. In enacting Section 1101(a)(48)(A), Congress codified BIA case law that reaffirmed the agency's treatment of state-expunged dispositions, which included holdings that state-expunged first-time drug possession dispositions are not convictions. Against this backdrop, Section 1101(a)(48)(A) clearly indicates that state-expunged first-time drug possession offenses are not convictions. *See infra* Part II. *See generally* Brief of *Amici Curiae* American Immigration Lawyers Association, et al., *Nunez-Reyes v. Holder*, No. 05-74350 (filed Nov. 5, 2010) [hereinafter AILA Brief].

Should the Court find the statute to be ambiguous, the Court should apply the criminal rule of lenity in interpreting the statute. Where congressional intent is unclear, the rule of lenity requires the Court to adopt the interpretation of Section 1101(a)(48)(A) more favorable to criminal defendants, here avoiding exposure of

individuals with state-expunged first-time drug possession offenses to illegal reentry prosecutions involving heavy sentences. *See infra* Part III.

If, even after considering the statute in context and applying the rule of lenity, the Court concludes that the meaning of the statute is unclear, the Court still should not apply *Chevron* deference to the BIA's interpretation because it is unreasonable. The BIA departed from its twenty-two-year precedent that state-expunged first-time drug possession dispositions were not convictions under Section 1101(a)(48)(A). Amici urge the Court to reject such an unreasonable interpretation of the statute. *See infra* Part IV.

ARGUMENT

Over a decade ago, this Court held that state-expunged first-time drug possession dispositions are not convictions on the basis of equal protection analysis, *Lujan-Armendariz v. INS*, 222 F.3d 728, 749 (9th Cir. 2000), and the Court should now reaffirm this ruling. *See generally* AILA Brief. However, amici submit that even if this Court withdraws from the equal protection basis for *Lujan*, Petitioner should nevertheless prevail based on a proper reading of the statute as not covering state-expunged first-time drug possession dispositions that are Federal First Offender Act ("FFOA") counterparts.

I. THE COURT SHOULD NOT APPLY THE *CHEVRON* FRAMEWORK BECAUSE AGENCY DEFERENCE DOES NOT APPLY WHEN A STATUTE HAS CRIMINAL APPLICATIONS.

Because Section 1101(a)(48)(A) defines the term "conviction" for purposes of the illegal reentry statute at Section 1326, this Court's interpretation of "conviction" will determine how courts interpret "conviction" in federal criminal cases. The Court should not defer to the BIA's interpretation of Section 1101(a)(48)(A) because the BIA lacks the administering authority to interpret criminal statutes. The Court must therefore adopt a definition of "conviction" that conforms with the term's use in the criminal context.

A. Given That 8 U.S.C. § 1101(a)(48)(A) Has Criminal Applications, the Court's Interpretation of the Term Will Have Significant Criminal Consequences.

The Court's interpretation of "conviction" in Section 1101(a)(48)(A) will directly impact what penalties are imposed under Section 1326, the statute that criminalizes illegal reentry into the United States after removal. Under Section 1326(b), a defendant prosecuted for illegal reentry faces increased maximum criminal penalties if the government previously removed him due to a "conviction" for one of the types of offenses enumerated in the statute.[4] 8 U.S.C. § 1326(b).

[4] The most relevant part of Section 1326(b) is Section 1326(b)(1), which assigns increased maximum criminal penalties to noncitizens whose removal is "subsequent to a *conviction* for commission of three or more misdemeanors

The definition of "conviction" in Section 1326(b) is dictated by the definition of "conviction" in Section 1101(a)(48)(A), because Section 1101(a)(48)(A) applies to all of Title 8, Chapter 12, which includes Section 1326. *See* 8 U.S.C. § 1101(a) ("As used in this Act . . ."). Thus, if the Court changes its interpretation of "conviction" in Section 1101(a)(48)(A), the change will necessarily affect which defendants are considered to have "convictions" for the purposes of the enhanced maximum criminal penalties imposed under Section 1326(b).

For example, pursuant to this Court's decision in *Lujan-Armendariz*, 222 F.3d at 749, a defendant with a state-expunged first-time drug possession disposition who illegally reenters the United States after removal would be subject to penalties under Section 1326(a), which is the less punitive general illegal reentry provision. 8 U.S.C. § 1326(a). The defendant could thus be fined under Title 18, imprisoned not more than *two* years, or both. 8 U.S.C. § 1326(a). However, if this Court were to interpret "conviction" to include state-expunged first-time drug possession dispositions, the same defendant could instead be subject to enhanced penalties under the more punitive provisions of Section 1326(b). He could then be fined under Title 18, imprisoned up to *ten* years, or both. 8 U.S.C. § 1326(b)(1).

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involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)." 8 U.S.C. § 1326(b)(1) (emphasis added).

The definition of "conviction" thus directly governs the criminal penalties faced by defendants who are convicted of illegal reentry under Section 1326.[5]

Not only will the Court's interpretation of "conviction" in Section 1101(a)(48)(A) dictate maximum statutory criminal penalties, but it will also impact sentencing under the United States Sentencing Commission Guidelines ("U.S.S.G."). Individuals convicted of illegal reentry under Section 1326 are sentenced under the advisory range set forth in U.S.S.G. § 2L1.2. U.S.S.G. Manual § 2L1.2 cmt. (2009). Given that the term "conviction" in Section 1326 is defined by Section 1101(a)(48)(A), courts have applied the same definition in sentencing under U.S.S.G. § 2L1.2. *United States v. Anderson*, 328 F.3d 1326, 1328 (11th Cir. 2003) ("Although § 2L1.2 does not explicitly refer to § 1101(a)(48)(A), . . . the term 'conviction' as used in § 2L1.2(b) is governed by the definition set forth in § 1101(a)(48)(A)."); *see also United States v. Zamudio*, 314 F.3d 517, 521 (10th Cir. 2002). As a result, individuals who unlawfully reenter the United States after a conviction for certain felonies and misdemeanors enumerated

[5] The Court's interpretation of Section 1101(a)(48)(A) has at least one other effect as to the illegal reentry statute. If the Court abandons its current treatment of state-expunged first-time drug possession dispositions, individuals with three drug offense misdemeanors, one of which is expunged, would be subject to the harsher penalties of Section 1326(b) rather than those of Section 1326(a), which has a lower maximum penalty and applies to individuals with fewer than three misdemeanors involving drugs. 8 U.S.C. § 1326.

in U.S.S.G. § 2L1.2(b)[6] may be subject to increased offense levels if they are found to have been "convicted" of those offenses. For example, under U.S.S.G. § 2L1.2(a), an individual who has unlawfully reentered the United States without any prior conviction is assigned a Base Offense Level of eight. The offense level is increased by four levels if the individual was previously *convicted* of a first-time drug possession felony, resulting in an offense level of twelve. U.S.S.G. § 2L1.2(b)(1)(D). *See infra* Part III.A (describing the enhanced penalties that criminal defendants would face if the Court accepts the Government's reading of Section 1101(a)(48)(A)). Therefore, the Court's interpretation of Section 1101(a)(48)(A) has significant effects on criminal sentencing for defendants subject to penalties under Section 1326.[7]

B. Because 8 U.S.C. § 1101(a)(48)(A) Applies in the Criminal Context, the Court Should Not Defer to the BIA's Interpretation.

Since the definition of "conviction" in Section 1101(a)(48)(A) applies to Section 1326(b), a criminal statute, the Court should *not* defer to the BIA's interpretation. To the contrary, courts, not agencies like the BIA, are charged with interpreting the meaning of criminal statutes. *See Crandon*, 494 U.S. at 177

[6] U.S.S.G. § 2L1.2(b) enumerates sentencing enhancements beyond the Base Offense Level found in § 2L1.2(a). U.S.S.G. § 2L1.2(b).

[7] None of the other circuits to examine the issue presented by this case have considered the applicability of the Section 1101(a)(48)(A) definition of "conviction" to Section 1326 or U.S.S.G. § 2L1.2(b).

(Scalia, J., concurring) ("The law in question, a criminal statute, is not administered by any agency but by the courts."). The BIA lacks administering authority and expertise over criminal statutes, including Section 1101(a)(48)(A) as incorporated in the criminal provisions of Section 1326(b). *See Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir. 2009) *cert. denied*, 130 S. Ct. 1011 (2009) ("The BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes . . . ."); *see Crandon*, 494 U.S. at 177 (Scalia, J., concurring). Indeed, the Government has conceded before the Supreme Court that the BIA does not have interpretive authority over federal criminal statutes. Brief for the Respondents at 32-33, *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (No. 03-583). Because the BIA is charged with administering many provisions of the INA, it will inevitably interpret terms that appear in those provisions but that also have criminal applications. However, because of the BIA's lack of expertise over such matters, courts should not accord any deference to the BIA's interpretation of terms employed in both criminal and immigration settings. *Cf. Crandon*, 494 U.S. at 177 (Scalia, J., concurring) (While an agency may need to interpret a statute to enforce it, an agency's interpretations of criminal statutory provisions are not entitled to deference.).

Consistent with this understanding of the limits of the BIA's power, the Supreme Court has decided a string of immigration cases involving the term

"aggravated felony" in the INA without deferring to the BIA and without any reference to the *Chevron* framework. Like the term "conviction," "aggravated felony" is a term defined in Section 1101(a) and used in Section 1326 and U.S.S.G. § 2L1.2. *See* 8 U.S.C. § 1101(a)(43); 8 U.S.C. § 1326(b)(2); U.S.S.G. § 2L1.2(b)(1)(C). In *Nijhawan v. Holder*, the Supreme Court resolved the question of whether the petitioner's conviction qualified as an "aggravated felony" without referencing the *Chevron* framework, even though the Government specifically argued for deference to the BIA. *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009); Brief for Respondents at 45, *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009) (No. 08-495). Similarly, in *Lopez v. Gonzales*, the Supreme Court did not mention the *Chevron* framework, even though the Government argued that the BIA's experience administering aggravated felonies under the INA at Section 1101(a)(43) deserved deference. *Lopez v. Gonzales*, 549 U.S. 47 (2006); Brief for Respondents at 32-33 n.26, *Lopez v. Gonzales*, 549 U.S. 47 (2006) (Nos. 05-547, 05-7664). *See also Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (not applying *Chevron* to analysis of the aggravated felony of "theft offense" under 8 U.S.C. § 1101(a)(43)(G)); *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (not applying the *Chevron* framework to whether second or subsequent simple drug possession offenses are "aggravated felonies" under INA provision 8 U.S.C. § 1101(a)(43)(B)). Like the INA statutory provisions with criminal applications at

issue in *Nijhawan*, *Lopez*, *Leocal*, *Duenas*, *and Carachuri-Rosendo*, the interpretation of the INA definition of "conviction" is one reserved for the courts.[8] Therefore, this Court, like the Supreme Court, should interpret the statute itself instead of deferring to the BIA's interpretation of "conviction."[9]

C. Because 8 U.S.C. § 1101(a)(48)(A) Applies in the Criminal Context, the Court Must Exercise its Own Independent Duty to Interpret the Statute Consistently in the Immigration and Criminal Contexts.

In exercising its duty to interpret Section 1101(a)(48)(A), the Court should follow the principle that a statute applied in both criminal and immigration contexts must be given a consistent interpretation in both contexts. As the Supreme Court has explained, "[t]o give [the] same words a different meaning for each category would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005). For example, in *Leocal*, the Supreme Court

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[8] This Court's panel decision *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001), which deferred to the BIA on the impact of the definition of "conviction" on a non-FFOA-counterpart disposition, did not address the fact that the definition of "conviction" has criminal applications and, moreover, did not involve interpretation of the FFOA. In addition, that decision was decided before the Supreme Court's decisions in *Nijhawan*, *Lopez*, *Leocal*, *Duenas*, *and Carachuri-Rosendo.*

[9] If the Court determines that a preliminary question to be addressed is whether the state-expunged disposition here corresponds to an FFOA disposition, this question is another that deserves no deference to the BIA's interpretation. The determination involves analysis of federal and state criminal statutes that is the province of the federal courts. The BIA has no administering authority or special expertise to interpret state or federal criminal laws and thus no deference is due to its interpretations of these laws. *See Marmolejo-Campos* 558 F.3d at 907.

analyzed 18 U.S.C. § 16, which defines the term "crime of violence" and is referenced in the INA at Section 1101(a)(43)(F). *Leocal*, 543 U.S. at 4. The Court noted that the term had been "incorporated into a variety of statutory provisions, both criminal and noncriminal," *id.* at 7, and ultimately held that "we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context," *id.* at 11 n.8.

Like the statute at issue in *Leocal*, Section 1101(a)(48)(A) has both criminal and immigration applications; therefore, the Court must interpret the statute consistently in both contexts. Just like the petitioner in *Leocal*, Mr. Nunez-Reyes was deemed convicted under state law and thus found removable. The Court in *Leocal* analyzed whether the petitioner's conviction counted as an "aggravated felony" under the INA for the purposes of removability, *Leocal*, 543 U.S. at 7-8, noting that the statute in question was used in both immigration and criminal contexts, *id.* at 11 n.8. Likewise, here the issue is whether a state-expunged first-time drug possession disposition counts as a "conviction" for the purposes of determining removability. Given how closely the present case parallels *Leocal*, the Court should follow *Leocal*'s treatment of dual-applicability statutes and exercise its duty to interpret Section 1101(a)(48)(A) so that it may be applied consistently in both the criminal and immigration contexts. *See also supra* Part I.B. In so doing, the Court must apply the traditional tools of statutory interpretation, including the

criminal rule of lenity, which requires the Court to adopt the interpretation favorable to criminal defendants if the statute is capable of more than one interpretation. *See infra* Parts II-III.

II. REGARDLESS OF WHETHER THE COURT CONCLUDES THAT THE *CHEVRON* FRAMEWORK IS APPROPRIATE, THE TEXT AND HISTORY OF THE STATUTE SHOW THAT "CONVICTION" IN 8 U.S.C. § 1101(a)(48)(A) DOES NOT INCLUDE STATE-EXPUNGED FIRST-TIME DRUG POSSESSION DISPOSITIONS.

Regardless of whether the Court applies the *Chevron* framework, the Court must first examine the language of the statute using traditional tools of statutory construction. If the Court "ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect," notwithstanding a contrary agency interpretation. *Chevron*, 467 U.S. at 842-43 n.9; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). Here, examination of the statute in light of its history and context compels the conclusion that state-expunged first-time drug possession offenses are not "convictions" under Section 1101(a)(48)(A).

Section 1101(a)(48)(A) states:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

This definition excludes a number of dispositions where convictions have subsequently been vacated or otherwise eliminated, including the expungement at issue here. For example, the BIA and virtually every circuit to consider the issue have held that dispositions vacated due to procedural defects are not "convictions" within the meaning of Section 1101(a)(48)(A).[10] Similarly, the BIA has held that juveniles who plead guilty and are adjudicated youthful offenders under certain types of ameliorative state statutes are also not deportable. *Matter of Devison-Charles*, 22 I. & N. Dec. 1362, 1363, 1373 (BIA 2000). Nothing in the language of Section 1101(a)(48)(A) suggests that state-expunged first-time drug possession offenses should be treated differently from these other exclusions.[11]

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[10] *Matter of Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003), *rev'd on other grounds sub nom. Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006); *see also Pickering v. Gonzales*, 465 F.3d 263, 266 (6th Cir. 2006); *Pinho v. Gonzales*, 432 F.3d 193, 210 (3d Cir. 2005); *Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1129 (10th Cir. 2005); *Sandoval v. INS*, 240 F.3d 577, 583 (7th Cir. 2001); *Herrera-Inirio v. INS*, 208 F.3d 299, 305 (1st Cir. 2000); *United States v. Campbell*, 167 F.3d 94, 98 (2d Cir. 1999). *But see Discipio v. Ashcroft*, 369 F.3d 472, 475 (5th Cir. 2004), *rev'd on other grounds*, 417 F.3d 448, 449 (5th Cir. 2004).

[11] None of the other circuits to consider the issue presented here reconciled these established exclusions with their conclusions that the plain language of the statute forecloses a reading of the definition that would exclude state-expunged first-time drug possession offenses. *See Nunez-Reyes*, 602 F.3d at 1106 (Graber, J., concurring) (collecting cases). *See generally* AILA Brief.

In fact, a contextualized analysis of the statute compels the conclusion that state-expunged first-time drug possession offenses are not "convictions" under Section 1101(a)(48)(A). In enacting Section 1101(a)(48)(A) in 1996, Congress expressly adopted two prongs of the definition of "conviction" from the three-prong definition in the BIA's decision in *Matter of Ozkok*. 19 I. & N. Dec. 546, 551-52 (BIA 1988). The only excluded part of the *Ozkok* definition, which is not at issue in this case, addressed the status *ab initio* of deferred adjudications that require an additional hearing on the issue of guilt. *Id.* *See generally* AILA Brief. *Ozkok* explicitly clarified that the BIA's long-standing policy of not treating certain expunged dispositions as convictions remained in effect. *Matter of Ozkok*, 19 I. & N. Dec. at 551-52. Consistent with this policy, just one year before Congress enacted Section 1101(a)(48)(A), the BIA reaffirmed its long-standing rule that immigration consequences do not attach to state-expunged first-time drug possession offenses. *Matter of Manrique*, 21 I. & N. Dec. 58, 64 (BIA 1995).[12] Particularly when, as with Section 1101(a)(48)(A), Congress adopts an agency interpretation, Congress intends the agency construction to be incorporated into the statute. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 804, 813 (1989) (When Congress "codifies a judicially defined concept, . . . absent an express statement to

[12] *See also Matter of Deris*, 20 I. & N. Dec. 5 (BIA 1989); *Matter of Kaneda*, 16 I. & N. Dec. 677 (BIA 1979); *Matter of Haddad*, 16 I. & N. Dec. 253 (BIA 1977); *Matter of Werk*, 16 I. & N. Dec. 234 (BIA 1977).

the contrary, . . . Congress intended to adopt the interpretation placed on that concept by the courts."); *see also Hing Sum v. Holder*, 602 F.3d 1092, 1099-1101 (9th Cir. 2010) (Where Congress uses terms that have settled meanings in BIA case law, "Congress means to incorporate the established meaning of these terms.").

Congress' decision to enact essentially verbatim the majority of *Ozkok*'s definition of conviction, while excluding one part of that definition, makes it "particularly appropriate" to read Section 1101(a)(48)(A) as incorporating the agency's treatment of expunged convictions. *See Lorillard v. Pons*, 434 U.S. 575, 581-82 (1977) (Congress' "willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation" makes the presumption that Congress intended to otherwise codify case law "particularly appropriate."). Nothing in the statute or the legislative history of Section 1101(a)(48)(A) mentions, much less contains, the requisite "express statement to the contrary" necessary for the Court to conclude that Congress intended to reject the BIA's established position on state-expunged first-time drug possession dispositions. *Davis*, 489 U.S. at 811; *see also Lorillard*, 434 U.S. at 581-82.[13] Given Congress'

[13] Other circuits rely on an overbroad reading of the Conference Report's statement that Section 1101(a)(48)(A) "deliberately broadens the scope of the definition of conviction beyond that adopted by the Board of Immigration Appeals in *Matter of Ozkok*," H.R. Conf. Rep. No. 104-828, at 224 (1996), to conclude that Congress intended to overrule the agency's approach to expungements. *See Herrera*, 208

strong reliance on agency law, the Court should rule that Section 1101(a)(48)(A) codified the BIA's rule of not including state-expunged first-time drug possession offenses within the definition of "conviction."

This interpretation is consistent with Supreme Court and BIA precedent recognizing that a uniform federal standard should be applied in deciding the immigration consequences of crimes. *See Lopez*, 549 U.S. at 58, 60 (It would be "passing strange" to treat certain state crimes as aggravated felonies when parallel federal crimes would not be treated as such.); *Devison-Charles*, 22 I. & N. Dec. at 1366-68, 1372 (A youthful offender adjudication under a state statute should be treated like adjudications under the Federal Juvenile Delinquency Act ("FJDA"), because the state analog, though not identical, is similar in nature and purpose to the FJDA.); *Matter of Andrade*, 14 I. & N. Dec. 651, 652, 658-59 (B.I.A. 1974) (adopting the position of the Solicitor General that treating marijuana offenses expunged under state youthful offender statutes differently from those expunged under a 1974 federal statute "is difficult to justify or defend, and should be avoided if possible by a reasonable construction of the statute"). The uniform federal standard as to expunged first-time drug possession dispositions is reflected in the

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F.3d at 305-06; *Acosta v. Ashcroft*, 341 F.3d 218, 222 (3d Cir. 2003); *Resendiz-Alcaraz v. U.S. Att'y Gen.*, 383 F.3d 1262, 1270 (11th Cir. 2004). All the Committee Report demonstrates is that Congress intended to exclude the third prong of *Ozkok*'s definition from Section 1101(a)(48)(A). H.R. Conf. Rep. No. 104-828, at 224. *See generally* AILA Brief.

language of the FFOA, which provides that, if expunged under the federal statute, such offenses should not constitute convictions "for any purpose." 18 U.S.C. § 3607.[14] Considerations of federal uniformity support interpreting Section 1101(a)(48)(A) to exclude first-time drug possession offenses expunged under state analogs to the FFOA.

For these reasons of uniformity, and given the plain meaning and statutory context of Section 1101(a)(48)(A), the Court should conclude that the statute excludes state-expunged first-time drug possession dispositions from the definition of "conviction."

III. IF THE COURT FINDS THE STATUTE AMBIGUOUS, THE COURT MUST APPLY THE CRIMINAL RULE OF LENITY TO HOLD THAT 8 U.S.C. § 1101(a)(48)(A) DOES NOT INCLUDE STATE-EXPUNGED FIRST-TIME DRUG POSSESSION DISPOSITIONS.

If, after considering the plain language of Section 1101(a)(48)(A) in its statutory and historical context, the Court finds the meaning of the statute to be ambiguous, the Court must apply the criminal rule of lenity. Under this rule, if the statute is ambiguous, the Court must adopt the interpretation of the statute that is favorable to criminal defendants to whom the statute might be applied. Because

[14] This uniform federal understanding of expungements is underscored by the Sentencing Guidelines, which state that, although expunged convictions may be considered under Section 4A1.3 (Adequacy of Criminal History Category), "[s]entences for expunged convictions are not counted" in determining the appropriate sentence for a criminal defendant. U.S.S.G. § 4A1.2(j).

the rule of lenity is a traditional tool of statutory interpretation, the Court must apply lenity before deciding whether to apply *Chevron* deference to the BIA's interpretation.

A. The Criminal Rule of Lenity Applies and Requires that Any Ambiguity in the Meaning of 8 U.S.C. § 1101(a)(48)(A) Be Interpreted in Favor of Individuals Facing Potential Enhanced Criminal Penalties Under the Statute.

The criminal rule of lenity applies to Section 1101(a)(48)(A) and requires that the Court interpret any ambiguity in the meaning of the statute in favor of defendants facing potential enhanced criminal penalties. Under the criminal rule of lenity, courts "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958); *see also Carachuri-Rosendo*, 130 S. Ct. at 2589 ("[A]mbiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor."); *United States v. Miranda-Lopez*, 532 F.3d 1034, 1040 (9th Cir. 2008) ("The longstanding rule of lenity requires us to resolve any ambiguity in the scope of a criminal statute in favor of the defendant."). The Supreme Court has held that the criminal rule of lenity must be applied to resolve competing interpretations of statutes like Section 1101(a)(48)(A), which have both criminal and immigration applications. *Leocal*, 543 U.S. at 11 n.8 ("Because we must interpret the statute consistently, whether we encounter its application in a

criminal or noncriminal context, the rule of lenity applies."). Thus, the Court must construe any ambiguity in Section 1101(a)(48)(A) in the way that is favorable to criminal defendants subject to the statute: it must exclude state-expunged first-time drug possession offenses from the definition of "conviction."[15]

Application of the rule of lenity to Section 1101(a)(48)(A) accords with the underlying rationale of lenity, to "promote fair notice," "minimize the risk of selective or arbitrary enforcement," and "maintain the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). In addition, the Court should apply lenity here to give effect to congressional intent: "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971).

[15] Not only does the criminal rule of lenity require the Court to interpret Section 1101(a)(48)(A) in favor of the individual facing enhanced penalties, but so also does the immigration rule of lenity. *See Retuta v. Holder*, 591 F.3d 1181, 1189 (9th Cir. 2010) (analyzing Section 1101(a)(48) and finding that even if the definition of "conviction" were ambiguous, "we would think it our duty to resolve the ambiguity favorably to the alien, pursuant to the principle of lenity applicable with respect to the gravity of removal."); *see also INS v. St. Cyr*, 533 U.S. 289, 320 (2001).

1. The Criminal Rule of Lenity Applies to Resolving Ambiguities in Interpreting 8 U.S.C. § 1101(a)(48)(A).

If the Court finds the criminal statute at issue here to be ambiguous, the rule of lenity requires the Court to reject the Government's interpretation of Section 1101(a)(48)(A), because it is harsher for defendants facing criminal penalties under Section 1326 than the interpretation urged by Petitioner and amici. Under Petitioner and amici's interpretation, a defendant with a state-expunged first-time drug felony disposition—like Petitioner in this case—who has illegally reentered the United States following removal would be subject to penalties under Section 1326(a), the general illegal reentry provision. 8 U.S.C. § 1326(a). Such a defendant would face maximum criminal penalties of a fine under Title 18, imprisonment of not more than *two* years, or both. *Id.* In contrast, the Government's interpretation of Section 1101(a)(48)(A) would increase the defendant's penalties to those found in Section 1326(b), the criminal penalties provision: the defendant would face a fine under Title 18, imprisonment of not more than *ten* years, or both, on the basis of his felony "conviction." 8 U.S.C. § 1326(b)(1). Given that Petitioner and amici's interpretation of Section 1101(a)(48)(A) is more favorable to defendants, the Court should apply the rule of lenity to exclude state-expunged first-time drug possession offenses from counting as "convictions" under Section 1101(a)(48)(A).

2. The Criminal Rule of Lenity Also Applies to Resolving Ambiguities in U.S.S.G. § 2L1.2, Which Relies on the Definition of "Conviction" in 8 U.S.C. § 1101(a)(48)(A).

The criminal rule of lenity also requires that the Court resolve any ambiguities about the definition of "conviction" in U.S.S.G. § 2L1.2 in favor of criminal defendants.[16] As discussed in Part I.A, *supra*, courts have found that the definition of "conviction" in U.S.S.G. § 2L1.2 relies on the definition in Section 1101(a)(48)(A). As this Court has instructed, "[d]oubts about the correct interpretation of U.S.S.G. § 2L1.2 should be resolved according to the rule of lenity. The rule of lenity applies to Sentencing Guidelines as well as to penal statutes." *United States v. Fuentes-Barahona*, 111 F.3d 651, 653 (9th Cir. 1997); *see also United States v. Bustillos-Pena*, 612 F.3d 863, 868 (5th Cir. 2010); *United States v. Lazaro-Guadarrama*, 71 F.3d 1419, 1421 (8th Cir. 1995); *United States v. Martinez*, 946 F.2d 100, 102 (9th Cir. 1991).

In the present case, the Court should reject the Government's interpretation of Section 1101(a)(48)(A), because doing otherwise would result in more severe sentencing enhancements for criminal defendants. Under Petitioner and amici's interpretation of the statute, criminal defendants would be subject to sentencing under U.S.S.G. § 2L1.2(a), the Base Offense Level for defendants who have illegally entered or remained in the United States. U.S.S.G. § 2L1.2(a). Under this

[16] As discussed in Part I.A, *supra*, U.S.S.G. § 2L1.2 is the federal sentencing guideline that corresponds to Section 1326.

Guideline, a defendant with a state-expunged first-time drug felony disposition would be assigned an offense level of eight. *Id.* Assuming *arguendo* that the defendant falls in Criminal History Category I,[17] his offense level would correspond to a Guidelines range of between zero and six months' imprisonment.[18] U.S.S.G. § 5A. In contrast, under the Government's interpretation of the statute, the same criminal defendant would be subject to enhanced sentencing under U.S.S.G. § 2L1.2(b)(1)(D), which imposes higher penalties on defendants who have illegally entered or remained in the United States after their removal subsequent to a felony *conviction*. U.S.S.G. § 2L1.2(b)(1)(D). This Guideline raises the defendant's offense level from eight to twelve, *id.*, and lengthens the corresponding prison term to between ten and sixteen months (again assuming a Criminal History Category of I). U.S.S.G. § 5A. The Government's interpretation of Section 1101(a)(48)(A) would thus result in more severe penalties for defendants and should be rejected pursuant to the rule of lenity.

[17] The Government's interpretation of the statute would trigger a longer term of imprisonment than Petitioner and amici's interpretation, regardless of the defendant's Criminal History Category.

[18] A defendant's term of imprisonment is determined by two factors: his offense level and his Criminal History Category. U.S.S.G. § 5A.

B. The Court Should Apply Lenity Before According *Chevron* Deference to the BIA's Interpretation of 8 U.S.C. § 1101(a)(48)(A).

As explained above, the Court must apply the rule of lenity—and thus exclude state-expunged first-time drug possession dispositions from the definition of "conviction"—because agency deference does not apply when a statute has criminal consequences. *See supra* Parts I, III.A. Even assuming, however, that the Court finds the *Chevron* framework applicable, the Court must apply lenity before deciding whether to defer to the BIA.

In *Brand X*, the Supreme Court held that a "rule of construction (such as the rule of lenity)" should be applied to a statute before a court determines whether deference to an agency is appropriate. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005). Even before *Brand X*, the conclusion that courts should apply the rule of lenity prior to considering deference followed inevitably from *Chevron* itself. Lenity is applied in step one of the *Chevron* two-step test because it is a traditional tool of statutory construction and such tools are applied in step one of *Chevron*. *See Chevron,* 467 U.S. at 843 n.9 (in step one of *Chevron* "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Fed. Election Comm'n*, 333 F.3d 168, 183 (D.C. Cir. 2003)

(substantive canons are applied in step one of *Chevron*); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 Harv. L. Rev. 26, 104 (1994) (lenity is a "substantive canon").

Consistent with this understanding, the Supreme Court has decided immigration cases involving statutory provisions with both criminal and immigration implications by applying lenity and without deferring to the BIA's interpretation. For example, in *Carachuri-Rosendo*, the Court applied lenity when interpreting the term "aggravated felony" in the INA—a term with criminal implications—without considering the BIA's interpretation of the term. 130 S. Ct. at 2589. Similarly, in *Leocal*, the Court did not discuss *Chevron* deference when interpreting the term "aggravated felony" from the INA and noted that "[e]ven if [the statute] lacked clarity . . . we would be constrained to interpret any ambiguity in the statute in petitioner's favor." 543 U.S. at 11 n.8. *See also supra* Part I.

Further, Congress legislates with the presumption that courts will apply the traditional tools of statutory construction when interpreting statutes. The Court should assume that Congress legislated with knowledge that courts would apply lenity to Section 1101(a)(48)(A), because the definition of "conviction" in the section applies to all of U.S.C. Title 8, Chapter 12, which includes the illegal reentry statute. 8 U.S.C. § 1101(a). The Court should therefore read the statute to avoid harsh and unexpected criminal consequences not clearly intended by

Congress. *See McNary v. Haitian Refugee Ctr., Inc*., 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."). This presumption is especially reasonable in regard to lenity, because lenity has long been a traditional rule of statutory construction in Anglo-American jurisprudence. *See, e.g.*, *United States v. Wiltberger* 18 U.S. (5 Wheat.) 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."); William Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 413 (1991) (lenity is "long a mainstay of Anglo-American statutory interpretation").

Consequently, before deferring to the BIA, the Court should apply the criminal rule of lenity and hold that state-expunged first-time drug possession dispositions are not convictions for immigration purposes.

IV. EVEN IF THE BIA WERE ENTITLED TO *CHEVRON* DEFERENCE, THE COURT SHOULD REJECT THE BIA'S INTERPRETATION BECAUSE IT IS UNREASONABLE.

Even if the Court concludes that Section 1101(a)(48)(A) is ambiguous after applying the canons of statutory interpretation, including the rule of lenity, the Court should not defer to the BIA's interpretation of the statute because it is inconsistent and thus unreasonable. The BIA's interpretation represents an abrupt departure from established BIA precedent and unreasonably ignores congressional intent.

The BIA departed from over twenty years of precedent to categorize state-expunged first-time drug possession dispositions as convictions, without any explicit congressional direction. *See supra* Part II (showing lack of congressional intent to terminate the exclusion of state-expunged first-time drug possession dispositions from the definition of conviction). *Compare Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512 (BIA 1999), *vacated sub nom. Lujan-Armendariz v. INS,* 222 F.3d 728 (9th Cir. 2000) *with Matter of Werk*, 16 I. & N. Dec. 234 (reflecting abrupt change in BIA interpretation of "conviction" from earlier BIA position adopted twenty-two years ago after Congress enacted the FFOA). Such an unwarranted abandonment of long-standing prior precedent is unreasonable and does not merit deference. *See Cardoza-Fonseca*, 480 U.S. at 446 n.30 ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."). Moreover, the BIA's new interpretation unreasonably ignores Congress' reliance on and incorporation of settled BIA law into its definition of "conviction," which *excluded* expunged first-time drug offenses from the definition of conviction. *See supra* Part II; *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) ("Sudden and unexplained change, . . . or change that does not take account of legitimate reliance on prior interpretation, . . . may be 'arbitrary, capricious [or] an abuse of discretion.'"). For the BIA to adopt a new

position after Congress incorporated the BIA's prior position (which prior position the BIA had adopted after Congress passed the FFOA) frustrates congressional intent. *Cf. Hing Sum*, 602 F.3d at 1100 (Congress incorporated BIA case law defining "admission" into Section 1101(a)(13)(A) during its 1996 amendments to the INA and courts assume Congress is aware of BIA case law.).

If the Court applies the *Chevron* framework and has not already applied lenity in construing Section 1101(a)(48)(A) at *Chevron* step one, then the Court should apply the rule of lenity at *Chevron* step two to conclude that the BIA's interpretation is unreasonable. The Court should apply time-honored canons such as the rule of lenity when determining whether an agency's interpretation of a statute is reasonable and thus entitled to *Chevron* deference. *See Massachusetts v. U.S. Dep't. of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996) (holding that "time-honored canons of construction may . . . constrain the possible number of *reasonable* ways to read an ambiguity in a statute") (emphasis added). For the reasons explained in Parts I.C and III, *supra*, application of the rule of lenity requires the exclusion of state-expunged first-time drug possession dispositions from the definition of "conviction" in Section 1101(a)(48)(A).

CONCLUSION

For all the reasons stated herein, the Court should conclude that "conviction" in Section 1101(a)(48)(A) excludes state-expunged first-time drug possession offenses, and rule in Petitioner's favor.

Respectfully submitted,

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Date: November 5, 2010

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C), and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,902 words.

Dated: November 5, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2010, the foregoing document, ***AMICI CURIAE*** **BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, AND IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER FLAVIO NUNEZ-REYES**, was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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