ACTS OF JUSTICE: RESTORING JUSTICE FOR IMMIGRANTS THROUGH STATE PARDONS

Sadie M. Casamenti†

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† Staff Editor, *Cardozo Law Review* (Vol. 42); J.D., 2021, Benjamin N. Cardozo School of Law; B.A., 2011, Amherst College. I'm indebted to the time I spent with clients in Cardozo's Kathryn O. Greenberg Immigration Justice Clinic, which inspired me to write this Note. I would like to thank my Note advisor, Professor Lindsay Nash, for her unwavering support and critical guidance; Jason Cade, Melissa Chua, Alina Das, Ingrid Eagly, and Alisa Whitfield for their engagement and encouragement during the development of this Note; and the talented individuals of *Cardozo Law Review* for their diligence and hard work throughout the editing process. Finally, a heartfelt thank you for the love and inspiration of my family—especially my mother, Maria Natividad; my late stepfather, Stew; my late father, Paul; and my grandmother, Ygnacia Josefa—from whom I draw grace and courage to challenge injustice.

Though sometimes called an act of grace and mercy, a pardon, where properly granted, is also an act of justice . . . .

—Knapp v. Thomas, 39 Ohio St. 377, 381 (1883)

INTRODUCTION

Former President Trump's selective use of his pardon power garnered much attention during his presidency, including some uses that have sparked controversy due to their particular personal and political connections to the President.[1] Despite who Trump chose to pardon, criminal justice advocates maintain the importance of increasing pardon power and recommend that President Biden do the same for people with

[1] *See* Jennifer Jacobs, Justin Sink & Josh Wingrove, *Trump Prepares Pardon List for Aides and Family, and Maybe Himself*, BLOOMBERG (Jan. 8, 2021, 7:25 AM), https://www.bloomberg.com/news/articles/2021-01-07/trump-prepares-pardon-list-for-aides-and-kin-and-maybe-himself [https://perma.cc/8KZ6-MR79]; Jim Sergent, Savannah Behrmann & George Petras, *Trump Pardons Sparked Controversy but Have Been the Fewest in More than 100 Years*, USA TODAY (Jan. 5, 2021, 10:07 AM), https://www.usatoday.com/in-depth/news/2020/12/18/trump-pardons-his-choices-and-their-place-presidential-history/6492080002 [https://perma.cc/2WBD-GP8U]; Noah Bookbinder, *The Craven Corruption of Trump's Pardons: Separate Justice System for Friends and Allies*, USA TODAY (Dec. 23, 2020, 9:23 PM), https://www.usatoday.com/story/opinion/2020/12/23/trump-corrupt-pardons-reward-white-rich-friends-allies-column/4032002001 [https://perma.cc/PLK5-HG8N].

drug and other types of convictions.[2] But mostly left out of that conversation is the impact of pardons on immigrant communities.[3] Consider the story of Ousman Darboe, a now twenty-eight-year-old Gambian immigrant from New York City who had been in Immigration and Customs Enforcement (ICE) detention for over three years.[4] His wife found out she was pregnant just one week after ICE arrested him.[5] Two years later, Mr. Darboe had only ever held his daughter twice while in detention.[6]

During his time in detention, Mr. Darboe received a rare pardon from New York Governor Andrew Cuomo for the one adult criminal conviction on his record—for a crime for which Mr. Darboe maintains he did not do.[7] While Mr. Darboe was finally released from detention on bond in September 2020,[8] he was released with an ankle monitor as his immigration case continued.[9] Despite being pardoned by Governor

2 Ayanna Alexander & Aaron Kessler, *Biden Gets Unlikely Advice on Pardons: Copy Trump, Sideline DOJ*, BLOOMBERG LAW (Dec. 30, 2020, 4:45 AM), https://news.bloomberglaw.com/social-justice/biden-gets-unlikely-advice-on-pardons-copy-trump-sideline-doj [https://perma.cc/N2XT-8CDB].

3 *See* Letter from ACLU Found. of N. Cal. et al., to Susan Rice, Dir., Domestic Pol'y Council, Dana Remus, White House Couns., Danielle Conley, Deputy Couns., Off. of White House Couns., Tona Boyd, Special Couns., Off. of White House Couns. & Lauren Moore, Assoc. Couns., Off. of White House Couns. (June 2, 2021), https://www.hrw.org/news/2021/06/02/groups-urge-president-biden-include-immigration-pardon-process [https://perma.cc/EM77-6RHR]; Dennis Wagner, *A Pardon for 'Dreamers'? Some Activists Tout Amnesty for Undocumented Immigrants if Congress Doesn't Act*, USA TODAY (Feb. 2, 2021, 6:08 PM), https://www.usatoday.com/story/news/2021/02/02/biden-immigration-package-some-push-pardons-if-congress-doesnt-act/4294393001 [https://perma.cc/PU9W-UL2B].

4 Shamira Ibrahim, *Ousman Darboe Could Be Deported Any Day. His Story Is a Common One for Black Immigrants*, VOX (Feb. 5, 2020, 11:58 AM), https://www.vox.com/identities/2019/9/30/20875821/black-immigrants-school-prison-deportation-pipeline [https://perma.cc/D4PY-C44M].

5 Matt Katz, *Pardoned by Cuomo but Detained by ICE, Bronx Immigrant Marks Three Years in ICE Detention*, GOTHAMIST (July 31, 2020, 9:00 AM), https://gothamist.com/news/pardoned-cuomo-detained-ice-bronx-immigrant-marks-three-years-ice-detention [https://perma.cc/KZ6P-L5QR].

6 *Id.*

7 *See* Ashoka Mukpo, *For Black Immigrants, Police and ICE Are Two Sides of the Same Coin*, ACLU N.C. (Sept. 3, 2020, 2:30 PM), https://www.acluofnorthcarolina.org/en/news/black-immigrants-police-and-ice-are-two-sides-same-coin [https://perma.cc/3N8A-WYUF].

8 *Id.*; *see also* Matt Katz, *Held by ICE Longer than Any New Yorker, Bronx Man Is Finally Freed*, WNYC NEWS (Sept. 29, 2020), https://www.wnyc.org/story/held-ice-longer-any-new-yorker-bronx-man-finally-freed [https://perma.cc/74JW-SPLC].

9 Katz, *supra* note 8.

Cuomo, Mr. Darboe remains threatened with removal from the United States.[10]

People like Mr. Darboe continue to face the threat of deportation because the power of pardons to eliminate the immigration consequences of convictions is not absolute.[11] Under current Board of Immigration Appeals (BIA) case law, pardons can relieve immigration consequences in some circumstances[12] but are entirely ineffective in two significant instances. First, pardons for certain underlying convictions do not waive deportability.[13] Section 237(a)(2) of the Immigration and Nationality Act (INA), also known as the Pardon Waiver Clause, provides that a full and unconditional pardon by a governor will prevent deportation through a statutory pardon waiver for four categories of offenses: Crimes Involving Moral Turpitude (CIMTs),[14] multiple convictions, aggravated felonies, and high-speed flight from Department of Homeland Security

10 *Id.* Please note that throughout this Note, the terms "deportation" and "removal" will be used interchangeably. Prior to 1996, there were two distinct proceedings: "deportation proceedings" for noncitizens who had already entered the United States, and "exclusion proceedings" for noncitizens seeking admission. *See* 8 U.S.C. § 1105a(a) (1994) (repealed 1996); 8 U.S.C. § 1105a(b) (1994) (repealed 1996). Today, "removal" in the INA refers to a single type of proceeding that encompasses both situations. *See id.* § 1231(a)(1)(A). I continue to use the term "deportation" because I believe it reflects the human impact of the laws.

11 *See* generally 8 U.S.C. § 1227(a)(2)(A)(vi).

12 *In re* Jung Tae Suh, 23 I&N Dec. 626, 627–28 (B.I.A. 2003) (ruling that a pardon has no effect for immigration purposes due to conviction not falling within the waiver provision); *see also* Dillingham v. Immigr. and Naturalization Serv., 267 F.3d 996, 1007 n.13 (9th Cir. 2001), *overruled by* Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. 2011) ("[N]o pardons of drug offenses are recognized under the INA, whether foreign or domestic."); Eskite v. Dist. Dir., 901 F. Supp. 530, 536 (E.D.N.Y. 1995) ("Congress did not intend to waive deportability in the cases of [noncitizens] convicted of drug-related offenses."); *In re* Ashraf Al-Jailani, No. A73 369 984, 2004 WL 1739163, at *1–2 (B.I.A. June 28, 2004) (ruling domestic violence conviction not within waiver provision); *In re* Lindner, 15 I&N Dec. 170, 171 (B.I.A. 1975) (ruling drug possession not within waiver provision); *In re* Lee, 12 I&N Dec. 335, 337 (B.I.A. 1967) (same).

13 *See, e.g.*, *In re* Suh, 23 I&N Dec. 626, 628 (B.I.A. 2003) (holding that domestic violence and child abuse offenses are not subject to a waiver); Dillingham v. Immigr. and Naturalization Serv., 267 F.3d 996, 1007 n.13 (9th Cir. 2001) ("[N]o pardons of drug offenses are recognized under the INA, whether foreign or domestic."); *see also* § 1227(a)(2)(A)(vi). *See generally* § 1227(a)(2)(A)(vi). Deportability refers to the grounds on which a noncitizen is considered deportable; in other words, persons whom the government will remove from the United States after entering the country. *See generally* § 1227.

14 Crimes Involving Moral Turpitude (CIMT) is a category of criminal offenses that can trigger deportation. *See* Haley Millner & Kathy Brady, *Flowchart on Crimes Involving Moral Turpitude*, IMMIGRANT LEGAL RES. CTR. 1–2 (June 2020), https://www.ilrc.org/sites/default/files/resources/cimt_flow_charts_0620.pdf [https://perma.cc/TDV2-8AFM].

checkpoints.[15] However, certain exceptions do not fall within the Pardon Waiver Clause.[16] In other words, if a governor issues a full and unconditional pardon for one of those underlying offenses, the pardon will not void immigration consequences resulting from that conviction.[17] If a governor issues that pardon for a crime that falls outside of one of those exceptions, deportation can no longer occur.[18]

Second, pardons are often rendered ineffective when someone is considered inadmissible based on a conviction, meaning that the person is considered present in the United States without being properly "admitted" into the States.[19] Although the INA's inadmissibility grounds do not expressly mention pardons, courts and the BIA have often read the statute to give pardons no effect when someone is charged on inadmissibility grounds.[20]

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15 *See* § 1227(a)(2)(A)(vi); *see also In re* H, 6 I&N Dec. 90, 90 (B.I.A. 1954) ("As long as there is a full and unconditional pardon granted by the President or by a governor of a state covering the crime which forms the ground of deportability, whether conviction was subsequent or prior to entry, the immunizing feature of the pardon clause applies, and such a crime no longer forms a basis for deportability."). Where a pardoned offense falls within the waiver provision, the B.I.A. typically gives it preclusive effect and also removes the CIMT for the purposes of inadmissibility. *See id.*

16 *See, e.g.*, *In re* Suh, 23 I&N at 628 (holding that domestic violence and child abuse offenses are not subject to a waiver); *Dillingham*, 267 F.3d at 1007 n.13 ("[N]o pardons of drug offenses are recognized under the INA, whether foreign or domestic."); *see also* § 1227(a)(2)(A)(vi).

17 *See, e.g.*, Eskite v. Dist. Dir., 901 F. Supp. 530, 536 (E.D.N.Y. 1995) ("Congress did not intend to waive deportability in the cases of aliens convicted of drug-related offenses.").

18 *See* Balogun v. U.S. Att'y Gen., 425 F.3d 1356, 1362–63 (11th Cir. 2005); Brailsford v. Holder, 374 F. App'x 738 (9th Cir. 2010); Irabor v. U.S. Att'y Gen., 219 F. App'x 964, 967–68 (11th Cir. 2007).

19 The terms "admitted" and "admission" are defined in 8 U.S.C. § 1101(a)(13)(A). Noncitizens who are deemed to not be admitted, also known as "inadmissible," are subject to the grounds of inadmissibility. *See* 8 U.S.C. § 1182(a).

20 *See* Aguilera-Montero v. Mukasey, 548 F.3d 1248, 1252 (9th Cir. 2008) (holding that a state pardon did not remove the immigration consequences of petitioner's conviction); Balogun v. U.S. Att'y Gen., 425 F.3d 1356, 1362–63 (11th Cir. 2005) (finding that the tenets of statutory construction preclude inferring a pardon waiver for inadmissibility); *In re* Irabor, 2006 WL 2008305, at *3 (B.I.A. May 26, 2006) (holding that the statutory language regarding pardons "does not apply to [noncitizens] charged with inadmissibility under section 212(a) of the Act"). *But see, e.g.*, Perkins v. United States *ex rel.* Malesevic, 99 F.2d 255, 257 (3d Cir. 1938) (concluding that it was the intention of Congress to recognize the effect of a state pardon and holding that pardoned petitioner was not subject to deportation); *In re* Winter, 12 I&N Dec. 638, 643–44 (B.I.A. 1968); *In re* K-, 9 I&N Dec. 121, 125 (B.I.A. 1960) (rejecting a finding of deportability for pardoned individual); *In re* E-V-, 5 I&N Dec. 194, 194 (B.I.A. 1953) ("A [noncitizen] is not inadmissible . . . when he admits committing acts which constitute the essential elements of a crime involving moral turpitude if such admission relates to the same crime for which he was previously convicted and for which he obtained a pardon.").

While it is not uncommon for certain types of offenses to trigger grounds of deportability and inadmissibility,[21] state-pardoned offenses should be excluded from triggering any immigration consequences. Because the failure to recognize the full effects of state pardons implicates federalism and constitutional concerns, this Note argues that courts and federal administrative agencies should instead recognize full and unconditional gubernatorial pardons for all offenses for immigration purposes.[22]

To lay the groundwork for this argument, Part I of this Note first provides a historical overview of the plenary doctrine, relevant INA provisions, and the limited jurisprudence involving the Pardon Waiver Clause. Part I also provides a brief historical background of the origins of the gubernatorial pardon power and then traces its evolution to its present-day use as a deliberate resistance tool by governors to prevent deportation of its state residents. In tracing this history, Part I suggests that courts should reject an expansive application of the plenary power doctrine in cases involving state pardons because pardons serve as a protective, inclusionary measure by governors that signal an effort to curb deportation.

Part II draws from federalism principles and state sovereignty to explain why federal immigration consequences should not interfere with state governors' distinct acts of pardons. Part II concludes that the exceptions enumerated in the Pardon Waiver Clause give rise to federalism issues and the constitutional problem of impermissible commandeering.

To resolve the federalism and constitutional concerns raised with the current immigration enforcement scheme for certain individuals pardoned by state governors, Part III proposes that Congress amend immigration laws to redefine the term "conviction" to exclude pardoned convictions. Until then, Part III also proposes that the Biden Administration should give full faith and credit to state pardons as a discretionary matter when considering whether to deport a noncitizen on the basis of their criminal history. Specifically, the Biden administration

21 *See generally* ALINA DAS, NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS (2020).

22 For the purposes of this Note, gubernatorial pardons are defined as full and unconditional pardons granted by a governor. *See generally* MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., THE MANY ROADS TO REINTEGRATION: A 50-STATE REPORT ON LAWS RESTORING RIGHTS AND OPPORTUNITIES AFTER ARREST OR CONVICTION (2020), https://ccresourcecenter.org/wp-content/uploads/2020/09/The-Many-Roads-to-Reintegration.pdf [https://perma.cc/65W4-UKGY].

should instruct ICE to use prosecutorial discretion by declining to initiate removal proceedings and terminating proceedings already underway for individuals with pardoned offenses. For individuals facing grounds of inadmissibility, the INA should be read by adjudicators in such a way that pardons overcome inadmissibility for all underlying convictions.

I. BACKGROUND

A. *Plenary Power and the Erosion of Federal Exclusivity Over Immigration*

For any state-related argument challenging federal immigration enforcement to withstand judicial scrutiny, it must first be examined through the plenary power doctrine. This Section provides a brief overview of the doctrine before tracing its gradual erosion. As such, this Section seeks to establish that plenary power should not apply in instances regarding immigration enforcement of state-pardoned individuals.

1. Traditional Understandings of Plenary Power

The federal government's power over immigration is traditionally understood through the plenary power doctrine. Since deciding *Chae Chan Ping v. United States* in 1889, the U.S. Supreme Court has viewed the federal government's authority over immigration as exclusive and closely tied to the nation's sovereignty.[23] This exclusivity has traditionally been understood as rooted in the need for the United States to speak with one voice on foreign affairs, to maintain safety and security, and to maintain uniformity in the development of immigration laws.[24]

Courts continue to grant significant deference to congressional and executive branch decisions relating to immigration.[25] For example,

23 Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

24 Arizona v. United States, 567 U.S. 387, 394–95 (2012) (emphasizing the federal government's "inherent power as sovereign to control and conduct relations with foreign nations"); Hines v. Davidowitz, 312 U.S. 52, 62–63 (1941) ("[T]he supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution . . . . No state can add to or take from the force and effect of such treaty or statute . . . .").

25 *See Arizona*, 567 U.S. at 394 (reiterating that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status" of noncitizens).

immigrant rights advocates have relied on this federal authority over immigration policy to establish that restrictive immigration laws in states such as Arizona, Alabama, and California were unconstitutional because they were preempted by federal law.[26] This deference was also recently evident in the U.S. Supreme Court's 2018 decision upholding President Trump's revised travel ban.[27] In *Trump v. Hawaii*, the Court noted that "[b]ecause decisions in [immigration] matters may implicate 'relations with foreign powers,' or involve 'classifications defined in the light of changing political and economic circumstances,' such judgments 'are frequently of a character more appropriate to either the Legislature or the Executive.'"[28] But as discussed below, it is important to note that this application of plenary power does not address situations involving state efforts to *protect* immigrants from deportation.[29]

In sum, this traditional plenary power analysis fails to take into account the historical basis for state authority in protecting immigrants through the criminal legal system.[30] As the next Section will demonstrate,

26 *See id.*; DeCanas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); Hisp. Int. Coal. of Ala. v. Governor of Alabama, 691 F.3d 1236, 1245–46 (11th Cir. 2012) (striking down Alabama's anti-immigrant law, which required schools to investigate children's and parents' immigration status, on equal protection grounds).

27 Trump v. Hawaii, 138 S. Ct. 2392, 2408–09 (2018).

28 *Id.* at 2418–19 (quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976)).

29 While the Court in *Arizona* prohibited states from making their own anti-immigration enforcement laws, the implications for state sanctuary protections have yet to be fully decided by courts. *See Arizona*, 567 U.S. at 399–410.

30 Through state criminal law, states exercise tremendous authority in their efforts to limit the immigration consequences of criminal convictions to avoid the deportation of their community members. For example, New York, California, Nevada, Utah, and Washington have explicitly reduced misdemeanor sentences in order to remove those crimes from the class of convictions that trigger deportation and inadmissibility. *See* CAL. PENAL CODE § 18.5(a) (West 2022) (making the maximum penalty for all state misdemeanors 364 days); NEV. REV. STAT. ANN. § 193.140 (West 2021) (making gross misdemeanors subject to up to 364 days incarceration); N.Y. PENAL LAW § 70.15 (McKinney 2022) (making the maximum penalty for all state misdemeanors 364 days); UTAH CODE ANN. § 76-3-204 (West 2022) (making the maximum penalty for gross misdemeanors 364 days); WASH. REV. CODE ANN. § 9.92.030 (West 2022) (same); *One Day to Protect New Yorkers*, FORTUNE SOC'Y, https://fortunesociety.org/one-day-to-protect-ny [https://perma.cc/P9N2-QLN7]; Jason Stevenson & Marina Lowe, *Utah Passed a Law to Protect Noncitizens from Automatic Deportation*, ACLU (Apr. 9, 2019, 3:45 PM), https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/utah-passed-law-protect-noncitizens-automatic [https://perma.cc/85AC-SRMY]; Daniel M. Kowalski, *Nevada Gross Misdemeanor Statute Modified to 364 Days*, LEXISNEXIS: LEGAL NEWSROOM (June 4, 2013), https://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/posts/nevada-gross-misdemeanor-statute-modified-to-364-days [https://perma.cc/HY9T-TKSG]; Jennifer Sullivan,

not all state efforts impacting immigrants are superseded by federal authority through the plenary power doctrine.

2. The Shift from Plenary Power to the Recognition of State Authority in Protecting Immigrants

While some courts and scholars contend that the plenary power doctrine forecloses states from playing a direct role in immigration enforcement decisions,[31] others have argued that the plenary power doctrine is not absolute and has, in fact, eroded significantly over time,[32]

New State Law Protects Legal Immigrants' Rights, SEATTLE TIMES (July 21, 2011, 11:16 PM), https://www.seattletimes.com/seattle-news/new-state-law-protects-legal-immigrants-rights [https://perma.cc/B4MM-N634]. New York, California, and Washington have also helped immigrants avoid the immigration consequences of convictions by defining offenses as infractions rather than convictions. *See, e.g.*, CAL. PENAL CODE §§ 17(d), 19.8 (West 2022); N.Y. PENAL LAW § 70.15 (McKinney 2022); WASH. REV. CODE ANN. § 7.84.020 (West 2022).

31 *See, e.g.*, *Arizona*, 567 U.S. at 416; David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 31–32 (2015).

32 The literature on the evolving plenary power doctrine is extensive. *See, e.g.*, Trillium Chang, *The Chinese Exclusion Cases and Policing in the Fourth Amendment-Free Zone*, 73 STAN. L. REV. ONLINE 209, 212–14 (2021); Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L.J. 1455, 1473–74 (2021) (highlighting instances where courts have deviated from applying the plenary power doctrine); Leticia M. Saucedo, *States of Desire: How Immigration Law Allows States to Attract Desired Immigrants*, 52 U.C. DAVIS L. REV. 471, 479–84 (2018); Michael Kagan, *Is the Chinese Exclusion Case Still Good Law? (The President Is Trying to Find Out)*, 1 NEV. L.J.F. 80, 85 (2017) (suggesting that the plenary power doctrine is "less robust in the twenty-first century"); Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 751–54 (2017); Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 87–93 (2017); Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 61–62 (2015) (arguing that recent Court decisions led to eventual demise of deference); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 262 (1984) (asserting that "it ignores reality to hold that every provision concerned with immigration, as applied to every fact situation it might encompass, is so intimately rooted in foreign policy that the usual scope of judicial review would hamper the effective conduct of foreign relations."). Moreover, the Court has also declined to defer to the federal government in immigration matters on recent occasions. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1694–98 (2017) (citing equal protection principles in striking down an INA provision that imposed a gender test on citizenship acquired by persons born abroad out of wedlock to one U.S. citizen parent); Sessions v. Dimaya, 138 S. Ct. 1204, 1210–12 (2018) (relying on due process to strike down a criminal removal ground as unconstitutional); *see also* United States v. California, 921 F.3d 865, 872–73 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 124 (2020); City and County of San Francisco v. Trump, 897 F.3d 1225, 1231 (9th Cir. 2018) (upholding preliminary injunction against enforcement of Executive Order); City of Chicago v. Sessions, 321 F. Supp. 3d 855, 861,

especially in instances when immigration intermingles with other areas of law.[33] This is particularly relevant in criminal law,[34] where states, through their decision-making authority, maintain an increasingly important role in federal immigration determinations.[35] Evidence of states' authority over federal immigration matters can be found in *Esquivel-Quintana v. Sessions*, in which the Court dealt with the statutory meaning of "sexual abuse of a minor."[36] There, the Court reasoned that state trends in the definition of a crime influence the federal definition of the crime for immigration purposes.[37] Specifically, the Court determined that because the majority of state criminal codes set the consenting age at sixteen for statutory rape offenses predicated exclusively on the age of the participants, the federal statute should follow that same definition in determining the immigration consequences of the crime at issue in the case.[38] The Court's deference to state consensus in *Esquivel-Quintana* suggests that courts would not foreclose other forms of state power and authority in criminal law from judicial review in cases involving federal immigration.[39]

Another indication of the shift away from plenary power is the open question that remains for courts to recognize the sovereign authority of state governments regarding the inclusion and protection of immigrant communities.[40] This open question remains following the Court's opinion in *Arizona v. United States*, which ultimately determined that states may not engage in anti-immigrant enforcement when such action

882 (N.D. Ill. 2018) (upholding nationwide injunction against enforcement of Executive Order regarding sanctuary cities).

33 *See* Wendy E. Parmet, *The Plenary Power Meets the Police Power: Federalism at the Intersection of Health & Immigration*, 45 AM. J.L. & MED. 224 (2019) (analyzing this intermingling at the intersection of immigration and health law); Saucedo, *supra* note 32, at 485–98 (analyzing federal and state sharing authority at the intersection of immigration and employment, family, and criminal laws).

34 *See* United States v. Lopez, 514 U.S. 549, 564 (1995) (identifying criminal law as an area "where States historically have been sovereign"); Gibbons v. Ogden, 22 U.S. 1, 43–44 (1824) (recognizing criminal law as within the inherent authority of the states).

35 *See* sources cited *supra* note 30 and accompanying text; *see also* Saucedo, *supra* note 32, at 498–500; Jennifer Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 582–85 (2012) (describing state trends challenging federal immigration power).

36 Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1567 (2017).

37 *Id.* at 1570–72.

38 *Id.* at 1571–72.

39 *See* Saucedo, *supra* note 32, at 485–98.

40 *See* Arizona v. United States, 567 U.S. 387, 398 (2012) ("Federalism, central to the constitutional design, adopts the principle that *both* the National and State Governments have elements of sovereignty the other is bound to respect." (emphasis added)).

intrudes upon the federal government's plenary power to determine immigration law.[41] As scholar Stella Burch Elias pointed out, the Court in *Arizona* left open the opportunities for state action concerning pro-immigration and inclusionary measures because the opinion is silent as to such regulation.[42] In support of this, courts in recent years have further supported states' use of inclusionary laws and anti-enforcement measures as a valid mechanism of protective state and local resources.[43] As a result, *Arizona* leaves open the argument that there is space for states to use their powers, including their pardon power, to combat anti-immigrant federal immigration laws.

In sum, the open question regarding states' inclusionary and protective measures towards immigrants in their communities, coupled with the state's sovereign authority related to the criminal legal system, suggests that plenary power should not apply in instances regarding immigration enforcement of state pardoned individuals. To better understand why, the next Section delves deeper into the unique sovereign nature of state pardon powers.

B. *Pardon Powers and State Sovereignty*

This Section begins with an examination of the origins and current practice of state pardons. Though primarily descriptive, this Section helps establish that a deportation regime based on pardoned convictions cannot be shielded from judicial scrutiny as it operates through states; and that an immigration system that protects states' sovereignty is not only possible, but probable—it in fact existed throughout U.S. history.

1. Origins of State Pardon Power and Early State Authority on Immigration Matters

Since the colonial era, the power to issue pardons has been a constitutionally reserved state power, specifically rooted in a state's

41 *Id.* at 398–99.

42 Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 718 (2013).

43 *See* City and County of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018) (upholding preliminary injunction against enforcement of Executive Order); City of Chicago v. Sessions, 321 F. Supp. 3d 855 (N.D. Ill. 2018) (upholding nationwide injunction against enforcement of Executive Order regarding sanctuary cities).

inherent authority to govern its own affairs.[44] The development of state constitutions, coupled with the influence of the newly adopted federal constitution, led to a rejection of the British legacy of complete control of the clemency power within the executive[45] and the embrace of governors' clemency powers in a number of states: the constitutions of twenty-six of the first thirty-five states to join the Union vested the pardoning power to the governor alone.[46] Courts have recognized and upheld this gubernatorial pardon power[47] and will often refrain from questioning its use.[48] In contrast, presidential pardons had been given the same effect in cases of federal offenses.[49]

Historically, state sovereignty to grant pardons has been a specific component of criminal justice and used to encourage rehabilitation,[50] to dispense with court-imposed punishments, and to restore one's rights and status lost because of convictions.[51] For example, in 1878, the framers of the California Constitution specifically contemplated state pardon power as a tool to correct both legislative and judicial deficiencies.[52]

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44 CHRISTEN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES 4–7 (1922) (discussing pardon powers in state governments during the colonial period).

45 Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 603 (1991); *see also* ALEXANDER HAMILTON, *Speech in the New York Ratifying Convention, June 28, 1788*, *in* SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 236, 238 (Morton J. Frisch ed., 1985) ("[I]n making and executing laws concerning the punishment of certain crimes, such as murder, theft &c. the states cannot be [controlled].").

46 *See* Kobil, *supra* note 45, at 605 n.231; *see also* JENSEN, *supra* note 44, at 15.

47 *See* 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."); People v. Potter, 1 Edm. Sel. Cas. 235, 244 (N.Y. Sup. Ct. 1846) ("[T]he power to pardon is incident to the sovereign power of the State."); Cook v. Bd. of Chosen Freeholders, 26 N.J.L. 326, 340 (1857) (describing gubernatorial pardon power as "lodged" within the framework of state sovereignty); *see also* State v. Fisher, 18 S.E.2d 649, 651 (W. Va. 1941) ("The framework upon which the common-law theory of pardon rests is that all governmental power is derived from the sovereign . . . ."); 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.").

48 *See* Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981). State pardons are not "the business" of federal courts and are "rarely, if ever, appropriate subjects for judicial review." *Id.*

49 *See* 8 U.S.C. § 1227(a)(2)(A)(vi).

50 Jason Cade, *Pardons for Immigrants: Legal, Legitimate, and Long Overdue*, COLLATERAL CONSEQUENCES RES. CTR. (Jan. 7, 2019), https://ccresourcecenter.org/2019/01/07/pardons-for-immigrants-legal-legitimate-and-long-overdue [https://perma.cc/RDY7-SDNY].

51 Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 394–95 (2012) [hereinafter Cade, *Deporting the Pardoned*]; *see also* LOVE & SCHLUSSEL, *supra* note 22.

52 *See* 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878, at 7 (1880) (art. V, § 13).

Lastly, governors during the colonial period also used their newly expanded political power to shape immigration within their own states.[53] For example, state governors were often empowered to issue conditional pardons on the condition that an individual leave the country for a given period of time.[54] The use of pardons in this way was significant during this period because it signaled an acceptance of state power over regulating immigration.[55] The following Section will illustrate how pardons have evolved into a sophisticated, complex procedure that is exercised only after exhaustive consideration and with a desire by governors to protect the immigrant populations who reside in their respective states.

2. The Modern Mechanics of State Pardons

Before assessing the current failure to recognize the full effects of state pardons and how that implicates state sovereignty, it is first helpful to understand how pardons operate in our present day. Today's system differs from the use of clemency power envisioned during the colonial period.[56] Presently, all fifty states have a mechanism for state executive pardons.[57] Each state has the power to craft its own structure for granting pardons, which generally fall into three categories: (1) the state's constitution grants exclusive authority to the governor;[58] (2) the governor, through the state constitution, delegates their exclusive

53 *See* MARILYN C. BASELER, "ASYLUM FOR MANKIND": AMERICA 1607–1800, 60–69 (1998).

54 *See, e.g.*, People v. Potter, 1 Edm. Sel. Cas. 235, 245–50 (N.Y. Sup. Ct. 1846); People v. James, 2 Cai. 57 (N.Y. 1804).

55 *See In re* L-, 6 I&N Dec. 355 (B.I.A. 1954) (terminating deportation proceedings for an individual who received a gubernatorial pardon for the express purpose of preventing deportation).

56 *See* Amelia Thomson-DeVeaux & Andrea Jones-Rooy, *Pardons Have Changed a Lot (and We're Not Just Talking About Arpaio),* FIVETHIRTYEIGHT (Oct. 4, 2017, 11:59 AM), https://fivethirtyeight.com/features/pardons-have-changed-a-lot-and-were-not-just-talking-about-arpaio [https://perma.cc/G3HY-82ZH].

57 *50-State Comparison: Pardon Policy & Practice*, RESTORATION OF RTS. PROJECT (Nov. 2021) [hereinafter *50-State Comparison*], https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities [https://perma.cc/AG9P-H7QD].

58 Twenty-nine states place pardon power in the governor alone. These states are Alaska, Arkansas, California, Colorado, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Kobil, *supra* note 45, at 605 n.232.

authority to an executive board;[59] or (3) the state's constitution provides that clemency power is shared between the governor and an executive body.[60] Forty-seven states have established an executive-branch board with at least some influence in the pardon process.[61] In some states, the governor sits on the board.[62] In others, the governor must consult with the board before issuing a pardon.[63] And in others, the governor appoints an independent pardons board, which makes pardon determinations without gubernatorial approval.[64] "[I]n a growing number of states, a full pardon [also] entitles the recipient to judicial expungement."[65] While these structures vary widely, they in no way derogate from the governor's pardon authority.[66]

Each state also has the power to craft its own procedure for applying for and granting pardons.[67] On the state executive level, the pardon application process often begins with submitting an extensive application calling for information on family, criminal history, prior applications, educational history, employment, and supporting documentation showing rehabilitation.[68] In determining whether to grant a pardon, the decisionmaker considers all of the information and factors before it, including, but not limited to, the severity of the offense; the impact on the survivor and the survivor's input; the applicant's criminal history and how much time has passed since the most recent offense; whether the public interest is served by granting a pardon; the applicant's accomplishments since their most recent offense; work history; subsequent contact with the criminal legal system; character references;

59 *Id.* at 605.

60 *Id.*

61 *Id.*

62 *See, e.g.*, FLA. STAT. ANN. §§ 940.01, 940.05 (West 2022); MINN. CONST. art. V, § 7; NEB. CONST. art. IV, § 13; NEV. CONST. art. V, § 14.

63 *See, e.g.*, ALASKA CONST. art. III, § 21; ALASKA STAT. ANN. § 33.20.080 (West 2022); MASS. CONST. art. LXXIII; MICH. CONST. art. V, § 14; MICH. COMP. LAWS ANN. §§ 791.243–791.244 (West 2022); MO. ANN. STAT. § 217.800(2) (West 2022); MONT. CONST. art. VI, § 12; MONT. CODE ANN. §§ 46-23-104(4), 46-23-301(3)(b) (West 2021); N.H. CONST. pt. 2, art. LII; OHIO CONST. art. III, § 11; OHIO REV. CODE ANN. § 2967.07 (West 2022).

64 *See* ALA. CODE § 15-22-20 (2022); CONN. GEN. STAT. ANN. § 54-124a(f) (West 2022); GA. CODE ANN. § 42-9-2 (West 2022); IDAHO CODE ANN. § 20-1002 (West 2022); S.C. CODE ANN. § 24-21-10 (2022); UTAH CODE ANN. § 77-27-2 (West 2022).

65 *See* LOVE & SCHLUSSEL, *supra* note 22, at 31.

66 *Id.* at 27–30.

67 *See 50-State Comparison*, *supra* note 57.

68 *See* IMMIGRANT DEFENSE PROJECT, PARDON: THE IMMIGRANT CLEMENCY PROJECT TOOLKIT 11–16 (2018).

and community service.[69] Pardons are issued on an individualized, case-by-case basis after consideration of the facts and circumstances of each case and the merits of each applicant.[70]

C. *The Evolving Treatment of Pardons in the Immigration Context*

To understand how the state pardon power interacts with the current immigration scheme, it is first important to trace the effect of pardons throughout their history. Prior to 1917, pardons appeared to have full effect on underlying criminal convictions.[71] In immigration cases that were adjudicated during this period, pardons were generally understood to remove immigration consequences that would follow the underlying conviction.[72] Moreover, legislative history involving a 1908 bill to add a ground of deportation on the basis of criminal convictions further indicates that pardons were understood to remove immigration consequences.[73]

Among the immigration consequences removed by pardons during this period, it is worth noting that the federal government also understood pardons to cure inadmissibility.[74] For example, in a case referred to the Attorney General by the Treasury Department,[75] the Attorney General determined that an immigrant pardoned for a crime that would otherwise render him inadmissible "should be permitted to land."[76]

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69 *See, e.g.*, CARLETON J. GILES, THE PARDON PROCESS, STATE OF CONN. BD. OF PARDONS AND PAROLES (2018).

70 *See generally id.*

71 In the Immigrant Act of 1882, Congress considered, but declined to adopt, language that would have rendered pardons ineffective where the pardon was conditioned on the recipient agreeing to emigrate—a common practice in Europe that resulted in unwanted migration to the United States. E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965, 51, 75 (1981).

72 For a synthesis of these relevant cases, see Cade, *Deporting the Pardoned*, *supra* note 51 (collecting agency records from between 1900 and 1920 that show pardons waived conviction-based inadmissibility).

73 42 CONG. REC. 2753 (1908) (statement of Rep. William Bennett) ("[A] pardon [by a governor] wipes out the conviction. This law only acts at the expiration of his sentence. Similarly, it would not act on a man on whom sentence was suspended."); *id.* (statement of Rep. William Sulzer) (noting that, if pardoned by a governor, an immigrant "would be restored to all his rights, and hence could not be sent back").

74 See 8 U.S.C. § 1182 for a definition of inadmissibility.

75 During this period, the Treasury Department was responsible for regulating immigration. Immigration Act of 1891, ch. 551, 26 Stat. 1085.

76 Immigrant Act, 18 U.S. Op. Att'y Gen. 239, 239–40 (1885), 1885 WL 2817.

While the United States saw significant immigration reforms through the Immigration Act of 1917, the Act reveals brief consideration of pardons.[77] Section 19 simply expressed that a noncitizen "who has been pardoned" could not be removed for a CIMT conviction.[78] The 1917 Act provided that "the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned."[79] The relevant legislative history suggests that pardons were not a preoccupation during this period of reform,[80] and because the pardon waiver language in the Immigration Act of 1917 was unqualified, it was understood to bar removal.[81]

When the INA was eventually adopted in 1952, it restructured the statutory provisions affecting pardons.[82] Consistent with prior immigration legislation, § 241(b) of the Act clearly precluded deportation for any noncitizen convicted of a crime involving moral turpitude if granted a full and unconditional pardon by the President of the United States or a state governor.[83] Notably, the restructured code placed deportation categories for convictions related to controlled substances, weapons, alien registration, and prostitution in a different statutory provision, which did not explicitly provide an exception for pardoned offenses.[84] In the restructured code of 1952, the pardon clause made no distinctions between the different offenses within the scope of the general

77 *See* Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889–90 (1917) (codified as amended at 8 U.S.C. §§ 1101–1537).

78 *Id.*

79 *Id.*

80 In response to a fellow representative pointing out that there was "nothing in [the] bill" about the effect of pardons, the bill's sponsor stated that "[t]he pardon wipes out the conviction." 42 CONG. REC. 2753 (1908); *see also* 53 CONG. REC. 5170 (1916) (statement of Rep. James Mann) ("But there are cases where the pardon is properly granted. There may be many cases where a parole is frequently granted. Now, ought not there to be some method . . . ."); *id.* (statement of Rep. John Burnett) ("If the gentleman will permit, that is provided for. I will call attention to it, in the proviso on page 41: 'That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned.'").

81 *See* Perkins v. United States *ex rel.* Malesevic, 99 F.2d 255, 256–58 (3d Cir. 1938) (holding that a noncitizen who was convicted of a CIMT, but who received an automatic pardon under Pennsylvania law, was not subject to removal).

82 *See* Immigration and Nationality Act of 1952, Pub. L. No. 414, § 241(b), 66 Stat. 163, 208.

83 *See id.*

84 *Compare* § 241(a)(1), *with* § 241(a)(11)–(18).

criminal deportation grounds.[85] In 1956, this changed when a sentence was added to create a criminal carve-out for specified drug violations.[86]

During this time, the BIA appeared reluctant to depart from the long-held recognition that full and unconditional gubernatorial pardons would remove the immigration consequences of a conviction.[87] For example, in *In re H-*, the BIA found that gubernatorial pardons continued to remove the deportation consequences of criminal convictions for CIMTs.[88] Although this decision did not turn on Congress's power to limit state pardons, it demonstrates how administrative decisions continued to interpret the 1952 Act to give effect to pardons in certain situations outside of its enumerated limitations.[89]

The last of the major immigration reforms took place in 1996 through the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act, which is infamously known for expanding the categories of deportable crimes and thereby further criminalizing the immigration legal system.[90] Interestingly, the pardon clause remained substantively unchanged aside from its renumbering to § 237(a)(2)(A)(vi), and its now-familiar exceptions based on convictions for CIMTs, aggravated felonies, and high-speed flight from immigration authorities.[91] Although the provision does not extend to all criminal grounds of removal, such as weapons or domestic violence offenses, the provision is unchanged as it applies to CIMTs and aggravated felonies, the two largest categories of deportable offenses.[92]

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85 *See* § 241(b).

86 Narcotic Control Act of 1956, Pub. L. No. 84-728, § 301(b)–(c), 70 Stat. 567, 575. Just one year prior, the U.S. Senate Judiciary Committee had singled out drug offenses by expressly stating that, "[c]ontrary to this Department's contention, the [Immigration Act's deportability pardon-waiver] section has been interpreted as possibly applying to the deportation of aliens convicted of narcotic offenses." S. REP. NO. 1997, at 21 (1956).

87 *See In re* H-, 6 I&N Dec. 90, 96–97 (B.I.A. 1954); *see also In re* S-, 5 I&N Dec. 10, 10, 16 (B.I.A. 1952).

88 *In re* H-, 6 I&N Dec. at 96–97 ("As long as there is a full and unconditional pardon granted by the President or by a Governor of a State covering the crime which forms the ground of deportability, whether in exclusion or in expulsion, the immunizing feature of the pardon clause applies, and such a crime no longer forms a basis for deportability.").

89 *See id.*

90 *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 301–309, 110 Stat. 3009-546, 3009-548 (1997).

91 *See* INA § 237(a)(2)(A)(vi) (codified as amended at 8 U.S.C. § 1227(a)(2)(A)(vi)); *id.* § 237(a)(2)(A)(i), (iii)–(iv) (codified as amended at 8 U.S.C. § 1227(a)(2)(A)(i), (iii)–(iv)) (covering, respectively, CIMTs, aggravated felonies, and high-speed flight from immigration authorities).

92 *See generally* § 1227(a)(2)(A).

As the law stands today, there are two major limits of state pardons. First, gubernatorial pardons can only prevent deportation through a statutory pardon waiver for specific categories of offenses.[93] Second, because the statute is drafted as a form of relief from deportation, the statute has been read to deny relief for inadmissibility.[94] Although the INA's inadmissibility grounds do not expressly mention pardons, courts and the BIA have often read the provision to give pardons no effect when someone is charged on inadmissibility grounds.[95] The following Section examines existing legal challenges to the Pardon Waiver Clause and ultimately argues that courts and the BIA have taken the wrong approach in their treatment of gubernatorial pardons.

D. *Existing Legal Challenges to 8 U.S.C. § 1227(a)(2)(A)(vi) and the Failure to Recognize Gubernatorial Pardons as a Resistance Tool for State Sovereignty*

In cases challenging removal based on pardoned convictions that fall outside the Pardon Waiver provision, both courts and the BIA have consistently rejected claims that a state's full and unconditional state pardon affords any relief for immigration purposes. Notably, the vast majority of these cases engage in a purely statutory analysis rather than engaging in any searching analysis of constitutional implications and state sovereignty.[96] As such, denials of these challenges have relied on a strict reading of the statute,[97] apparently assuming that Congress's

93 *See supra* note 15.

94 The terms "admitted" and "admission" are defined in INA § 1101(a)(13). Noncitizens who are deemed not to have been admitted, also known as "inadmissible," are considered applicants for admission and are subject to the grounds of inadmissibility. *See* INA § 1182(a).

95 *See* Aguilera-Montero v. Mukasey, 548 F.3d 1248, 1252 (9th Cir. 2008); Balogun v. U.S. Att'y Gen., 425 F.3d 1356, 1362–63 (11th Cir. 2005); *In re* Irabor, 2006 WL 2008305, at *1, *3 (B.I.A. May 26, 2006) (holding that the statutory language regarding pardons "does not apply to [noncitizens] charged with inadmissibility under section 212(a) of the Act").

96 *In re* Jung Tae Suh, 23 I&N Dec. 626, 627–28 (B.I.A. 2003) (ruling that a pardon has no effect for immigration purposes due to conviction not falling within the waiver provision); *see also* Dillingham v. Immigr. and Naturalization Serv., 267 F.3d 996, 1007 n.13 (9th Cir. 2001), *overruled by* Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. 2011) ("[N]o pardons of drug offenses are recognized under the INA, whether foreign or domestic."); Eskite v. Dist. Dir., 901 F. Supp. 530, 536 (E.D.N.Y. 1995) ("Congress did not intend to waive deportability in the cases of [noncitizens] convicted of drug-related offenses."); *In re* Ashraf Al-Jailani, No. A73 369 984, 2004 WL 1739163, at *1–2 (B.I.A. June 28, 2004) (ruling domestic violence conviction not within waiver provision); *In re* Lindner, 15 I&N Dec. 170, 171 (B.I.A. 1975) (ruling drug possession not within waiver provision); *In re* Lee, 12 I&N Dec. 335, 337 (B.I.A. 1967) (same).

97 *See supra* note 96 (collecting cases).

determination regarding the criminal carve-outs contained in the Pardon Waiver Clause simply preempt any conflicting action by a state governor.

Courts have also been asked to weigh in on whether the Pardon Waiver Clause provides relief for inadmissibility.[98] Several decisions have restricted the effect of pardons to deny relief for inadmissibility by relying on a strict reading of the statute.[99] In *Aguilera-Montero v. Mukasey*, which involved a noncitizen who was placed into removal proceedings on inadmissibility grounds due to his criminal conviction for a controlled substance offense,[100] the Ninth Circuit denied a constitutional challenge to the provision on equal protection grounds, ultimately ruling that the noncitizen was still inadmissible despite a state pardon.[101]

The Second Circuit in *Darboe v. Garland* is also currently engaging with this inadmissibility question.[102] There, Mr. Darboe, who was highlighted in the Introduction, challenged the BIA's denial of his motion to reopen on the basis that he remained inadmissible despite receiving a gubernatorial pardon.[103] In its decision, the BIA ruled that the gubernatorial pardon "does not refute the validity and finality of the Immigration Judge's adverse credibility finding in his prior proceeding."[104] Notably, Governor Cuomo then submitted a brief advocating for the full effects of his pardon in support of Mr. Darboe's relief from removal.[105]

What the Governor's involvement in Darboe's case demonstrates, and what the aforementioned cases fail to consider, is how pardons have been used by governors as a mechanism to resist federal enforcement practices. For example, Georgia explicitly adjusted pardon practice to provide even greater immigration protections in light of federal enforcement changes by changing its practice of issue. After Congress

98 *See, e.g.*, *Balogun*, 425 F.3d at 1362–63; Brailsford v. Holder, 374 F. App'x 738 (9th Cir. 2010); Irabor v. U.S. Att'y Gen., 219 F. App'x 964, 967–68 (11th Cir. 2007).

99 *See supra* note 98 (collecting cases).

100 *Aguilera-Montero*, 548 F.3d at 1249–50.

101 The court justified its holding on another basis rooted in the statute: that controlled substance offenses were an exception, and, ultimately, such convictions render someone both deportable and inadmissible. *Id.* at 1252–54; *see also* Kwai Chiu Yuen v. Immigr. and Naturalization Serv., 406 F.2d 499 (9th Cir. 1969).

102 Darboe v. Garland, No. 20-2427 (2d Cir. briefed Mar. 4, 2021).

103 Brief for Petitioner Ousman Darboe at 5, Darboe v. Barr, Nos. 19-3956, 20-2427 (2d Cir. Dec. 17, 2020).

104 *Id.* at 20.

105 Brief for Governor Andrew M. Cuomo of New York as Amicus Curiae in Support of Petitioner and Reversal at 24, Darboe v. Barr, Nos. 19-3956, 20-2427 (2d Cir. Dec. 10, 2020) [hereinafter Brief for Governor Cuomo].

passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996,[106] the Georgia Board of Pardons and Parole granted 138 pardons to noncitizens with prior misdemeanor convictions between 2000 and 2001, in order to prevent their deportation.[107] During the Trump administration, New York also saw an increased use of state pardon power, not only as a direct rebuke to the President but also as a potential way of rehabilitating and curbing against the especially punitive immigration consequences of criminal convictions that took place during that era.[108] Such gubernatorial acts were integral in helping to constrain the abuse of federal executive authority and provided an important counterbalance to overreach by the executive branch.[109]

II. ANALYSIS OF THE PROBLEMS WITH 8 U.S.C. § 1227(A)(2)(A)(VI)

Finding someone inadmissible on the basis of pardoned convictions or deporting them altogether on the basis of a pardoned criminal conviction, regardless of the type of offense, raises a series of problems. As this Part will argue in further detail below, ensuing constitutional concerns and principles of comity require that courts and federal agencies reject the Pardon Waiver exceptions altogether and recognize the full effects of state pardons in relieving grounds of deportability and inadmissibility.

A. *The Exceptions in 8 U.S.C. § 1227(a)(2)(A)(vi) Violate Federalism Principles*

The exceptions, or criminal carve-outs, enumerated in the Pardon Waiver Clause threaten state sovereignty by diminishing state control over state criminal law.[110] By wrongfully expanding federal law to restrict the full effect of state sovereign power, the exceptions in the Pardon

106 *See supra* Section I.C for a discussion of these immigration reforms.

107 Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENT'G REP. 184 (2001).

108 *See* Vivian Wang, *In Rebuke to Trump, Cuomo Pardons 18 Immigrants*, N.Y. TIMES (Dec. 27, 2017), https://www.nytimes.com/2017/12/27/nyregion/trump-cuomo-pardons-immigrants.html [https://perma.cc/6KNM-9UY8].

109 *See* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 460 (2012).

110 *See* THE FEDERALIST NO. 17 (Alexander Hamilton) (The "ordinary administration of criminal and civil justice" belongs "to the province of the State governments.").

Waiver Clause disregard the federalism principle of separation of powers. While there are indeed times when Congress can preempt state authority with respect to immigration,[111] there are structural limitations enshrined in federalism to suggest that courts should be wary of relying on such plenary power to grant broad deference to federal actions that undermine state executive power.[112]

The exemptions in 8 U.S.C. § 1227(a)(2)(A)(vi) also violate federalism principles because state pardons typically remove all disabilities stemming from criminal convictions. In New York, for example, the effects of a gubernatorial pardon span a broad spectrum of individual rights.[113] Moreover, state legislatures, including New York's, have codified several legal disabilities associated with a conviction that a pardon reverses, including restoration of the rights to vote,[114] serve on a jury,[115] hold public office,[116] serve as a notary public,[117] and own a firearm.[118]

In addition to restoring state statutory rights, pardons have historically carried broad rehabilitative effects as a matter of federal and

111 Bulman-Pozen, *supra* note 109, at 460.

112 *See* New York v. United States, 505 U.S. 144, 181 (1992) ("[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.") (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

113 *See* N.Y. CONST. art. IV, § 4; *see also* People v. Potter, 1 Edm. Sel. Cas. 235, 240–41 (N.Y. Sup. Ct. 1846) (describing a gubernatorial 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").

114 *See* N.Y. ELEC. LAW § 5-106(2) (McKinney 2022); IOWA EXEC. ORDER NO. 7 (Aug. 5, 2020); KY. CONST. § 145(1); MISS. CONST. art. 5, § 124; *id.* art. 12, § 253; VA. EXEC. ORDER (Mar. 16, 2021).

115 *See* N.Y. JUD. LAW § 510(3) (McKinney 2022); ARK. CODE ANN. § 16-31-102(a)(4) (West 2022); DEL. CODE ANN. tit. 10, § 4509(b)(6) (West 2022); HAW. REV. STAT. ANN. § 612-4(b)(2) (West 2022); OKLA. STAT. ANN. tit. 38, § 28(C)(7) (West 2022).

116 *See* N.Y. PUB. OFF. LAW § 30(1)(e) (McKinney 2022); GA. CONST. art. II, § 2, para. III; 65 ILL. COMP. STAT. 5/3.1-10-5(b) (2021); 10 ILL. COMP. STAT. 5/29-15 (2021); MISS. CODE ANN. § 99-19-35 (West 2022); N.M. STAT. ANN. § 31-13-1(E), *invalidated by* United States v. DeVargas, No. CR 21-0857, 2022 WL 93374 (D.N.M. Jan. 10, 2022).

117 *See* N.Y. EXEC. LAW § 130(1) (McKinney 2022); 1 TEX. ADMIN. CODE § 87.10(b) (2022); VA. CODE ANN. § 47.1-4 (West 2022).

118 *See* N.Y. CORRECT. LAW § 701(2) (McKinney 2022); *id.* § 703-a(2) (McKinney 2022); GA. CODE ANN. § 16-11-131(c) (West 2022); HAW. REV. STAT. ANN. § 134-7 (West 2022); IND. CODE § 35-47-2-20 (2022); KY. REV. STAT. ANN. § 527.040(1) (West 2022); MICH. COMP. LAWS § 750.224f(8) (2022); S.C. CODE ANN. § 16-23-30 (2022); VA. CODE ANN. § 18.2-308.2 (West 2022); 18 PA. CONS. STAT. § 6105.1(d) (2022). For more information on what pardons do and do not cover, see Peter L. Markowitz & Lindsay Nash, *Pardoning Immigrants*, 93 N.Y.U. L. REV. 58 (2018).

state common law.[119] Failing to recognize a state pardon's rehabilitative effects disregards federalism principles.[120] As mentioned in Part I of this Note, courts have understood state gubernatorial pardons to be a form of restitution, restoring a person involved in the criminal legal system to the position she would have held but-for the conviction.[121] For example, the governors of several states, including Colorado, North Dakota, and Washington, have used their pardon power to provide relief to people convicted of marijuana possession before its decriminalization on the federal level; the Colorado legislature even passed a law authorizing class-wide pardon relief.[122] In Nevada, the Nevada Board of Pardons Commissioners passed a resolution at the request of the state's governor automatically pardoning approximately 15,000 people convicted of possessing one ounce or less of marijuana between 1986 and 2017.[123] The legislature in Illinois also gave the governor's pardon power a part to play in Illinois's marijuana sealing effort.[124] The governors in Iowa, Kentucky, New York, and Virginia have used their power to limit felony disenfranchisement on a class-wide basis.[125]

Courts have long recognized a state pardon's ability to cure such federal disabilities. In *United States v. McMurrey*, a district court found

119 Stacy Caplow, *Governors! Seize the Law: A Call to Expand the Use of Pardons to Provide Relief from Deportation*, 22 B.U. PUB. INT. L.J. 293, 297 (2013) (urging the use of the pardon power to relieve immigrants from deportation because of its "deep roots in . . . mercy").

120 *See id.* at 323 (addressing the rehabilitative effect of pardons even in immigration cases) ("Not using the pardon power to redress the extreme hardship or inequities in some cases of deportation is a squandered opportunity.").

121 *See supra* Section I.B.1.

122 *50-State Comparison*, *supra* note 57.

123 *Nevada: Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT (Jan. 16, 2021), https://ccresourcecenter.org/state-restoration-profiles/nevada-restoration-of-rights-pardon-expungement-sealing/#II_Pardon_policy_practice [https://perma.cc/ZB2H-S5R4].

124 *See Illinois: Pardon Policy & Practice*, RESTORATION OF RTS. PROJECT (Dec. 21, 2021), https://ccresourcecenter.org/state-restoration-profiles/illinois-restoration-of-rights-pardon-expungement-sealing [https://perma.cc/RWP9-R74F].

125 *See Iowa: Pardon Policy & Practice*, RESTORATION OF RTS. PROJECT (May 14, 2020), https://ccresourcecenter.org/state-restoration-profiles/iowa-restoration-of-rights-pardon-expungement-sealing [https://perma.cc/5NFJ-EPQS]; *Kentucky: Pardon Policy & Practice*, RESTORATION OF RTS. PROJECT (Dec. 22, 2021), https://ccresourcecenter.org/state-restoration-profiles/kentucky-restoration-of-rights-pardon-expungement-sealing [https://perma.cc/HR8X-6NQM]; *New York: Pardon Policy & Practice*, RESTORATION OF RTS. PROJECT (Jan. 16, 2022), https://ccresourcecenter.org/state-restoration-profiles/new-york-restoration-of-rights-pardon-expungement-sealing [https://perma.cc/YL7W-63B3]; *Virginia: Pardon Policy & Practice*, RESTORATION OF RTS. PROJECT (January 30, 2022), https://ccresourcecenter.org/state-restoration-profiles/virginia-restoration-of-rights-pardon-expungement-sealing [https://perma.cc/E9E4-F84Z].

that a collateral attack on a pardon by a court violates federalist principles, as the federal court's act would eviscerate the effect of a state executive pardon.[126] Notably, the court found that the petitioner's gubernatorial pardon "erases completely the conviction from his past. Pardons grant a person the luxury of travelling back in time to a point before the arrest. For the pardoned crime, the slate is wiped clean . . . ."[127]

This federalism principle was affirmed by the Court on two occasions. First, in *Ex Parte Garland*, the Court held that a full 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 offence."[128] The Court later elucidated this principle in *Knote v. United States*, holding that a pardon releases an individual from all disabilities imposed by an offense and restores to him all his civil rights.[129] While these two cases are not in the immigration context, they demonstrate the federalism principles at play when courts have established that gubernatorial pardons eliminate all legal consequences of a conviction, including collateral consequences under civil statutes.

In sum, the aforementioned federalism principles and related precedent weigh in favor of the argument that courts and federal agencies should grant stays of removal when based on pardoned criminal offenses.

B. *Constitutional Problems Arising from the Pardon Waiver Exceptions*

Deportation proceedings on the basis of a pardoned conviction also give rise to constitutional issues. In particular, this Section seeks to establish that finding someone inadmissible on the basis of a pardoned conviction, or deporting them altogether on the basis of a pardoned criminal conviction, constitutes an impermissible commandeering of that state's criminal enforcement process where a governor does not want its conviction to be so used.

126 *See* United States v. McMurrey, 827 F. Supp. 424 (S.D. Tex. 1993).

127 *Id.* at 425.

128 *Ex parte* Garland, 71 U.S. 333, 380 (1866).

129 Knote v. United States, 95 U.S. 149, 153 (1877) (noting that a pardon "so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights").

1. The Exceptions in 8 U.S.C. § 1227(a)(2)(A)(vi) Constitute Impermissible Commandeering of State Criminal Enforcement Decisions

This Section seeks to establish that deporting a noncitizen on the sole basis of a pardoned state conviction constitutes an impermissible commandeering of that state's criminal enforcement process.[130] Commandeering has occurred because when a governor grants a noncitizen a full and unconditional pardon, it signals to the federal government that the state objects to this aspect of its criminal legal system being used to effect deportation.[131]

To lay out this argument, it is important to understand the substantive values invoked by the Court in its Tenth Amendment commandeering cases—in particular, protecting local autonomy and promoting political accountability—before connecting how they are

130 While this use of the anticommandeering doctrine has never been applied to the context of state pardons, similar arguments have been made in other state criminal contexts. *See, e.g.*, George Bach, *Federalism and the State Police Power: Why Immigration and Customs Enforcement Must Stay Away from State Courthouses*, 54 WILLAMETTE L. REV. 323 (2018) (applying the anticommandeering doctrine to arrests at state courthouses); Note, *States' Commandeered Convictions: Why States Should Get a Veto Over Crime-Based Deportation*, 132 HARV. L. REV. 2322 (2019) (applying this argument to all state convictions); *see also* Charlotte S. Butash, Note, *The Anti-Commandeering Doctrine in Civil Rights Litigation*, 55 HARV. C.R.-C.L. L. REV. 681 (2020).

131 *See, e.g.*, Julie Johnson, *Gov. Newsom Pardons Santa Rosa Man Facing Deportation*, PRESS DEMOCRAT (Nov. 14, 2020), https://www.pressdemocrat.com/article/news/gov-newsom-pardons-santa-rosa-man-facing-deportation [https://perma.cc/C2ZZ-6GR4] (pardoning an individual's controlled substance conviction with the express goal of preventing his deportation and other unjust collateral consequences); Carla Marinucci, *Newsom Pardons 3 Immigrants at Risk of Deportation*, POLITICO (Oct. 18, 2019, 6:08 PM), https://www.politico.com/states/california/story/2019/10/18/newsom-pardons-3-immigrants-at-risk-of-deportation-1225677 [https://perma.cc/WYS6-53QM] (pardoning individuals with numerous drug convictions with the goal of "remov[ing] barriers to employment and public service, restor[ing] their civic rights or prevent[ing] unjust collateral consequences of conviction."); Melissa Gira Grant, *California Governor Jerry Brown Is Fighting Trump with Pardons. Will Other Governors Follow Suit?*, APPEAL (Nov. 29, 2018), https://theappeal.org/california-governor-jerry-brown-is-fighting-trump-with-pardons-advocates-hope-other-governors-will-too [https://perma.cc/TLU3-RKVA]; *Pardons for Immigrants with Criminal Records Emerge as a Tool of Resistance to Trump's Deportation Agenda*, APPEAL, https://us15.campaign-archive.com/?u=8df91532e55f25ed5dd237f56&id=401e985917 [https://perma.cc/DJ7J-DV7T]. In one instance, a governor even pardoned an individual who had already been deported with the goal of ensuring that person's return back to the States. *See Illinois Governor Pardons Army Vet Deported to Mexico*, WNDU (Aug. 31, 2019, 4:35 AM), https://www.wndu.com/content/news/Illinois-governor-pardons-Army-vet-deported-to-Mexico-558914671.html [https://perma.cc/8VKA-3UY7].

implicated in the context of state pardons intended to curb against deportation. These values are clarified in the seminal case *New York v. United States* in a way that is instructive here.[132] First, the Court in *New York* established that the federal government may not compel or coerce states into participating in a federal regulatory program.[133] In doing so, the Court signaled that the commandeering doctrine preserves individual liberty and local autonomy by preventing the federal government from assuming and centralizing powers not delegated to it through its enumerated powers.[134] Second, *New York* promoted political accountability as a justification for the anticommandeering doctrine in that it lets voters know which government deserves credit or blame for any particular regulation.[135]

As to the first point in *New York* regarding the protection of local autonomy, this clearly applies to the INA's conviction provisions because they allow the federal government to regulate the conduct of people in areas core to state police powers.[136] After all, states have authority to make decisions in how their state laws are to be enforced. Already, some states seek to insulate state criminal law enforcement from federal immigration enforcement in whatever ways they can—by sentencing adjustments or by selectively choosing which charges to bring.[137] Moreover, since *Murphy v. National Collegiate Athletic Association*, courts have grown more willing to question federal statutes prohibiting states from insulating state criminal law enforcement from federal immigration enforcement.[138] The federal government's refusal to fully recognize the ability of state pardons to insulate individuals from immigration enforcement warrants similar scrutiny.

132 *See* New York v. United States, 505 U.S. 144, 181 (1992).

133 *Id.*

134 *Id.* at 147; Printz v. United States, 521 U.S. 898, 921 (1997).

135 *See New York*, 505 U.S. at 168–69 ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."); *see also* Note, *States' Commandeered Convictions: Why States Should Get a Veto over Crime-Based Deportation*, *supra* note 130, at 2323 (noting that political accountability gets "eviscerated" when the federal government engages in commandeering).

136 *See* cases cited *supra* note 26.

137 *See supra* note 30 and accompanying text.

138 For example, post-*Murphy*, at least three district courts have concluded that federal efforts to stop states from regulating their employees' use of immigration information constitute commandeering. *See* New York v. Dep't of Just., 343 F. Supp. 3d 213, 233–38 (S.D.N.Y. 2018); City of Chicago v. Sessions, 321 F. Supp. 3d 855, 866–73 (N.D. Ill. 2018); City of Philadelphia v. Sessions, 309 F. Supp. 3d 289, 329–31 (E.D. Pa. 2018), *aff'd in part, vacated in part on other grounds sub nom*. City of Philadelphia v. Att'y Gen., 916 F.3d 276 (3d Cir. 2019); *see also* United States v. State, 314 F. Supp. 3d 1077, 1100–01 (E.D. Cal. 2018).

As to the second point, the Court's concern about preserving political accountability certainly applies to governors who decide to exercise their full and unconditional pardon power for two reasons.[139] The first reason deals with the political risks associated with granting state pardons to begin with.[140] For example, Republican Governor Matt Bevin in Kentucky faced backlash in 2019 when he issued over six hundred pardons and commutations before leaving office.[141] The fact that issuing pardons has emerged as a politically risky strategy is important because public reactions to state pardons tend to track alongside evolving notions of what it means to interact with the criminal justice system and how that shapes our current immigration system.[142] Concerns already arise when the federal government carries out a deportation despite governor action and public outcry, thus undermining a governor's ability to determine the full reach of their state pardons.[143] In such cases, federal actions diminish the power and value of state pardons. Because of how pardons as a political act factor into public accountability, the problem with triggering deportation based on pardoned state convictions, is that it creates confusion in the lines of political accountability that the anti-commandeering doctrine is designed to prevent.

While some might argue that honoring a pardon is not necessarily the same as forcing a state to use its resources to enforce immigration laws, its connection to the Tenth Amendment is perhaps best understood through the courts' assessment of policies limiting compliance with ICE detainers.[144] In *Galarza v. Szalczyk*, the Third Circuit found that under the Tenth Amendment's anti-commandeering doctrine, "immigration officials may not compel state and local agencies to expend funds and

139 *See New York*, 505 U.S. at 168–69.

140 *See, e.g.*, Adam H. Johnson, *Misplaced Outrage over Kentucky Governor's Pardons Harms Criminal Justice Reform*, APPEAL (Dec. 20, 2019), https://theappeal.org/misplaced-outrage-over-kentucky-governors-pardons-harms-criminal-justice-reform [https://perma.cc/YM3W-QMG8]; Ken Armstrong, *The Politics of Mercy: Is Clemency Still the Third Rail? We May Find Out*, MARSHALL PROJECT (Jan. 23, 2015, 5:13 PM), https://www.themarshallproject.org/2015/01/23/the-politics-of-mercy [https://perma.cc/5C29-ZKCV] ("Any governor who grants pardons or commutations to convicted felons invites political risk—with no potential benefit.").

141 Sarah Mervosh, Campbell Robertson & Mike Baker, *"'How? How? How?': Victims' Families Rage as Matt Bevin Defends Pardons*, N.Y. TIMES (Dec. 20, 2019), https://nyti.ms/2EDQwVV [https://perma.cc/4F25-WULH].

142 *See supra* Section I.B.

143 *See* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 395 (1997) (explaining that political accountability encompasses not just electoral accountability but also moral approval and ease of access).

144 *See* Galarza v. Szalczyk, 745 F.3d 634, 640 (3d Cir. 2014); Miranda-Olivares v. Clackamas County, No. 12-cv-02317, 2014 WL 1414305 (D. Or. Apr. 11, 2014).

resources to effectuate a federal regulatory scheme."[145] Relying in large part on *Galarza*, an Oregon district court later found that utilizing state and local actions "to enforce a federal regulatory scheme on behalf of INS would raise potential violations of the anti-commandeering principle."[146] Construed broadly, these cases suggest that moving forward with deportation proceedings on the basis of a pardoned conviction unconstitutionally commandeers states by prohibiting them from restricting the exchange of information related to immigration status with federal officials. In other words, when a state decides to pardon an immigrant, it, in effect, signals to the federal government that it does not wish to comply with any federal immigration enforcement against that person, similar to a state's decision not to honor an ICE detainer.

It is important to note that no state has yet used the commandeering doctrine to challenge the federal government's criminalized deportation regime, let alone to challenge the criminal carve-outs contained in the Pardon Waiver provision. With that said, because the commandeering doctrine generally allows for states to exercise some control over federal use of state law, there remains a powerful case for preventing the federal government from relying on pardoned convictions to effect deportation, as they are being done without the state's consent.

In sum, an argument can be made that the Pardon Waiver Clause's criminal exceptions run afoul of the Tenth Amendment.

III. PROPOSALS

This Part outlines three primary proposals that would make the Pardon Waiver Clause more constitutionally adequate. Section III.A proposes an amendment to the INA's overly broad definition of a conviction to exclude convictions that have been pardoned. Section III.B proposes that the Biden Administration give full faith and credit to state pardons as a discretionary matter when considering whether to deport a noncitizen on the basis of their criminal history. Lastly, to address inadmissibility, Section III.B also proposes that the Biden Administration direct immigration courts and the BIA to formalize the existing practice of reading the INA narrowly so that gubernatorial pardons overcome conviction-based inadmissibility. This Part sets forth these proposals in greater detail below.

145 *Galarza*, 745 F.3d at 644.

146 *Miranda-Olivares*, 2014 WL 1414305, at *6.

A. *Amending the INA to Exclude Pardoned Convictions*

To cure any potential constitutional or federalist problems with the Pardon Waiver provision, Congress should amend the INA and redefine the term "conviction"[147] in the INA altogether to expressly exclude convictions that have been pardoned.[148] This simple, but essential, amendment would resolve the need for a Pardon Waiver Clause altogether, restore the full effects of gubernatorial pardon power, and address both inadmissibility and deportability concerns.[149]

Promisingly, the federal government has already taken steps to redefine the term "conviction" for immigration purposes.[150] In January 2021, U.S. Representatives reintroduced the New Way Forward Act, and in February 2021, the U.S. Citizenship Act of 2021 (USCA) was introduced in the House and Senate.[151] The USCA proposes to redefine conviction to exclude "[a]n adjudication or judgment of guilt that has been dismissed, expunged, deferred, annulled, invalidated, withheld, or vacated."[152] The USCA was referred to the House Subcommittee on Immigration and Citizenship in April 2021, but at the time of this writing, the bill has yet to receive a vote.[153] While this bill serves to bring the immigration definition of conviction more in line with the term as defined in the criminal legal system, it falls short by failing to expressly exclude pardons.

147 What constitutes a "conviction" here for immigration purposes is a term of art and includes guilty pleas, convictions after trial, and outcomes where an adjudication of guilt has been withheld in which the criminal court imposes a punishment. *See* 8 U.S.C. § 1101(a)(48).

148 Human Rights Watch has called for a similar type of recommendation in the past, and the organization even went so far as to say "conviction" should also exclude all convictions that are vacated and expunged "or are otherwise not recognized by the jurisdiction in which the conviction occurred." *See* HUMAN RIGHTS WATCH, A PRICE TOO HIGH: US FAMILIES TORN APART BY DEPORTATIONS FOR DRUG OFFENSES (2015), https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses [https://perma.cc/EB8E-4UCV].

149 Beyond addressing the problematic aspects of the Pardon Waiver Clause, Congress should also use legislative reform as a tool to undo many of the aspects of the current INA that were adopted either without careful review or through antiquated notions of who is a "deserving" or "undeserving" immigrant. These narratives all too often leave out immigrants who were unjustly involved with the criminal legal system.

150 U.S. Citizenship Act, H.R. 1177, 117th Cong. § 1202(a) (2021); New Way Forward Act, H.R. 536, 117th Cong. § 302(b) (2021).

151 *See supra* note 150.

152 U.S. Citizenship Act, H.R. 1177, 117th Cong. § 1202(B)(i).

153 *See* U.S. Citizenship Act, H.R. 1177 (referred to H. Subcomm. on Immigr. & Citizenship, Apr. 28, 2021).

B. *The Biden Administration Should Use Pardons as a Proxy for Prosecutorial Discretion and Construe the INA Narrowly so that Pardons Overcome Inadmissibility for All Underlying Convictions*

Regardless of whether the INA is lawfully construed, the Biden administration should give deference to state pardons as a discretionary matter when considering whether to deport a noncitizen on the basis of their criminal history. Specifically, the Biden administration should instruct ICE to use prosecutorial discretion by declining to initiate removal proceedings, and terminating proceedings already underway, for individuals with sole pardoned offenses.[154]

As discussed in Part I, deportations based on criminal convictions have become much more common since the 1996 expansion of criminal removal grounds.[155] As a result, this expansion, coupled with limited availability of discretionary relief, has fundamentally changed the nature of the immigration deportation system today.[156] This entanglement of our criminal and immigration systems has undermined the effectiveness of both systems and has imported the defects and racial disparities of criminal justice systems into deportation proceedings.[157] In recognition of this, governors have increased their use of pardons as a way of disentangling these two systems and retaining authority over the protection of their immigrant residents who get swept up in the criminal legal system.[158] Through the use of prosecutorial discretion, the Biden administration should return to the pre-1996 era and end the use of deportation as a second punishment for criminal convictions for those

154 Prosecutorial discretion, in this context, refers to a choice made by the Department of Homeland Security (DHS) about whether to enforce immigration laws against a person or group of people. *See* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010).

155 *See supra* Section I.C; Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936–39 (2000).

156 *See* Ryan D. King, Michael Massoglia & Christopher Uggen, *Employment and Exile: U.S. Criminal Deportations, 1908–2005*, 117 AM. J. SOCIO. 1786, 1798 (2012); *see also supra* Section I.C.

157 *See generally* César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197 (2018); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

158 *See* sources cited *infra* notes 160–68.

who have been pardoned.[159] The BIA should also utilize this discretion and reopen and terminate all cases based on state-pardoned convictions.

This is not a novel recommendation—ICE has and continues to exercise this discretion for pardoned individuals. For example, Colorado Governor Jared Polis pardoned Ingrid Encalada LaTorre, a Peruvian immigrant who sought sanctuary in a local church after facing removal due to a felony conviction.[160] Subsequently, in November 2021, ICE granted Ms. Encalada LaTorre a one-year stay of removal so that she could work to reopen her immigration case.[161] Colorado congressmembers have encouraged this result, with much success, by also reaching out to ICE to prevent the deportation of other pardoned individuals.[162]

In New York, then-Governor Cuomo pardoned Baba Sillah, an immigrant living in New York who faced removal related to misdemeanor convictions.[163] On the same day that Governor Cuomo pardoned Mr. Sillah, ICE dropped its removal proceedings, seemingly out of its own discretion, and released Mr. Sillah from custody.[164] Former Governor Cuomo also granted a pardon to Colin Absolam, who faced

159 *See* Hernández, *supra* note 157, at 200; *see also* Bridges v. Wixon, 326 U.S. 135, 147 (1945) (recognizing the effects of deportation as a "loss 'of all that makes life worth living'" (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922))).

160 Pattrik Perez, *ICE Grants Peruvian Native Seeking Sanctuary in Colorado Stay of Removal*, DENV. CHANNEL (Nov. 5, 2021, 10:29 PM), https://www.thedenverchannel.com/news/local-news/ice-grants-peruvian-native-seeking-sanctuary-in-colorado-stay-of-removal.

161 Kelsey Hammon, *Ingrid Encalada Latorre Granted Stay of Removal in Immigration Case After Years of Sanctuary in Boulder Church*, DAILY CAMERA (Nov. 5, 2021, 6:02 PM), https://www.dailycamera.com/2021/11/05/ingrid-encalada-latorre-granted-stay-of-removal-in-immigration-case-after-years-of-sanctuary-in-boulder-church.

162 Saja Hindi, *Five Colorado Immigrants Who Lived in Sanctuary in Churches Granted Temporary Block from Deportation*, TIMES-CALL (Dec. 30, 2021, 10:04 AM), https://www.timescall.com/2021/12/30/biden-approves-temporary-deportation-block-colorado-sanctuary-immigrants [https://perma.cc/6ENA-57XM].

163 *See* Ellen Moynihan & Janon Fisher, *Gambian Immigrant Joyously Reunited with His Family After Gov. Cuomo's Pardon Frees Him*, N.Y. DAILY NEWS (Mar. 15, 2019, 12:00 AM), https://www.nydailynews.com/news/politics/ny-pol-baba-sillah-deportation-gambia-family-stay-bronx-20190315-story.html.

164 Press Release, N.Y. State, Governor Andrew M. Cuomo, Statement from Governor Andrew M. Cuomo on the Release of Baba Sillah by ICE Following Pardon Granted This Morning (Mar. 15, 2019), https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-release-baba-sillah-ice-following-pardon-granted-morning [https://perma.cc/5KGX-PZWU]; *see also* Brief for Governor Cuomo, *supra* note 105 (describing Mr. Sillah's release from custody after "ICE dropped its removal proceedings" against him).

immediate deportation upon being paroled from prison.[165] 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 [Mr. Absolam's] continued rehabilitation than by his removal based on the predicate state conviction."[166] Upon learning of the pardon, ICE removed Mr. Absolam from a plane, which was about to deport him back to his home country.[167] Moreover, in the brief submitted by Governor Cuomo in Mr. Darboe's case, the counsel for the Governor recounts numerous other immigrants who won relief from imminent removal by ICE after being issued a pardon by Governor Cuomo.[168]

The Biden Administration began its tenure by taking a cue from Obama-era reforms[169] and encouraging wide-ranging use of prosecutorial discretion for many forms of immigration enforcement.[170] For example, on January 20, 2021, DHS issued a memorandum directing the ICE Chief of Staff to review immigration enforcement policies and practices and to use the review as a guide for prioritization and prosecutorial discretion.[171] Notably, the memo identified many different forms and stages of prosecutorial discretion that are at ICE's disposal that

165 Marshall Project Staff, *Colin Absolam, an Immigrant Facing Deportation, Pardoned by Gov. Cuomo*, MARSHALL PROJECT (Jan. 30, 2020, 8:23 AM), https://www.themarshallproject.org/2020/01/30/colin-absolam-an-immigrant-facing-deportation-pardoned-by-gov-cuomo [https://perma.cc/7QKJ-VH5E].

166 *See* Brief for Governor Cuomo, *supra* note 105, at 25.

167 *Id.*

168 *Id.* (listing "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"); *see also* Sarah Maslin Nir, *To Stave off a Deportation, Cuomo Pardons a 9/11 Volunteer*, N.Y. TIMES (June 21, 2017), http://nyti.ms/2vEjgL1 [https://perma.cc/Q2AW-6RX2] (reporting that New York Governor Cuomo pardoned the crimes of a Colombian immigrant with a final order of removal in order to allow his case to be reopened and dismissed because he served as a first responder on 9/11).

169 *See* Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 665–68 (2015) (examining the causes and consequences of the immigration enforcement regime's embrace of a noncitizen's criminal history as a "near-irrevocable proxy" for undesirability).

170 Shoba Sivaprasad Wadhia, *Prosecutorial Discretion in a Biden Administration*, YALE J. REGUL. (Jan. 21, 2021), https://www.yalejreg.com/nc/prosecutorial-discretion-in-a-biden-administration-by-shoba-sivaprasad-wadhia [https://perma.cc/43CJ-4KXS].

171 Memorandum from David Pekoske, Acting Sec'y, U.S. Dep't of Homeland Sec., on Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities to Troy Miller, Senior Off. Performing the Duties of the Comm'r, U.S. Customs and Border Prot., Tae Johnson, Acting Dir., U.S. Immigr. and Customs Enf't, & Tracey Renau, Senior Off. Performing the Duties of the Dir., U.S. Citizenship and Immigr. Servs. (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [https://perma.cc/PM3D-P6QB].

could be applicable to people who receive gubernatorial pardons at many stages in their deportation proceedings.[172] While the Biden administration's specific use of enforcement priorities is now subject to federal litigation,[173] this does not preclude immigration officials from exercising prosecutorial discretion in individual cases.[174]

By specifying that such discretion should be afforded to those with pardoned criminal convictions, this policy would implement clear, bright-line prosecutorial discretion guidelines to exclude large categories of cases—which include, but do not necessarily have to be limited to, pardoned offenses—that do not justify enforcement and removal.

While critics of this proposal might caution against ICE issuing such blanket discretion, it is worth noting that exercising prosecutorial discretion does not have to foreclose an analysis of how criminal histories should factor into someone's deportation proceedings. For example, Professor Jason A. Cade recommends that pardons can also serve as a "disproportionality rule of thumb," which is almost like a proxy to prosecutorial discretion. [175] Given the involved application processes in which state pardons are addressed by governors,[176] Cade emphasizes how pardons typically require a balancing test of the egregiousness of the underlying offense and the mitigating factors, which are heavily fact-specific, that has already taken place independent a person's deportation proceedings.[177]

Moreover, the use of prosecutorial discretion in the context of state pardons would address the federalism issues raised in Part II of this Note

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172 According to the memo:

> These priorities shall apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action or parole.

Id. at 2. Please note that while aspects of this memo are currently enjoined due to pending federal court litigation, this aspect of the memo remains in place.

173 Texas v. United States, No. 22-40367, 2022 WL 2466786 (5th Cir. July 6, 2022).

174 *What Is Prosecutorial Discretion* (PD)?, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/about-ice/opla/prosecutorial-discretion [https://perma.cc/HWK7-S2RW] (noting the "longstanding authority of a law enforcement agency charged to decide where to focus its resources and whether or how to enforce the law against an individual"); *see also* Texas v. United States, No. 6:21-CV-00016, 2022 WL 2109204, at *1 (S.D. Tex. June 10, 2022) ("[T]he Executive Branch has case-by-case discretion to abandon immigration enforcement as to a particular individual.").

175 Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 36, 39 (2015).

176 See *supra* Section I.B.2 for a reminder of the typical pardon application process.

177 Cade, *supra* note 175.

to better align federal and state priorities.[178] As discussed in Part II, pardons reflect and implement the criminal system's justice-seeking and rehabilitative goals of eliminating the stigma and barriers that result from a criminal conviction.[179] Any federal government effort to deport a person on the basis of a pardoned conviction only continues to create conflict and tension with state sovereignty.[180]

While the aforementioned proposals would preclude relief for people who are removable for reasons beyond a pardoned conviction (such as people who are in proceedings based on an arrest or on another conviction), courts and the BIA can still take pardons into consideration when assessing the underlying facts of each individual case. To encourage this, the Biden Administration could also enact reforms giving immigration judges discretion—when making any removal decision—to consider pardon as part of a person's rehabilitation, ties to their state, and the impact of potential deportation on their state community members.[181]

With regards to inadmissibility, the Biden Administration should direct immigration courts and the BIA to formalize a policy and practice of establishing that gubernatorial pardons overcome conviction-based inadmissibility.

While critics of this proposal might argue that pardoned individuals should instead go through the steps of seeking an inadmissibility waiver, as some are currently eligible to do for deportability through the Pardon Waiver provision, current waiver provisions for the various grounds of inadmissibility vary widely in standards and applicability.[182] Moreover, seeking a waiver involves an unnecessary additional layer of review that undermines the gubernatorial pardon vetting process, with no guarantee that the waiver will ultimately be granted. For administrative ease, adjudicators should read the INA to mean that pardons overcome inadmissibility for all underlying convictions.

In conclusion, to resolve the constitutional and federalism issues presented in Part II of this Note, courts and administrative agencies

178 *See supra* Section II.A and accompanying notes.

179 *See supra* Section I.B.

180 Cade, *supra* note 175, at 51.

181 The Biden Administration has taken steps to restore the amount of judicial discretion in this area. In the USCA, the Biden Administration has proposed restoring JRAD, now called the Judicial Recommendation Against Removal. If enacted, pardoned convictions could also potentially be reclassified as nonconvictions for immigration purposes on a case-by-case basis through this mechanism. *See* U.S. Citizenship Act, H.R. 1177, 117th Cong. § 1202(B)(ii)(I) (2021).

182 *See, e.g.*, Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, 399–401 (2020) (examining the discretionary nature of inadmissibility waivers).

should adopt a series of policies and practices that presume state pardons for all criminal offenses, signaling that a noncitizen's encounter with the criminal system alone should not trigger grounds of deportability and inadmissibility.[183]

CONCLUSION

Upon his release from immigration detention, Mr. Darboe was finally able to hold his daughter after years of separation, and now he is home with his family.[184] However, his fight to remain in the United States with his family continues, all based on a sole, unfounded, and now pardoned, conviction.[185] As such, the full effect of state pardons is crucial for justice-involved immigrants facing deportation. As part of his initial campaign platform, President Biden promised to broadly use his clemency power to secure the release of individuals facing unduly long sentences for certain nonviolent and drug crimes.[186] Despite reports of a long-term plan to use pardons to address racial injustice,[187] the Biden Administration has so far fallen short on this promise.[188] While President Biden's anticipated use of increased pardons will also be very important in the immigration context, Biden's messaging already signals a

183 *See id.*

184 *See* Basma Eid, *Welcome Home, Ousman!*, FUNDRAZR, https://fundrazr.com/WelcomeHomeOusman?ref=ab_0aOxsjqu5PR0aOxsjqu5PR [https://perma.cc/P7QX-ERSR]; Matt Katz, *Held by ICE Longer than Any New Yorker, Bronx Man Is Finally Freed*, WNYC NEWS (Sept. 29, 2020), https://www.wnyc.org/story/held-ice-longer-any-new-yorker-bronx-man-finally-freed [https://perma.cc/74JW-SPLC].

185 *See* New Way Forward Act, *Ousman Darboe | New Way Forward Act*, YOUTUBE (May 10, 2022), https://www.youtube.com/watch?v=qyd9ZZha5sY [https://perma.cc/S6GJ-2EB7].

186 *See The Biden Plan for Strengthening America's Commitment to Justice*, BIDEN HARRIS https://joebiden.com/justice [https://perma.cc/4CDA-Q5PM].

187 *See* Kenneth P. Vogel & Annie Karni, *Biden Is Developing a Pardon Process with a Focus on Racial Justice*, N.Y. TIMES (Aug. 30, 2021), https://www.nytimes.com/2021/05/17/us/politics/biden-pardons-racial-justice.html [https://perma.cc/B8L3-DSN7].

188 *See* Charles R. Davis, *Despite Promises, Biden Has Yet to Issue a Single Pardon, Leaving Reformers Depressed and Thousands Incarcerated*, BUS. INSIDER (Dec. 8, 2021, 3:02 PM), https://www.businessinsider.com/joe-biden-pardons-clemency-none-so-far-activists-disappointed-2021-12 [https://perma.cc/V27G-3APY]; Samantha Michaels, *Biden's Turkey Pardon Reveals an Uncomfortable Truth*, MOTHER JONES (Nov. 21, 2021), https://www.motherjones.com/crime-justice/2021/11/biden-turkey-pardon-clemency-federal-prisons [https://perma.cc/RUK8-FHGX]; *see also* Austin Sarat, Opinion, *It's Time for President Biden to Use His Vast Clemency Power*, HILL (Jan. 4, 2022, 12:30 PM), https://thehill.com/opinion/criminal-justice/588159-its-time-for-president-biden-to-use-his-vast-clemency-power [https://perma.cc/LL2Y-D85T].

line-drawing of the type of offenses that will likely be considered for those pardons.[189] As such, it is tremendously important on the state level for governors to continue using their state pardon power towards *all* kinds of offenses, including controlled substance offenses, and that the full effects of those pardons are recognized for immigration purposes. With the widespread use of the pardon power, it will also be crucial for the INA to be amended so that all immigrants such as Mr. Darboe can receive the full effects of those pardons and no longer face the risk of deportation.

189 *See generally* sources cited *supra* note 188.