No. 18-1823

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RICHARD MARVIN THOMPSON,
Petitioner

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL,
Respondent

ON REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER RICHARD MARVIN THOMPSON

WILLIAM TONG
Attorney General of Connecticut

CLARE KINDALL
Solicitor General
JANE ROSENBERG
Assistant Attorney General
Connecticut Attorney General's Office
55 Elm Street
P.O. Box 120

Hartford, CT 06141-0120
Ph: 860-808-5020
Fax: 860-808-5347
Email: jane.rosenberg@ct.gov

Counsel for Amicus Curiae
State of Connecticut

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IDENTITY AND INTEREST OF THE AMICUS CURIAE

The amicus curiae State of Connecticut, by and through its Attorney General, respectfully submits this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) in support of the petitioner-appellant Richard Marvin Thompson and reversal of the decision of the Board of Immigration Appeals (BIA).

The State of Connecticut has a vital interest in this case, which directly impacts the State's sovereign power to issue pardons for the commission of crimes; the State's authority, protected by the Tenth Amendment and by the constitutional principle of equal sovereignty, to determine the manner in which it will structure and exercise its sovereign pardoning power; and State residents' Fifth Amendment right to have the federal government honor Connecticut's full and unconditional pardons to the same extent that it honors functionally-identical pardons issued by other states.

These critically-important issues of federalism, comity, and constitutional justice arise from the threatened deportation of Petitioner Richard Marvin Thompson, who was admitted to the United States as a lawful permanent resident over twenty-two years ago.

Immigration and Customs Enforcement (ICE) seeks to deport Mr. Thompson, arguing that he forfeited his legal status by virtue of a crime he committed in 2001 at the age of eighteen.

But under Connecticut law, Mr. Thompson has not been convicted of any crime. Connecticut's Board of Pardons and Paroles granted him a "full, complete, absolute, and unconditional" pardon on December 13, 2017, which has the legal effect of erasing his criminal record and even the fact of any arrest. Conn. Gen. Stat. § 54-142a(e)(3). Because of that pardon, he is entitled to a waiver from deportation under 8 U.S.C. § 1227(a)(2)(A)(vi) (the "Pardon Waiver Clause").

In seeking to deport Mr. Thompson, ICE and the BIA are refusing to honor Connecticut's full and unconditional pardon. Instead, they take the position that, merely because Mr. Thompson's pardon was granted by a gubernatorially-appointed board rather than by the Governor himself, the pardon is not a "full and unconditional pardon" issued "by the Governor of any of the several States" and thus does not comport with the Pardon Waiver Clause.

ICE and the BIA's incorrect and unconstitutional invalidation of a critical intended effect of Connecticut's pardon system, while honoring

identical pardons issued by other states, deeply prejudices Mr. Thompson's Fifth Amendment equal protection rights and those of all other similarly-situated Connecticut residents.

Connecticut has a compelling interest in ensuring that the federal government does not treat its immigrant residents differently and worse from those of other states. More than one in seven Connecticut residents – well over 500,000 people – is an immigrant, while another one in eight is a native-born U.S. citizen with at least one immigrant parent. These residents are vital members of Connecticut's communities, its workforce, and its families. ICE and the BIA would deny those Connecticut residents the full benefits to which they are entitled under federal law, threatening the integrity of their families, the security of their jobs, and even their physical safety. The State of Connecticut seeks to be heard on behalf of those residents, their families, and our entire state-wide community that benefits so greatly from their presence.

Connecticut also has a compelling sovereign interest in the enforcement of its laws and in ensuring that the federal government accords those laws the respect to which they are entitled under our

federal system. ICE and the BIA's position damages federal-state comity by disrespecting Connecticut's prerogative to determine the proper interpretation of its own laws and threatens to violate state sovereignty under the Tenth Amendment by effectively mandating that Connecticut's legislature enact, and Connecticut's executive administer, a specific Congressionally-mandated pardons scheme. Given these significant and vital interests in the outcome of this appeal, Connecticut urges this Court to reverse the BIA's decision.

SUMMARY OF ARGUMENT

The full and unconditional pardon granted to Mr. Thompson by Connecticut's Board of Pardons and Paroles comports with the requirements of the Pardon Waiver Clause. By refusing to respect that pardon, ICE and the BIA have misconstrued Congressional intent and deviated, without justification, from past BIA interpretations of the Pardon Waiver Clause. Their disregard for Connecticut pardons contrasts sharply and impermissibly with the respect that they accord the five other states that, like Connecticut, exercise their sovereign pardon power through a gubernatorially-appointed board.

Connecticut's Board of Pardons and Paroles is the supreme and sole pardoning authority for the State of Connecticut. Delegated that authority by statute, the Board is an executive branch agency whose members and chairperson are appointed by the Governor. Effectively standing in the shoes of the Governor, the Board exercises full discretion to grant or deny pardons based on a case-by-case assessment of the facts and circumstances of each applicant. This individualized, executive pardon is functionally identical to pardons granted by other states and respected by the BIA. And Connecticut's pardons are categorically distinct from the generic legislative pardon that the Pardon Waiver Clause sought to exclude.

The BIA and ICE's treatment of Mr. Thompson's pardon not only deviates from their past interpretation and application of the Pardon Waiver Clause, but also threatens Mr. Thompson's right to equal protection and disrespects Connecticut's fundamental sovereign authority to structure its government and exercise its pardoning power. Because the BIA and ICE's incorrect and unconstitutional interpretation of the requirements of the Pardon Waiver Clause is inconsistent with Congress' intent, and deeply prejudices Mr. Thompson

and Connecticut residents like him, the BIA's decision should be reversed.

ARGUMENT

I. UNDER CONNECTICUT'S PARDON SYSTEM, MR. THOMPSON'S PARDON IS AN EXECUTIVE PARDON THAT SATISFIES THE REQUIREMENTS OF THE PARDON WAIVER CLAUSE.

The Pardon Waiver Clause of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(vi), provides that a non-citizen who would otherwise be subject to deportation for conviction of an enumerated offense is entitled to a waiver of deportation if he or she "has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States." In concluding the Connecticut Board of Pardons and Paroles' (the "Board") full and unconditional pardon of Mr. Thompson does not satisfy this Clause because it purportedly constitutes a legislative, rather than an executive pardon, the Board of Immigration Appeals ("BIA") and ICE have fundamentally misconstrued the intent of the Pardon Waiver Clause and the nature of Connecticut's pardoning system.

A. The Pardon Waiver Clause Applies To Pardons That Are Executive In Nature, Regardless Of Whether They Are Granted By The Governor.

The Pardon Waiver Clause does not insist that a specific state executive-branch official sign a state pardon. That elevation of form over substance would interfere impermissibly with state sovereignty. Instead, Congress intended by enacting the Clause to ensure that generic legislative pardons, granted automatically by operation of law when a sentence has been served, do not protect against deportation. In place of these legislative pardons, Congress intended for the Clause to extend waiver benefits to the recipients of "executive" pardons – pardons that are characterized by executive discretion and individualized consideration of each applicant's situation, even if issued by a state pardoning authority other than the Governor.

That Congress' concern was directed at automatic legislative pardons is evident from the history of the Immigration and Nationality Act and decisions interpreting it. Prior to 1952, Section 19 of the Immigration Act of 1917 stated that provisions requiring the deportation of aliens convicted of crimes involving moral turpitude would "not apply to one who has been pardoned." 8 U.S.C. § 155 (1917).

Because this language was not qualified in any way, it barred deportation regardless of the nature of the pardon. Thus, in *Perkins v. U.S. ex rel. Malesevic*, 99 F.2d 255 (3rd Cir. 1938), the Third Circuit held that a non-citizen who was convicted of a crime of moral turpitude, but pardoned automatically under Pennsylvania law because he had served his time, was not subject to deportation. As the district court noted, "[i]f the pardon granted by [the Pennsylvania statute] was not in [the] actual contemplation of Congress, it at least comes within the wording of the federal statute; and, in such case, . . . it is not the province of this court to read into it a limitation not plainly expressed." *U.S. ex rel. Malesevic v. Perkins*, 17 F. Supp. 851, 853 (D. Pa. 1936).

In adopting the Immigration and Nationality Act in 1952 and adding language to the Pardon Waiver Clause requiring a full and unconditional pardon by the President of the United States or the governor of any of the states, Congress was fully aware of statutes such as the Pennsylvania statute at issue in *Perkins*. As the Senate Judiciary Committee explained in reporting on "deportation problems" at the time, "there exist so-called legislative pardons under which an alien is

pardoned by operation of law in several States after completion of his sentence." S. Rep. No. 1515, at 637 (81st Cong., 2d Sess. 1950).

Subsequent BIA decisions emphasize that Congress' concern in requiring that pardons be granted by the President or a state's governor was specifically to eliminate these automatic legislative pardons as a basis for avoiding deportation. For example, in *In the Matter of R--*, 5 I&N Dec. 612 (BIA 1954), the BIA held that after the adoption of the INA, the same Pennsylvania pardon statute that had been the subject of the *Perkins* case no longer satisfied the requirements of the Pardon Waiver Clause. As the BIA explained, "[b]y limiting the benefit [of the Pardon Waiver Clause] to presidential and gubernatorial pardons only, Congress has manifested an express intention to grant exemptions from deportation only to those aliens who have obtained an executive pardon. We therefore conclude that a *legislative pardon, such as that obtained by the respondent* [namely, an automatic pardon], is ineffective to prevent deportation." *Id.* at 619 (emphasis omitted, emphasis and brackets added).

Similarly, in *Matter of Nolan*, 19 I&N Dec. 539, 543 (BIA 1988), the BIA held that a pardon granted automatically by the Louisiana

constitution to first time felons did not satisfy the Pardon Waiver Clause. As the BIA explained, "[t]his type of pardon, although provided for under a state constitution rather than by statute, is akin to the legislative pardon which Congress clearly rejected when it enacted the current pardon provision of the Act in 1952." *Id.* at 544. As in *Matter of R--*, 5 I&N Dec. 612 (BIA 1954), it was the *automatic nature* of the pardon, regardless of whether it had been authorized by legislation or a state constitution, that was the distinguishing feature of the "legislative" pardons that Congress sought to eliminate from the scope of the Pardon Waiver Clause.

In short, Congress' intent was to ensure that only pardons that were executive in nature – that is, characterized by executive discretion and individualized consideration of a particular person's situation, as opposed to being automatically granted by blanket operation of law – would satisfy the Pardon Waiver Clause. *See Matter of Nolan*, 19 I&N Dec. 539 (BIA 1988); *Matter of Tajer*, 15 I&N Dec. 125, 126 (BIA 1974); *Matter of G-*, 9 I&N Dec. 159, 163-164 (BIA 1960).

As the BIA has repeatedly recognized, such executive pardons are not limited to those signed by the President or a governor. Because "the

supreme pardoning power may rest with an executive or executive body other than the President of the United States or the Governor of a state," *Matter of Nolan*, 19 I&N Dec. 539, 542 (BIA 1988), the BIA has held that pardons granted by a wide range of authorities with supreme pardoning power satisfy the Pardon Waiver Clause.

For example, in *Matter of C-R-*, 8 I&N Dec. 59, 61 (BIA 1958), the Board held that an unconditional pardon issued by the mayor of a first-class Nebraska city was an executive pardon that satisfied the Pardon Waiver Clause because the state legislature had enacted legislation delegating to first-class city mayors the supreme pardoning authority over convictions for city ordinance violations. The fact that the power had been delegated by legislation, as in the present case, rather than by the state constitution, in no way altered the conclusion that the pardon was executive in nature. What mattered was that Nebraska law designated the mayor as the sole authority with discretionary power to pardon the violation of a city ordinance.

Other BIA decisions have likewise interpreted the Pardon Waiver Clause to include pardons granted by executive authorities other than governors. *See, e.g., Matter of Tajer*, 15 I&N Dec. 125 (BIA 1974) and

Matter of D-, 7 I&N Dec. 476 (BIA 1957) (recognizing pardons granted by the Georgia State Board of Pardons and Paroles vested with executive authority by the Georgia constitution); *Matter of K-*, 9 I&N Dec. 336 (BIA 1961) (recognizing pardon granted by the U.S. High Commissioner for Germany vested with authority by executive order); and *Matter of T-*, 6 I&N Dec. 214 (BIA 1954) (recognizing pardon granted by the Governor of the Territory of Hawaii vested with authority by statute).

Until its sharp reversal in this case, then, the BIA had a long history of properly interpreting and applying Congress' intent to respect all discretionary and individualized executive pardons – not just those granted by state governors. And that proper approach continues to be manifested today in the BIA's respect for the wide variety of executive pardons granted by states across the country – including by five other states that, like Connecticut, vest their pardon power in an executive-branch board. In this context, the mistaken interpretation at issue here, which uniquely prejudices the state of Connecticut and its residents, seems all the more anomalous, puzzling, and unjustifiable.

All 50 states have a mechanism for executive pardons. *See* Restoration of Rights Project, *Characteristics of Pardon Authorities*, (Dec. 2018) (surveying all 50 states' pardon systems), https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities/. Of those, fully 47 have established an executive-branch board with at least some influence in the pardon process. *Id.* In some states, the governor sits on the board. *See, e.g.,* Fla. Stat. ch. 940.01. In others, the governor must consult with the board before issuing a pardon. *See, e.g.,* Alaska Stat. § 33.20.080. In still others, the board serves as a gatekeeper, passing recommendations to the governor. *See, e.g.,* Ariz. Rev. Stat. § 31-402(A). And in six states – Alabama, Connecticut, Georgia, Idaho, South Carolina, and Utah – the governor appoints members of an executive-branch board, to which is fully delegated the pardon power of the sovereign state in non-capital cases. *See* Ala. Code §§ 15-22-20 *et seq*. (governor appoints an independent pardons board, which makes pardon determinations without gubernatorial approval); Ga. Code Ann., § 42-9-2 (same); Idaho Code § 20-210 (same); S.C. Code Ann. § 24-21-10 (same); Utah Code Ann. § 77-27-2 (same).

There is no indication in the historical record, in any of the BIA's decisions, or in any court decision, that Congress intended to – or, constitutionally, is entitled to – pick and choose favorites from among this wide variety of state executive pardon schemes. Indeed, even today, the BIA and ICE appear to respect the pardons granted in all 49 other states, regardless of the level of their governor's engagement in granting pardons – including the five other states where, like Connecticut, the governor does not sign off on pardons. *See, e.g., In re Pervez Pasha*, 2011 WL 891881 (BIA 2011) (unpublished opinion) (recognizing pardon from Georgia's Board of Pardons as warranting waiver of deportation); *In re Peter G. Balogun*, 2004 WL 2374920 (BIA 2004) (unpublished opinion) (accepting without question the proposition that a pardon from the Alabama Board of Pardons and Paroles would constitute a "full and unconditional" pardon under the Pardon Waiver Clause).[1]

[1] Neither the text of Immigration and Nationality Act nor any other source of authority suggests a rational or valid distinction between state pardon schemes based on whether the scheme derives from state constitutional or statutory authority. The state authority in which a pardon scheme is rooted has no bearing on its procedural fairness, its substantive accuracy, or its relationship to the executive (and therefore individualized and discretionary)/legislative (and therefore generic and automatic) distinction that is at the heart of the Pardon Waiver Clause. And, as a core matter of federalism, it is not for the federal government to say how states

As these decisions and the continued practices of the BIA and ICE demonstrate, what matters in determining whether a pardon satisfies the requirements of the Pardon Waiver Clause is not whether it was signed by a state's governor, but rather whether it was granted by an official or entity vested with the state's supreme pardoning power and possessing unfettered discretion to exercise that authority on a case-by-case basis. Connecticut's Board of Pardons and Parole is precisely that type of entity.

B. Connecticut's Pardon System Is Executive In Nature.

Pardons issued by the Connecticut Board of Pardons and Paroles are executive in nature and fall squarely within the scope of the Pardon Waiver Clause.

Like every state in the country, Connecticut exercises its own prerogative, protected by the Tenth Amendment, to determine its structures of government, including its pardon system. *See Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 287 (1981) (describing the fundamental prerogative of "states as states" to "structure integral operations in areas of traditional governmental

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must make their laws. Connecticut's first constitution predates the I.N.A. by more than 300 years.

functions"). Like the power to punish, the power to pardon is typical of, and inherent in, each government's sovereignty. *See United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160–61 (1833). As the BIA has recognized, "[w]hether a state opts to authorize the granting of a pardon, and by what mechanism, for which offenses, and under what circumstances, are matters resting within the sovereign decision-making powers of that state." *Matter of Nolan*, 19 I&N Dec. 539, 544 (BIA 1988).

Under Connecticut's chosen system, which has been in place since 1883, *Palka v. Walker*, 124 Conn. 121, 123, 198 A. 265, 266 (Conn. 1938), the state's sovereign power to pardon is vested, through the legislature, in the Board of Pardons and Paroles. *McLaughlin v. Bronson*, 206 Conn. 267, 271, 537 A.2d 1004, 1006-07 (Conn. 1988); *Dumschat v. Board of Pardons*, 452 U.S. 458, 463 (1981). The Board is an executive branch agency, whose members and chairperson are appointed by the Governor. *See* Conn. Gen. Stat. § 54-130a; Conn. Gen. Stat. § 54-124a(a)(1) ("There shall be a Board of Pardons and Paroles within the Department of Correction, for administrative purposes only. … [T]he board shall consist of ten full-time and up to five part-time members appointed by the Governor with the advice and consent of

both houses of the General Assembly."). Transformed into an autonomous executive agency in 1969, the Board effectively stands in the executive's shoes to exercise the state's sovereign power to grant full and unconditional pardons. No other official or entity in the state possesses this sovereign authority to pardon. Conn. Gen. Stat. § 54-130a.

Critically, unlike some other states, Connecticut has *no* provision for legislative pardons that occur automatically as a matter of law. Instead, Connecticut's Board of Pardons and Paroles grants pardons, if at all, only after extensive individualized consideration of the facts and circumstances of each case and the merits of each applicant. *See* Carlton J. Giles, *The Pardon Process*, Connecticut Board of Pardons and Paroles (2018),https://portal.ct.gov/-/media/BOPP/Legacy-Files/2118FINALPardonsEligibiltyNoticepdf.pdf?la=en.

Connecticut's pardon process not only requires an individualized case-by-case assessment of each applicant, but also vests the Board with "unfettered discretion" to grant or deny a pardon. *McLaughlin v. Bronson*, 206 Conn. 267, 271, 537 A.2d 1004, 1006-07 (Conn. 1988); *Dumschat v. Board of Pardons*, 452 U.S. 458, 466 (1981). Connecticut's

statutory scheme "imposes no definitions, no criteria and no mandates giving rise to a duty to . . . grant a pardon, or creating a constitutional entitlement to an exercise of clemency." *See id*. The Board "can deny the requested relief for any constitutionally permissible reason or for no reason at all." *Dumschat,*, 452 U.S. at 467 (Brennan, J. concurring). If granted, an absolute pardon by the Board legally erases the applicant's criminal record, including the fact of arrest. Conn. Gen. Stat. § 54-142a(e)(3).

Connecticut's pardon process, which Mr. Thompson successfully completed, is built on nationally-accepted best practices and aligns with procedures used in many other states across the country. The process begins when an eligible applicant submits an exhaustive 21-page written application calling for information on family; criminal history; prior applications; educational history; employment; and history of substance abuse and treatment. Connecticut Board of Pardons and Paroles, *Absolute Pardon Application* (Nov. 2017), https://portal.ct.gov/-/media/BOPP/Legacy-Files/2018CTPardonapplicationpdf.pdf?la=en. That application must be supplemented with supporting documents including a state police criminal history report; police reports for arrests

resulting in convictions within the last 10 years; probation status forms for each period of probation served; reference questionnaires from three references; and proof of employment. *Id.*

Written applications and supporting materials are screened by Board staff to determine eligibility and suitability. *See* Carlton J. Giles, *The Pardon Process*, Connecticut Board of Pardons and Paroles (2018), https://portal.ct.gov/-/media/BOPP/Legacy-Files/2118FINALPardonsEligibiltyNoticepdf.pdf?la=en. The Board then solicits victim input and, wherever appropriate, holds a hearing before a three-member panel at which the victim – if they desire – and the applicant have an opportunity to be physically present. Conn. Gen. Stat. § 54-130d(a)-(b); Conn. Gen. Stat. § 54-124a(e). In determining whether to grant a pardon, the Board considers all of the information and factors before it, including, but not limited to, the severity of the offense; the impact on the victim and the victim'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 justice system; character

references; and community service. Carlton J. Giles, *The Pardon Process*, Connecticut Board of Pardons and Paroles (2018), https://portal.ct.gov/-/media/BOPP/Legacy-Files/2118FINALPardonsEligibiltyNoticepdf.pdf?la=en.

This process vests an executive agency with exclusive sovereign pardoning power for the State and grants the executive unfettered discretion to decide whether to grant pardons on a case-by-case basis. As such, this power is substantively no different from the pardoning power granted to the mayor in *Matter of C-R-*, 8 I&N Dec. 59, 61 (BIA 1958), the Georgia State Board of Pardons and Paroles in *Matter of Tajer*, 15 I&N Dec. 125 (BIA 1974), and *Matter of D-*, 7 I&N Dec. 476 (BIA 1957), the U.S. High Commissioner for Germany in *Matter of K-*, 9 I&N Dec. 336 (BIA 1961), and the Governor for the Territory of Hawaii in *Matter of T-*, 6 I&N Dec. 214 (BIA 1954), which was found, in each case, to satisfy the requirements of the Pardon Waiver Clause. There is no meaningful distinction between Connecticut's process and the pardons processes that ICE and the BIA have approved, and continue to approve, in states across the country – including states whose pardon schemes mirror Connecticut's. Accordingly, there is no principled basis

for the BIA's conclusion that the "full, complete, absolute and unconditional pardon" that the Connecticut Board of Pardons and Paroles has granted to Mr. Thompson does not meet the requirements of the Pardon Waiver Clause.

II. ICE AND THE BIA'S MISCONSTRUCTION OF CONNECTICUT'S PARDONING SCHEME SERIOUSLY PREJUDICES CONNECTICUT RESIDENTS' CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAW.

ICE and the BIA's erroneous conclusion that full and unconditional pardons granted by the Connecticut Board of Pardons and Paroles do not satisfy the requirements of the Pardon Waiver Clause not only deviates from the BIA's past decisions and present interpretation of other states' laws, but also seriously prejudices the constitutional rights of Mr. Thompson, and all of Connecticut's non-citizen residents, to equal protection of the law under the Fifth Amendment of the Constitution.

The Fifth Amendment's due process clause prohibits the federal government from denying equal protection of the laws to any U.S. resident. *U.S. v. Windsor*, 570 U.S. 744, 774 (2013). But under ICE and the BIA's fundamentally flawed interpretation, Connecticut's residents

who have been granted pardons are singled out and treated differently from similarly-situated residents of other states solely because the supreme pardoning power in Connecticut is exercised by an executive branch agency rather than by the Governor personally.

Notwithstanding that Connecticut's executive pardons are in all substantive respects identical to other states' pardons that the BIA deems sufficient to satisfy the Pardon Waiver Clause, ICE and the BIA are refusing to honor Connecticut's pardons. In Mr. Thompson's case, it is solely because *Connecticut* issued his pardon that he faces deportation and separation from his family. Had New York or Massachusetts – or, indeed, Alabama or Georgia, each of which also vests its power in a Board – issued his pardon, based on laws that are no more reliable or procedurally fair than Connecticut's but which happen to provide for pardons issued by their respective governors, Mr. Thompson would be exempt from deportation and at liberty to remain in the United States.

The federal government has no legitimate interest in disparate treatment of state residents based on whether their executive pardons were granted by a governor or by a gubernatorially-appointed board. As

a policy matter, there is every indication that pardon boards – precisely because they are more insulated from politics – are more likely to grant discretionary pardons on the basis of substantive merit rather than based on the power and influence of applicants. *See* Mindy Fetterman, *Move Is on to Make End-of-Year Pardons Less Random*, Pew Charitable Trusts, (Jan. 6, 2016), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/01/06/move-is-on-to-make-end-of-year-pardons-less-random (noting the importance of a "fair and structured process" over a "random" political calculation). The federal government has no basis for disfavoring rational and structured systems and preferring systems that are more susceptible to abuses like granting Christmas pardons to the politically favored, and which as a result risk damaging public perceptions of the entire justice system's fairness and impartiality. *See, e.g.*, Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. Crim. L. & Criminology 1131, 1168 (2010) (decrying the use of the pardon power in ways that give the appearance of selling justice); Richard Fausset, *Pardons Could Haunt Barbour*, L.A. Times, Jan. 13, 2012, at A1 (describing controversy over Mississippi governor's use of Christmas pardons).

Mr. Thompson is not alone in being subjected to unconstitutional disparate treatment merely because he lives in Connecticut. ICE has similarly discriminated against other Connecticut residents, disrespecting their Connecticut pardons and taking steps towards immediate deportation or denial of re-entry because it does not deem their pardons to be executive. *See, e.g., Wayzaro Yashimabet Walton v. Barr*, No. 19-789 (2nd Circuit) (appeal pending). Yet when identically-situated individuals across the state line in New York or Massachusetts seek exemption from deportation pursuant to the Pardon Waiver Clause, they face no similar barrier. And, tellingly, not all states that vest their pardon power in appointed boards are treated similarly to Connecticut. It appears, as noted *supra*, that the BIA and ICE respect pardons granted by the five other states whose systems are similar to Connecticut's. Because such unjustifiably disparate treatment violates the Fifth Amendment, the BIA's decision should be reversed.

III. ICE AND THE BIA'S REFUSAL TO TREAT CONNECTICUT PARDONS AS SUFFICIENT TO SATISFY THE PARDON WAIVER CLAUSE THREATENS CONNECTICUT'S SOVEREIGN RIGHTS.

Reversal is further warranted because ICE and the BIA's refusal to recognize the sufficiency of Connecticut's full and unconditional

pardons under the Pardon Waiver Clause threatens Connecticut's equal sovereignty and Tenth Amendment rights.

The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Although the States surrendered many of their powers to the Federal Government when they adopted the Constitution, "they retained 'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 919 (1997) (citing The Federalist No. 39, at 245 (J. Madison). That sovereignty includes the States' power to organize its governmental structure, *see, e.g., Printz*, 521 U.S. at 909; *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), and grant pardons. *See, e.g., Ex parte Wells*, 59 U.S. 307 (1955); *United States v. Wilson*, 32 U.S. 150, 160-161 (1833). "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991).

By designating the Board of Pardons and Paroles as the executive entity authorized to grant pardons, Connecticut is exercising its sovereign power. ICE and the BIA's reading of the Pardon Waiver

Clause disrespects this power. It disrespects Connecticut's long-established choice about where to situate and how to effectuate the state's power to pardon. To categorically bar Pardon Waiver Clause relief to all Connecticut residents pardoned by the state Board of Pardons and Paroles is effectively to dictate how Connecticut's legislature must establish its state pardon scheme and how Connecticut's executive branch must exercise its power. Such a mandate works a Tenth Amendment violation because the federal government cannot dictate the content of legislation passed by a state nor commandeer the state's executive officers, ordering a specific officer to be the conduit for pardons. *New York v. United States*, 505 U.S. 144 (1992). This was not, and could not have been, Congress' intent when it adopted the Pardon Waiver Clause.

ICE and the BIA's reading do not just threaten Connecticut's sovereignty as a state under the Tenth Amendment: They also threaten the principle of equal sovereignty among states. *See Shelby County v. Holder*, 570 U.S. 529, 544 (2013) ("Not only do States retain sovereignty under the Constitution, there is also a fundamental principle of equal sovereignty" among the States.") (internal quotation marks omitted). As

the Supreme Court taught in *Shelby County*, the federal government must make – at a minimum – a "showing" of "current need" if it intends to impose disparate treatment among the states and their laws, departing from the principle of "constitutional equality of the States" that "is essential to the harmonious operation of the scheme upon which the Republic was organized." *Id.* at 542 (citing to *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

Here, ICE and the BIA propose to treat Connecticut's pardon system and its residents who receive pardons differently from those of any other state – even those states whose systems are structurally identical to Connecticut's – deviating in the process from a long history of recognizing the authentic intent behind the Pardon Waiver Clause. That sharp reversal is backed by no showing of any policy or other justification for disparate treatment of Connecticut and its residents. But Congress did not intend, by the Pardon Waiver Clause, to randomly select winners and losers from among the states, and the Constitution does not allow it.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the BIA's decision denying Mr. Thompson's motion to open and refusing to recognize that his Connecticut pardon is an executive pardon that fully comports with the requirements of the Pardon Waiver Clause.

Respectfully submitted,

Amicus Curiae
State of Connecticut

WILLIAM TONG
ATTORNEY GENERAL FOR
CONNECTICUT

CLARE KINDALL
SOLICITOR GENERAL

By: */s/ Jane Rosenberg*
Jane Rosenberg
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5020
Fax: (860) 808-5347
Email: jane.rosenberg@ct.gov

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I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that it contains 5,032 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook font.

/s/ Jane Rosenberg
Jane Rosenberg
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5020
Fax: (860) 808-5347
Email: jane.rosenberg@ct.gov

Dated: April 4, 2019

CERTIFICATION OF SERVICE

I hereby certify that on this 4th day of April, 2019, I caused the foregoing brief to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: */s/ Jane Rosenberg*
Jane Rosenberg
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5020
Fax: (860) 808-5347
Email: jane.rosenberg@ct.gov