Nos. 19-3956 & 20-2427

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OUSMAN DARBOE,

Petitioner,

v.

WILLIAM P. BARR,

Respondent.

On Petition for Review
From the United States Department of Justice
Executive Office of Immigration Review Board of Immigration Appeals
Agency Case No. A201-119-754

BRIEF FOR GOVERNOR ANDREW M. CUOMO OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONER AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

STATEMENT OF COMPLIANCE WITH RULE 29(a)(2)

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, amicus curiae states that all parties to this appeal have consented to the filing of this brief.

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INTEREST OF AMICUS CURIAE[1]

Andrew M. Cuomo, in his official capacity as Governor of the State of New York, respectfully submits this brief in support of petitioner Ousman Darboe and for reversal of the decision of the Board of Immigration Appeals (BIA).

Governor Cuomo has a vital interest in the outcome of this case, which raises urgent questions of comity and federalism that directly affect the State's sovereign power to issue pardons for the commission of crimes.

The State of New York has vested its governor with "the power to grant reprieves, commutations, and pardons after conviction, for all offenses except treason and cases of impeachment." N.Y. CONST. art. IV, § 4. The BIA's decision undermines the power of Governor Cuomo to grant full and unconditional pardons to persons for their New York convictions, in gross excess of its jurisdiction and in violation of federal law. Additionally, the BIA's decision will have an adverse impact on Governor Cuomo's strongly held public policy interests, including supporting the approximately 4.4 million immigrants living in New York. Ensuring stable immigrant communities and promoting rehabilitation enhance the well-being of all New Yorkers.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amicus affirms that no party or counsel for a party authored this brief in whole or in part and that no person other than amicus or his counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Since 2013, Governor Cuomo's executive clemency program has been a critical component of his support for New York's immigrant community. As part of that program, Governor Cuomo issues pardons to non-citizens who demonstrate the redemptive and rehabilitative interests inherent in clemency but who may otherwise be subject to removal from the United States based on predicate New York state criminal convictions. Since taking office, Governor Cuomo has issued 237 pardons, 84 of them to individuals subject to collateral immigration consequences as a result of their state convictions in circumstances where—as in the case of Ousman Darboe—an immigrant's removal from the United States would be severely averse to New York's interests.

FACTUAL BACKGROUND

Ousman Darboe is a New Yorker who lawfully came to the United States from The Gambia with his mother as a young child. Mr. Darboe has lived in New York for over 20 years and now resides in the Bronx with his wife and their two-year-old daughter, both of whom are U.S. citizens. His parents and eight siblings are all New Yorkers and are all either U.S. citizens or lawful permanent residents; his elder sister is a sergeant in the U.S. Marine Corps. Mr. Darboe and his family are among the approximately 4.4 million immigrants who have made new lives for themselves in New York State, one of the most diverse places in the world.

Since 2011, Immigrations and Customs Enforcement (ICE) has sought to remove Mr. Darboe from the United States, ultimately prioritizing his removal on the basis of a single conviction for a crime of moral turpitude, as defined under 8 U.S.C. § 1182(a)(2)(A)(i)(I)—in particular, a charge for unarmed robbery of a gold chain at the age of 20. He served over a year on Rikers Island as a pretrial detainee, and ultimately pled guilty and was sentenced to time served. Upon release, Mr. Darboe completed a re-entry and job readiness training program, obtained an internship, and assumed significant familial duties. However, five months after Mr. Darboe completed his sentence, ICE took him into custody and initiated removal proceedings. Mr. Darboe served over three years in ICE detention after completing his robbery sentence; as he describes in his brief (at 12-15), he and his family experienced extraordinary hardship during his time in detention.

On February 3, 2020, Governor Cuomo granted Mr. Darboe a "full[] and unconditional[] pardon, remise, and release" from his conviction for the offense underlying ICE's removal proceedings. CAR 41. This pardon released Mr. Darboe "from all sentences, judgments, and executions thereon, including offering relief from removal." *Id.* ICE therefore has no legal basis to remove Mr. Darboe on the basis of his robbery offense because under New York law, Mr. Darboe has not been legally convicted of any crime.

Governor Cuomo pardoned Mr. Darboe after a rigorous vetting process, during which the Governor reviewed the youthful circumstances of Mr. Darboe's conviction and the length of the time he has been incarcerated and away from his family, both in state and ICE custody. The Governor's pardon serves New York State's strong interest in redemption and rehabilitative justice. Further, the Governor intended the pardon to serve New York's interest in not seeing Mr. Darboe, a valued member of his community, removed from the United States as a collateral consequence of his conviction—a consequence grossly disproportionate to the scope of his offense that would serve no legitimate penological or other purpose.

All parties agree that, under federal law, Governor Cuomo's pardon waives Mr. Darboe's deportability on the grounds of his former conviction. *See* 8 U.S.C. § 1227(a)(2)(A)(vi). The INA and federal law recognize that a state's governor can issue pardons of state convictions that serve as the predicates for various immigration consequences. Nonetheless, the Board of Immigration Appeals (BIA) has authorized ICE to remove Mr. Darboe from the United States on the theory that his former conviction continues to render him inadmissible, and thus ineligible for relief from removal without a waiver on separate grounds. If removed, Mr. Darboe would be barred from re-entry to the United States for a minimum of 10 years.

The BIA's decision has nullified the intended effects of the Governor's pardon, undermining the comity that the United States ordinarily pays to state sovereigns for determining the consequences of violations of state law. As a result, Mr. Darboe now faces imminent removal while his entire family will continue to live lawfully in the United States.

SUMMARY OF THE ARGUMENT

The Governor urges this Court to grant the petition and overturn the BIA's decision, which poses long-term procedural and substantive threats to the interests of New York State. By declaring Governor Cuomo's complete pardon of Mr. Darboe effectively irrelevant for purposes of federal immigration law, the BIA's decision threatens the very foundation of the state-federal system.

New York retains absolute sovereignty over its criminal law under the United States Constitution. The pardon power is inherent in this sovereignty—a State does not have control over its body of criminal law unless it has the authority to determine the scope of its criminal penalties. It is well established, as a matter of both Supreme Court and New York precedent, that a New York pardon relieves the person convicted of all disabilities associated with his conviction and restores him to the legal position of a non-offender. Thus, principles of federalism and sovereignty require the federal government to defer to New York's interpretation of its criminal code, including its determination that a conviction no longer carries

any legal disabilities. The BIA's decision violates these principles by permitting the federal government to deny Mr. Darboe relief from removal as a consequence of a New York offense after New York exercised its sovereign power to pardon Mr. Darboe, thereby making his past conviction a legal nullity.

Given the compelling federalism and comity interests at stake, Congress must speak with sufficient clarity before depriving New York of its sovereign authority to issue pardons for state crimes. The BIA substitutes a strained interpretation of the INA that flies in the face of over a century of immigration case law and is far too unclear to abrogate a state's sovereignty under the Tenth Amendment. In the absence of a clear statement by Congress, the BIA cannot undermine Governor Cuomo's power to exercise a pardon by basing immigration decisions on legally nullified state convictions.

Further, the BIA's decision has frustrated New York's strong interest in relieving the consequences elicited by state prosecutorial action on a fully rehabilitated individual, and its long-held policies of exercising the pardon power to promote rehabilitation, redemption, and justice. New York governors have long used the pardon power to ensure that punishment—including both a sentence and its collateral consequences—does not exceed the State's legitimate penological interests. Governor Cuomo has a strong policy interest in eliminating excessive sentences and minimizing onerous collateral consequences of a criminal

convictions—such as removal from the United States, the collateral consequence that will await Mr. Darboe if his petition is not granted. Further, Governor Cuomo has an interest in protecting immigrant rights and immigrant communities, an interest that would be impaired by Mr. Darboe's unjust removal. Governor Cuomo's decision to pardon Mr. Darboe was the product of careful scrutiny and reflects a determination that New York will be best served by Mr. Darboe's continued presence in the community.

ARGUMENT

I. PRINCIPLES OF FEDERALISM AND COMITY DEMAND THAT REMOVAL NOT BE BASED ON STATE CRIMINAL CONVICTIONS THAT HAVE BEEN PARDONED

The BIA's decision threatens New York's sovereignty by diminishing its control over state criminal law. By wrongfully expanding federal law to restrict New York's sovereign power to both prosecute *and* pardon violations of state law, the federal government disregards the principles of comity underlying American federalism.

The United States is a federal union of fifty sovereign States, each endowed with a general police power. Although the States surrendered many of their powers to the federal government when they adopted the Constitution, "they retained 'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 919 (1997) (citing THE FEDERALIST No. 39 (James Madison)). This

sovereignty includes a State's power to organize its governmental structure. *See, e.g.*, *Printz*, 521 U.S. at 909; *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a state defines itself as a sovereign."). States retain a particular sovereignty over their body of criminal law. *See United States v. Lopez*, 514 U.S. 549, 564 (1995) ("in areas such as criminal law enforcement … States historically have been sovereign"); *Heath v. Alabama*, 474 U.S. 82, 89 (1985) (describing state "powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment"); *Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("Federal intrusions into state criminal trials frustrate … the States' sovereign power to punish offenders"); THE FEDERALIST No. 17 (Alexander Hamilton) (the "ordinary administration of criminal and civil justice" belongs "to the province of state governments").

Inherent in this sovereignty over criminal law enforcement is a State's power to grant pardons. *See People v. Potter*, 1 Edm. Sel. Cas. 235, 244 (N.Y. 1846) ("the power to pardon is incident to the sovereign power of the State"); *People v. Larkman*, 244 N.Y.S. 431, 433 (Sup. Ct. 1930) ("The power to pardon or commute … is a sovereign power inherent in the state"); *see also Polk v. State*, 150 So. 3d 967, 969 (Miss. 2014) ("[a] pardon by the governor is an act of sovereign grace,

proceeding from the same source which makes conviction of crime a ground of exclusion from suffrage"); *State v. Fisher*, 18 S.E. 2d 649, 651 (W.V. 1941) ("The framework upon which the common law theory of pardon rests is that all governmental power is derived from the sovereign"); *Cook v. Board of Chosen Freeholders*, 26 N.J.L. 326, 340 (N.J. 1857) (describing the New Jersey Governor's pardon power as an inherent feature of sovereignty descended from the British monarch's comparable power); THE FEDERALIST No. 69 (Alexander Hamilton) (explaining that the Governor of New York would retain plenary pardon power after ratification of the Constitution); Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 Geo. L. J. 949, 984-985 (2006) (reviewing the central history of executive pardons in Anglo-American criminal jurisprudence and arguing that an executive of a sovereign that creates and enforces criminal liability must also hold pardon power). State pardons are not "the business" of federal courts and are "rarely, if ever, appropriate subjects for judicial review." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981).

The United States' interpretation of federal immigration law is irreconcilable with this principle of state sovereignty. The State-federal system dictates that only New York, and not the federal government, may create state criminal laws and hold an offender liable. When Mr. Darboe was convicted of New York robbery charges, it was a crime and sentence that New York's government created, and one

that New York's government could remove. When Governor Cuomo decided to exercise the pardon power under the New York State Constitution, he acted in his capacity as the State's Governor to nullify the underlying conviction. For an immigration court to cast aside the exercise of a gubernatorial pardon and base its decisions on a nullified state criminal conviction disrupts a foundational principle of state sovereignty.

A. New York Pardons Remove "All Disabilities" Imposed and Restore "All Civil Rights" Affected By Convictions

A New York gubernatorial pardon carries broad and irreversible legal effects across a broad spectrum of individual rights. *See* N.Y. CONST. art. IV, § 4. At common law, New York's highest court described a Governor's pardon as "forgiveness of the offense … committed, or some part of it, and a remission of, and release from, the penalties attached to the offense." *Potter*, 1 Edm. Sel. Cas. at 241. The New York Legislature has codified several legal disabilities associated with conviction that a pardon reverses, including restoration of the rights to vote, N.Y. Elec. Law § 5-106(2); to serve on a jury, N.Y. Jud. Law § 510(3); to hold public office, N.Y. Pub. Off. Law § 30(1)(e); to serve as a notary public, N.Y. Exec. Law § 130; and to own a firearm, N.Y. Correct. Law §§ 701(2), 703-a(2).

In addition to restoration of these state statutory rights, historically pardons have carried broad rehabilitative effects as a matter of federal common law. Since the ratification of the Constitution, courts and legislatures have understood state

gubernatorial pardons to be a form of restitution, restoring the offender to the position he would have held but-for the conviction. During the Reconstruction Era (when state pardons of former Confederates triggered a wave of federal court litigation over the extent of state pardon power), the Supreme Court affirmed this principle in two opinions that remain good law. First, in *Ex Parte Garland*, the Court held that a pardon fully "releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense." 71 U.S. 333, 380 (1866); *see also United States v. Wilson,* 32 U.S. 150, 157 (1833) (a pardon "absolves [the recipient] from all the consequences of crime"). Eleven years later, the Court further explained this principle, holding that a pardon "releases the offender from *all* disabilities imposed by the offense, and restores to him *all* his civil rights." *Knote v. United States*, 95 U.S. 149, 153 (1877) (emphasis added). New York's highest court swiftly adopted these holdings as its own, affirming the broad reach of its Governors' pardons. *See People ex rel. Forsyth v. Court of Sessions*, 36 N.E. 386, 388 (N.Y. 1894).

The Supreme Court's holdings are clear: A State's full and unconditional pardon restores all rights that were abrogated and cures all disabilities that were imposed by the fact of the conviction the pardon eliminates. As a matter of comity, both federal and state courts must accord a state gubernatorial pardon its full weight—to diminish the pardon's effect would be to deny the State its

sovereign right to establish its criminal law. *See, e.g.*, *Lopez*, 514 U.S. at 564; *Heath*, 474 U.S. at 89.

The cases the BIA relied upon to reach the contrary conclusion are not applicable here and are of little persuasive authority. In *Balogun v. U.S. Attorney General*, the Eleventh Circuit held that the Alabama governor's pardon of the collateral consequences of an immigrant's *federal* conviction did not waive inadmissibility. 425 F.3d 1356 (11th Cir. 2005). A state governor's pardon of the collateral consequences of a federal offense is not inherent in the State's sovereign authority to pardon—and therefore nullify—convictions for *state* offenses. Thus, the limited effect the Eleventh Circuit ascribed to that pardon did not violate Alabama's sovereignty in the way that the BIA's decision violates New York's, and that opinion does not engage with the serious federalism concerns present here. To the extent *Balogun* held that a pardoned state conviction can be the basis for an inadmissibility determination, the case was wrongly decided and is not binding on this Court.

Likewise, the Ninth Circuit's opinion in *Aguilera-Montero v. Mukasey* is of little authority because it relied entirely on the Eleventh Circuit's reasoning in *Balogun* in reaching its conclusion. 548 F.3d 1248 (9th Cir. 2008). Because *Balogun*'s holding is inapposite to this case, *Aguilera-Montero* invokes no applicable principle. Further, as Mr. Darboe explains in greater detail (at 32-33),

Balogun relied on a factually incorrect review of the statutory history, and *Aguilera-Montero* dealt with a controlled-substance conviction, a type of offense that Congress explicitly exempted from its deportability pardon waiver clause.[2]

B. The BIA's Decision Ignores Principles of Federalism

As Mr. Darboe explains in detail (at 21-33), the BIA's decision is contrary to decades of precedent and all rules of sound statutory interpretation. Of particular concern to New York is the BIA's violation of the canons underwritten by federalism principles, which require, among other things, that Congress explicitly express its intent to limit state power before interpreting a statute to infringe on state sovereign powers. *See Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 50 (2008) (citing *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851-52 (1989)); Cade, *Deporting the Pardoned,* 46 U.C. Davis L. Rev. 355, 407 (2012). Statutes should not be interpreted to "upset the usual constitutional balance of federal and state powers" unless Congress has made "its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460-461 (internal citation omitted).

[2] This Court considered a case factually similar to *Aguilera-Montero*, resolving it via summary order. *See Montesquieu v. Holder*, 536 F. App'x 145 (2d Cir. 2013) (unpublished). Because this summary order is nonprecedential and, like *Aguilera-Montero*, is factually inapposite, this Court should ascribe it no weight.

In the INA, Congress expressed no intent whatsoever to limit state governors' sovereign pardon powers. *See* INA of 1952, ch. 5, § 241, 66 Stat. 208 (codified as amended at 8 U.S.C. § 1227(a)(2)(A)(vi)). Rather, the statute places a limitation on the power of the *federal* government to deport non-citizens on the basis of state conviction: it may not do so where the non-citizen has received a gubernatorial pardon for the conviction, rendering that conviction a legal nullity. The statute's silence on the applicability of pardons to other forms of removal falls far short of "unmistakably clear" intent to "upset the usual constitutional balance of federal and state powers." *Gregory*, 501 U.S. at 460-61. To be sure, Congress has the power to enact laws that adopt an entirely different standard for what constitutes inadmissibility for purposes of federal immigration law. But because a State's sovereign power is inextricably linked to its authority to determine what constitutes a conviction under its laws, Congress must speak with unmistakable intent to assume for itself the power to determine what qualifies as a state conviction. *See Florida Dep't of Revenue*, 554 U.S. at 50.[3]

[3] In other instances, Congress *has* spoken with the requisite unmistakably clear intent to alter the import of a state pardon within a federal scheme. For example, in the Gun Control Act of 1968, Congress unambiguously added the requirement that a pardoned individual receive an additional express authorization to possess a firearm from the pardoning executive in order to be exempt from the statute's restrictions. *See* Pub. L. 90-351, Title VII, 82 Stat. 228; *Dickinson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983) (upholding application of statute). Here, the INA has placed no such express limitation on a state pardon, nor any

Therefore, the BIA's decision violates the Tenth Amendment because it purports to regulate a "domain of activity set apart by the Constitution as the province of the states." *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 338 (1935) (Cardozo, J.). The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Criminal prosecution is one of the powers expressly reserved to the states under this Amendment. *See Heath*, 474 U.S. at 89 (describing state "powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment"). The pardon power is inherent within a State's power to prosecute. Accordingly, the Tenth Amendment protects a Governor's pardon power from federal interference. *See* Bellia, *supra*, at 484.

The import of the Tenth Amendment's protection of state pardon powers is that Congress may not commandeer States' exercise of their sovereign powers to support federal legislation. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1471 (2018); *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999). Congress thus may

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additional burden on a pardon recipient. *See also United States v. Matassini*, 656 U.S. 1297, 1314 (5th Cir. 1978) (Congress failed to limit the state pardon power under a separate gun control statute because "statutory exclusion of [the pardon power] should require luminous rather than opaque words).

not enact any law that reduces a State's power to define the scope of its criminal penalties—including the executive's determination to pardon and thereby nullify a criminal conviction—in order to support a federal regulatory scheme. *Cf. Murphy*, 138 S. Ct. at 1478 ("[Congress] unequivocally dictates what a state legislature may and may not do. … A more direct affront to state sovereignty is not easy to imagine."). Further, federal courts—including administrative courts like the BIA—must accept state law determinations on matters committed to the sovereignty of the states: they may not disregard or derogate state decisions they do not like. *See Windsor v. United States*, 699 F.3d 169, 177 (2d Cir. 2012) (applying New York state marital law to determine, for the purpose of federal estate tax scheme, whether a couple was lawfully married). By reducing the scope of New York's pardon power to support the objectives of federal government's immigration scheme, the BIA's decision improperly dilutes state power that has been a domain of exclusive state regulation for centuries.

The at-best ambiguously worded statutory provision at issue here comes nowhere close to meeting the clear-statement standard that the Tenth Amendment and federalism and comity principles require. A negative implication is too thin a reed on which to negate the State's sovereign exercise of a pardon for a state crime.

C. The BIA's Decision Will Lead to Absurd, Arbitrary Results

Moreover, current State Department regulations interpreting the inadmissibility provision in this case, INA § 212(a)(2)(A)(i)(I), incorporate the common-law precedent and render the BIA's interpretation an absurdity. The regulation governing consular processing for visa applicants abroad directs that an applicant will not be deemed inadmissible under §212(a)(2)(A)(i)(I) "by reason of a conviction of a crime involving moral turpitude for which a full and unconditional pardon has been granted by the President of the United States [or] by the Governor of a State of the United States." 22 C.F.R. § 40.21(a)(5). This regulation is irreconcilable with the BIA's holding that a Governor's pardon "does not create an implicit waiver for … inadmissibility" under § 212(a)(2)(A)(i)(I). BIA Op. 5. Under the BIA's decision, Mr. Darboe will be removed from the United States as inadmissible for an offense that U.S. consular officers may not use to deem a visa applicant inadmissible.[4]

The BIA's interpretation will also lead to arbitrary outcomes in similar removal proceedings. It is settled law that Mr. Darboe may not be removed as deportable for the offense for which he has been pardoned. *See* 8 U.S.C. § 1227(a)(2)(A)(vi). But by the BIA's reasoning, he is inadmissible on the very

[4] Mr. Darboe would not benefit from this absurd outcome, however, as the fact of his removal would bar him from re-entry for 10 years.

grounds by which Congress has clarified that he is not deportable. Although inadmissibility and deportability are defined by separate portions of the INA, it strains logic to conceive that Congress would have created a system by which a gubernatorial pardon could prevent an immigrant from being deported on the basis of a crime, but—by negative implication alone—that the same gubernatorial pardon will be irrelevant for the purposes of admissibility. Yet, the BIA has held that Governor Cuomo's pardon is both applicable and inapplicable to prevent Mr. Darboe's removal, depending on whether the removal grounds are listed in the charging instrument filed with the immigration court and/or raised only at the relief stage. *See* Cade, *supra*, at 379 (providing examples of arbitrary outcomes in pardon cases based on the charging instrument).

In this context, the distinction between deportability and inadmissibility is a legal fiction, as either ground triggers adverse immigration consequences that will ultimately result in the same fate for Mr. Darboe—*i.e.*, removal from the United States. Under this tortured logic, in some cases ICE could potentially reinitiate removal proceedings on the basis of inadmissibility immediately after dropping deportation proceedings against a pardoned immigrant, forcing governors to parse immigrants' applications for which additional grounds of removability they may be subject to in determining whether their pardon would carry any practical effect.

The arbitrary distinction the BIA draws between forms of removability has no basis in statute and serves no conceivable public policy goal. Conversely, if one reads the INA's silence on the applicability of gubernatorial pardons to state-law convictions in the admissibility context as just that—silence—the rule is workable: an immigrant may be removed from the United States, as either inadmissible *or* deportable, on the basis of certain state law convictions, but not where the state's governor has issued a pardon. This commonsense interpretation is consistent with longstanding precedent on the broad power of gubernatorial pardons to nullify a criminal conviction and restore the offender to his pre-offense status, and would give governors certainty about the impact of their pardons on immigration proceedings by closing the loophole the BIA's decision has opened.

II. THE BIA'S DECISION THREATENS NEW YORK'S INTERESTS IN SUPPORTING IMMIGRANT COMMUNITIES

Governor Cuomo's pardon of Mr. Darboe served New York's long-held interests in providing opportunities for immigrants to succeed, for their families to remain together in the community, and for promoting rehabilitation in immigrant communities. The Governor's pardon intended to serve the interests of justice by preventing Mr. Darboe's removal from the United States—an outcome grossly disproportionate to Mr. Darboe's underlying criminal offense and individual circumstances. Mr. Darboe is a resident of New York, with a United States citizen wife and two-year old daughter whom he will leave behind if he is removed. The

Governor's actions seek to support immigrant communities because ensuring stable families and promoting redemption and rehabilitation contribute to the well-being of all New Yorkers.

The BIA's decision limiting the scope of the Governor's pardon power will frustrate the State's ability to continue to pursue these goals. Further, the BIA's decision will result in a son, husband, and father being permanently separated from his family, causing needless harm to three generations of New Yorkers.

A. The Governor Established a Pardon Program to Protect New York's Vibrant Immigrant Communities

Since 1777, the State of New York has vested its governor with "the power to grant reprieves, commutations, and pardons after conviction, for all offenses except treason and cases of impeachment." N.Y. CONST. art. IV, § 4; *see* N.Y. CONST. of 1777 art. XVIII (granting governor the power "at his discretion, to grant reprieves and pardons to persons convicted of crimes"); *Forsyth*, 36 N.E. at 388 (A New York pardon "releases the punishment, and blots out of existence the guilt, so that, in the eye of the law, the offender is as innocent as if he had never committed the offense. It removes the penalties and disabilities, and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity.").

Governor Cuomo has used this constitutionally created power to assist immigrant communities who face the harm of federal immigration consequences.

In 2013, Governor Cuomo issued his first pardons to individuals who faced immigration consequences as a result of their state convictions. In 2015, the Governor created the Executive Clemency Bureau to help process applications for clemency. As Governor Cuomo said in 2018 one of the program's goals has been to "stand[] strong in our support for immigrant communities."[5]

To accomplish this, Governor Cuomo has established a multi-step application process that requires an applicant to meet stringent criteria and demonstrate exceptional and compelling circumstances to receive clemency. The applicant must bring forth substantial evidence of rehabilitation and demonstrate that lesser forms of clemency are not available to them. The Executive Clemency Board receives and reviews applications, criminal histories, letters of support, and any other evidence of rehabilitation relevant to the application. The Board refers eligible applications to the Governor's Counsel's Office for additional review; Counsel's Office, in turn, makes recommendations to Governor Cuomo, who conducts a final review. The Governor will issue a pardon only where the offender

[5] "These actions will help keep immigrant families together and take a critical step toward a more just, more fair and more compassionate New York." Press Release, Office of Governor Andrew M. Cuomo, Governor Cuomo Grants Clemency to 29 Individuals (Dec. 31, 3018), https://www.governor.ny.gov/news/governor-cuomo-grants-clemency-29-individuals

has demonstrated full rehabilitation and a strong likelihood that he or she will continue to make a positive impact on the broader New York community.

The New York pardon application process is rigorous by design: pardons are extraordinary remedies with broad legal consequences and are only warranted in unusual circumstances where lesser forms of clemency, such as commutation, would not appropriately serve the ends of justice. Governor Cuomo has exercised this power carefully, often where it is the only avenue for protecting a rehabilitated immigrant from the excessive consequence of removal. The Court should not curb the State's power to protect its residents from harm.

B. New York Governors Have Used the Clemency Power to Protect Immigrants From Unjust Removal

The pardon power, and related clemency powers, carry exceptional importance for immigrants in a state whose defining symbol is the Statute of Liberty. When Congress enacted the first provision permitting immigrants to be deported on the basis of a criminal conviction in 1917, it simultaneously codified the long-accepted principle that a gubernatorially pardoned conviction cannot be a basis for removal. *See* Immigration Act of 1917, 39 Stat. 874, 889 (Feb. 5, 1917). Shortly after this deportation provision was enacted, New York Governors began using the pardon power as a shield against unjust removal—a policy that continues to this day. For example, during the Great Depression, Governor Herbert Lehman granted 110 pardons to noncitizen felons who had completed their prison terms,

including at least one to an Italian immigrant denied re-entry to the United States on the basis of a theft the man had committed as a child to help keep his family warm. *See* Cade, *supra*, at 370; Pardons, Commutations, and Reprieves, in Public Papers of Governor Herbert S. Lehman, 1933-1942 (1935-1947), 444-452.

In 2010, New York Governor David Paterson formalized the State's longstanding pardon policy by creating a special panel to expedite review of pardon applications from immigrants deemed removable as a result of past state criminal convictions. Governor Paterson announced that the purpose of this panel was to "set an example for how to soften the blow in those cases of deserving individuals caught in the web of our national immigration laws." *See* Press Release, New York State Governor David A. Paterson, Governor Paterson Creates Panel to Review Cases of Legal Immigrants Facing Deportation (May 3, 2010). Governor Paterson pardoned 33 rehabilitated New Yorkers who faced immigration consequences related to their convictions, including an award-winning Broadway costume and set designer, a Navy veteran, a certified public accountant working as an executive in the state university system, and an ordained pastor ministering to HIV/AIDS patients. *See* Press Release, New York State Governor David A. Paterson, Governor Paterson Announces Pardons, at 3 (Dec. 24, 2010).

Since succeeding Governor Paterson, Governor Cuomo has continued to give strong consideration to pardon applications from individuals facing

immigration consequences. New York's range of criminal penalties, from community service to probation to incarceration, are tailored to meet the State's penological objectives of rehabilitating offenders, promoting public safety, and deterring future crime. Removal from the United States is a severe and often disproportionate consequence of a criminal conviction, and, in many cases, is contrary to New York's rehabilitation interest. The pardon power allows Governor Cuomo to assist immigrants who might otherwise be subject to grossly excessive immigration penalties that are collateral to the fact of their conviction after they have served their sentences and successfully demonstrated rehabilitation.

For example, on March 15, 2019, Governor Cuomo pardoned Baba Sillah, who faced removal related to misdemeanor convictions for working as an unlicensed vendor. Like Mr. Darboe, Mr. Sillah is a Gambian immigrant and a married father of minor children who had lived in New York for 20 years before ICE initiated removal proceedings. *See* Press Release, Office of Governor Andrew M. Cuomo, Governor Cuomo Grants Clemency to Immigrant Father from the Bronx (Mar. 15, 2019). On the same day that Governor Cuomo issued his pardon of Mr. Sillah, ICE dropped its removal proceedings and released Mr. Sillah from custody. *See* Moynihan & Fisher, *Gambian Immigrant Joyously Reunited with His Family After Gov. Cuomo's Pardon Frees Him*, N.Y. DAILY NEWS (Mar. 15, 2019).

On January 29, 2020, Governor Cuomo granted an exceptionally rare pardon from a homicide conviction to Colin Absolam, who faced immediate deportation to Jamaica upon being paroled from prison. Mr. Absolam was convicted of shooting a man during a fight when he was 19 years old and was sentenced to no fewer than 25 years in prison. After Mr. Absolam served the first 25 years of his sentence, the New York Board of Parole determined that he met the criteria for parole by showing personal growth, acceptance of responsibility, and strong rehabilitation during his time in prison. Yet instead of beginning the next step of his return to society, Mr. Absolam immediately entered ICE custody upon his release from prison and faced expedited deportation proceedings. Governor Cuomo issued his pardon after an intensive review of Mr. Absolam's record and a determination that New York's policy interests were better served by his continued rehabilitation than by his removal based on the predicate state conviction. Upon learning of the pardon, ICE removed Mr. Absolam from a plane, which had been about to take him to Jamaica.

Many other immigrants in Mr. Darboe's position won immediate relief from removal after being issued a pardon by Governor Cuomo, including a Barbadian father of a special-needs child whose removal order was vacated to permit him to pursue alternative relief; a Guyanese married father of two and criminal justice reform advocate whose removal case was closed; and a married Guyanese plumber

whose removal case was also closed. The federal government's timely closing of these immigrants' removal cases suggests a recognition of the statutory and common-law effect of Governor Cuomo's pardons on their removability.

Since taking office, Governor Cuomo has issued pardons sparingly and only to the most deserving applications after careful review of their record or under exceptional circumstances. The removal of Mr. Darboe—where he will leave behind a wife and two-year-old daughter—will intrude upon the Governor's pardon power and injures Mr. Darboe and the New York community as a whole.

CONCLUSION

The petition should be granted and the judgment of the BIA reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 2d Cir. Local Rules 29.1(c) & 32.1(a)(4).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 6,031 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Alan E. Schoenfeld
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