UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
5107 LEESBURG PIKE, SUITE 2000
FALL CHURCH, VA 22041

_____

IN RE: WAYZARO YASHIMABET WALTON
A041 657 485

IN REMOVAL PROCEEDINGS

DETAINED

_____

ON MOTION TO REOPEN ORDER OF REMOVAL

BRIEF OF THE STATE OF CONNECTICUT AS *AMICUS CURIAE* IN SUPPORT OF WAYZARO Y. WALTON

WILLIAM TONG
Attorney General of Connecticut

CLARE KINDALL
Solicitor General

JOSHUA PERRY
Special Counsel for Civil Rights
Connecticut Attorney General's Office
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Tel: (860)808-5372
Fax: (860) 808-5347
Email: Joshua.perry@ct.gov

Counsel for Amicus Curiae
State of Connecticut

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICUS CURIAE*

This case implicates Connecticut's prerogative, protected by the Tenth Amendment and the constitutional principle of equal sovereignty, to structure and exercise its sovereign pardoning power. It also implicates the Fifth Amendment right of Connecticut residents to receive the benefits of federal law – here, the immigration benefits of full and unconditional pardons – to the same extent as identically situated residents of other states.

These critically important issues of federalism, comity, and constitutional justice arise from the threatened removal of Wayzaro Yashimabet Walton, who has lived in Connecticut since she was three years old. She received a Green Card; married a U.S. citizen in Hartford, Connecticut; and lives in the state with her spouse and U.S. citizen child.

Now, Immigration and Customs Enforcement ("ICE") seeks to remove Ms. Walton. ICE argues that Ms. Walton forfeited her legal permanent resident status, and warrants removal, because she committed non-violent larceny offenses, the most recent of which is said to have occurred more than seven years ago.

But under Connecticut law, Ms. Walton has not been convicted of any crime. On January 15, 2019, Ms. Walton received a "full, complete, absolute, and unconditional" pardon from Connecticut's Board of Pardons and Paroles. That pardon erases all records of arrest and conviction. Conn. Gen. Stat. § 54-142a(e)(3). She seeks – and should receive – reopening of her removal order, and she is entitled to waiver of removal under the Pardon Waiver Clause (the "Clause") of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(vi).

Under the Clause, an alien cannot be removed for commission of an offense if they have "been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States." While ICE has not explained its reasoning in this case, it

seems that Ms. Walton has been denied the benefits of the Clause because her pardon was granted by a gubernatorially-appointed board established by statute, rather than directly by the Governor himself or by a board established by state constitutional rule. That novel and mistaken reading contravenes the intent and language of the INA; a long and settled history of interpretation of the Clause; constitutional federalism and equal sovereignty principles protected by the Tenth Amendment; and Ms. Walton's own Fifth Amendment rights.

The Clause means today what it has always meant, and its meaning mandates relief for Ms. Walton and other similarly-situated recipients of Connecticut pardons. Under the Clause, "executive" pardons – pardons characterized by individualized discretion and consideration – give rise to relief. "Legislative" pardons – pardons that automatically take effect by operation of law – do not. The State of Connecticut is uniquely situated to explain that, under Connecticut law properly understood, Ms. Walton has an executive pardon and must be granted a waiver of removal.

Connecticut has an especially strong interest here because it appears that Ms. Walton's case is not an isolated instance. In *Richard Marvin Thompson*, A045 882 548 (BIA Aug. 7, 2018) (unpublished decision), the Board of Immigration Appeals ("BIA") ruled – erroneously, in Connecticut's view – that Mr. Thompson, an immigrant recipient of a Connecticut pardon, cannot obtain relief under the Clause. That decision is now being reviewed by the U.S. Court of Appeals for the First Circuit. *Thompson v. Barr*, 18-1823 (1st Cir) (oral argument held July 23, 2019).

Since becoming aware of this erroneous application of Connecticut law in March of 2019, Connecticut has sought to be heard in every forum where the issue can be raised. The State appeared as an *amicus curiae* and participated in oral argument in Mr. Thompson's First Circuit

case; appeared as an *amicus curiae* and participated in oral argument in Ms. Walton's application for relief to the U.S. Court of Appeals for the Second Circuit, now dismissed for want of jurisdiction, *In re Wayzaro Y. Walton*, No. 19-789 (2nd Cir.); and has even filed an action in federal district court seeking a declaratory judgment about the meaning of Connecticut's pardon system under the Clause. *State of Connecticut v. Department of Homeland Security, et. al.*, 3:19-cv-01597-VLB (D. Conn) (complaint filed Oct. 10, 2019). Now that the Board of Immigration Appeals has stayed Ms. Walton's removal and signaled that it may consider her motion to reopen on the merits, the State seeks to present its arguments and its interests in this forum as well.

In addition to its 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, Connecticut has a compelling interest in protecting its immigrant residents. 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. Denying those residents the full benefits of the Clause threatens 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 its residents, their families, and our entire state-wide community that is so much stronger for their presence.

Given these significant and vital interests, and in light of the law and argument presented below, Connecticut urges this Court to grant Ms. Walton's motion to reopen and to order that she be given relief under the Pardon Waiver Clause of the Immigration and Nationality Act.

SUMMARY OF ARGUMENT

The full and unconditional pardon granted to Wayzaro Walton by Connecticut's Board of Pardons and Paroles (the "Board") comports with the Pardon Waiver Clause and mandates waiver of removal.

In crafting the Clause, Congress sought to distinguish between "executive" pardons – characterized by individualized consideration and the exercise of discretion – and "legislative" pardons, which are generic and occur by operation of law. The former give rise to waiver of removal under the Clause; the latter do not. The Clause was not intended to mean, does not mean, and apparently until quite recently has never been interpreted to mean that relief depends on the precise identity of the state executive branch official signing the pardon, or on whether a state's system for granting pardons is authorized by statute or state constitution. Those readings have no basis in legislative text or history or in the settled meaning of the Clause as understood by the courts. And they fly in the face of the federalism concerns and constitutional violations that result from singling-out Connecticut's pardon system for unfavorable treatment.

Ms. Walton received an executive pardon. Connecticut's Board of Pardons and Paroles is the supreme and sole pardoning authority for the State of Connecticut. Established by statute, the Board is an executive branch agency whose members and chairperson are appointed by 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. Indeed: ICE's disregard for Connecticut pardons contrasts sharply and impermissibly with the respect apparently accorded to pardons in all 49 other states – including the five other states that, like Connecticut, exercise their sovereign pardon power through a board appointed by the governor.

ARGUMENT

I. THE PARDON WAIVER CLAUSE MANDATES WAIVER OF REMOVAL FOR RECIPIENTS OF STATE "EXECUTIVE" PARDONS

The Pardon Waiver Clause of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(2)(A)(vi), provides that a non-citizen who would otherwise be subject to removal for conviction of an enumerated offense is entitled to waiver of removal if he or she "has been granted a full and unconditional pardon by… the Governor of any of the several States."

The Clause has never been read to mean, and nobody now claims that it means, that a pardon, to be valid under the Clause, must be granted directly and exclusively by a state governor. Instead, the Clause has a clear and settled meaning that grows out of the text and legislative history and has been repeatedly validated by the courts: *Functionally executive* pardons – characterized by individualized consideration and the exercise of discretion – give rise to relief under the Clause. *Functionally legislative* pardons, which are generic and occur automatically by operation of law, do not.

A. Legislative History Shows that the Clause Was Intended to Mandate Relief for Recipients of Functionally "Executive" Pardons

Prior to the passage of the INA in 1952, Section 19 of the Immigration Act of 1917 provided simply that a noncitizen "who has been pardoned" could not be removed for conviction of a crime of moral turpitude. 8 U.S.C. § 155 (1917). The unqualified pardon waiver language was understood to bar removal regardless of the nature of the pardon. Thus, *in Perkins v. United States ex rel. Malesevic*, 99 F.2d 255 (3rd Cir. 1938), the Third Circuit held that a noncitizen who was convicted of a crime of moral turpitude but who received an automatic pardon under Pennsylvania law – that is, a pardon that was effectuated by operation of law and extended to

every member of a predefined class, regardless of individualized circumstances – was not subject to removal.

When it adopted the INA and added 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 aware of, and spoke directly to limit the efficacy of, automatic pardons such as the one in *Perkins*. The Senate Judiciary Committee even had a name for these disfavored pardons: "[T]here 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) (emphasis added).

The new language in the Clause had its intended effect. In *Matter of R-*, 5 I&N Dec. 612, 619 (BIA 1954), the BIA held that after the adoption of the INA, the same Pennsylvania automatic pardon statute at issue in *Perkins* no longer gave rise to a waiver of removal. As the BIA explained: "By 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, is ineffective to prevent deportation."

The terminology used and the distinction drawn by the Senate, and again by the BIA just two years after the INA's passage, became dispositive of the settled meaning of the statute over the next 60-plus years. "Executive" pardons – pardons characterized by individualized discretion and consideration – give rise to relief under the Pardon Waiver Clause. "Legislative" pardons – pardons that automatically take effect by operation of law – do not.

B. A Pardon is "Executive" If It Is Characterized by Individualized Consideration and Discretion – Regardless of Which Official Grants It and Whether It Is Authorized by State Statute or by a State Constitution

The validity of a pardon under the Clause has nothing to do with the source of state authority for the pardon. Most importantly, there is nothing in Clause providing that a state's pardon is valid if it stems from the state's constitution but invalid if it is rooted in statute. And the BIA has held to the contrary. In *Matter of Nolan*, 19 I&N Dec. 539 (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: "This 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. In other words: *Legislative* in this context means "by operation of law," not "created by statute."

Nolan highlights the Clause's functional test. A pardon is legislative and thus ineffective under the Clause if it works in the way that legislation typically works: by defining a class of eligible applicants and granting relief automatically and across the board to everyone in the class. By contrast, a pardon is executive, and therefore effective under the Clause, if it works in the way that executive action typically works: discretionarily, based on individualized facts.

It follows from the functional nature of the legislative/executive distinction that it has never mattered to the settled meaning of the Pardon Waiver Clause whether an executive pardon is granted directly by a governor or instead by another executive-branch official making a discretionary and individualized determination. As the BIA put it in *Nolan*, and as it has continued to hold ever since: "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." *Id*. at 542.

In *Matter of C-R-*, 8 I&N Dec. 59, 61 (BIA 1958), the BIA 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. In *C-R-*, the state 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, rather than by the state constitution, in no way altered the conclusion that the pardon was executive in nature.

Other BIA decisions have likewise interpreted the Pardon Waiver Clause to extend to pardons granted by executive officers other than state governors, and where the authority to pardon was not vested by constitutional provision. *See, e.g.*, *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); *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).

C. State Executive Branch Pardon Boards Issue "Executive" Pardons Within the Meaning of the Clause

All 50 states have a mechanism for issuing pardons. *See* Restoration of Rights Project, *Characteristics of Pardon Authorities* (Dec. 2018), https://tinyurl.com/y5qyk6du (surveying all 50 states' pardon systems). Fully 47 states 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 delegated the pardon power of the sovereign state in all or the lion's share of cases. *See* Ala. Code §§ 15-22-20 *et seq*. (governor

appoints an independent pardons board); 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 INA itself, in the historical record, in any of the BIA's decisions, or in any Article III court decision – that Congress intended to pick and choose favorites from among this wide variety of state pardon schemes, provided that the pardons are functionally executive. Indeed, it appears today that federal immigration enforcement authorities respect the pardons granted in all 49 states other than Connecticut, 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 all pardons. *See, e.g.*, *Matter of Tajer*, 15 I&N Dec. 125 (BIA 1974) (recognizing the efficacy under the Clause of pardons granted by the Georgia State Board of Pardons and Paroles); *Matter of D-*, 7 I&N Dec. 476 (BIA 1957) (same); *Pervez Pasha*, 2011 WL 891881 (BIA Feb. 24, 2011) (unpublished opinion) (recognizing pardon from Georgia's Board of Pardons as warranting waiver of removal); *Peter G. Balogun*, 2004 WL 2374920 (BIA Aug. 23, 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 Clause).

In fact, in an unpublished decision, the BIA has even spoken directly to the issue in the instant case, holding that Connecticut's pardons give rise to removal waivers under the Clause for all the reasons detailed above. In *Ainsleton Murphy*, A037 214 467 (BIA April 16, 2002), the BIA relied on the well-settled functional test to rule that a Connecticut pardon compels a waiver of removal, since Connecticut's Board – as an executive branch agency that wields the sovereign state's individualized and discretionary pardoning power – satisfies the requirements of the Pardon Waiver Clause.

II. CONNECTICUT'S PARDONS ARE "EXECUTIVE" PARDONS UNDER THE PARDON WAIVER CLAUSE

As the BIA explained in *Ainsleton Murphy*, 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.

A. Connecticut's Board of Pardons and Paroles Is an Executive Branch Agency Appointed by the State Governor

Like every other state, Connecticut exercises its sovereign 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 functions."). Like the power to punish, the power to pardon is typical of, and inherent in, each government's sovereignty. The BIA has long recognized that each state has the exclusive prerogative, in our federal system, to structure its own pardon processes: "[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*, 198 A. 265, 266 (Conn. 1938), the state's sovereign power to pardon is vested in a Board of Pardons and Paroles established by the state legislature. *Dumschat v. Bd. 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 has the exclusive prerogative to exercise the state's sovereign power to pardon. No other official or entity in the state wields this authority. Conn. Gen. Stat. § 54-130a.

B. The Connecticut Board of Pardons and Paroles Grants Entirely Discretionary and Fully Individualized Pardons

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://tinyurl.com/y4qkojw8 (hereinafter "The Pardon Process").

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. *Dumschat*, 452 U.S. at 466. 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." *Id*. at 466. The Board "can deny the requested relief for any constitutionally permissible reason or for no reason at all." *Id*. at 467 (Brennan, J. concurring).

Connecticut's pardon process, which Ms. Walton successfully completed, is built on nationally accepted best practices and aligns with procedures used in many other states. 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://tinyurl.com/y253wms9. 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* Giles, *The Pardon Process, supra*. The Board then solicits victim input and, wherever appropriate, holds a hearing before a three-member panel at which the victim 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 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 history of offending; how much time has passed since the applicant's most recent conviction; 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. Giles, *The Pardon Process, supra*.

C. There Is No Valid Distinction Between Connecticut Pardons and Other State Pardons that the Federal Government Respects Under the Clause

Connecticut's pardon process vests an executive agency with the State's sovereign pardoning power and with the unfettered discretion to grant pardons on a case-by-case basis. So Connecticut's pardons are not meaningfully different from the powers 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), 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). All those pardons have been found to satisfy the Pardon Waiver Clause.

Certainly, no valid distinction can be found in the difference between a pardon granted by a governor and a pardon granted by a gubernatorially-appointed board, or the pardons issued by Georgia would be invalid. Neither is there any legally meaningful distinction between a board established by statute and one established by legislation. As shown above: Automatic pardons are invalid as "legislative" even when they are authorized by state constitution, *Matter of Nolan*, 19 I&N Dec. 539 (BIA 1988), and individualized pardons are valid as "executive" even when they are authorized by state statute. *Matter of C-R-*, 8 I&N Dec. 59, 61 (BIA 1958); *Ainsleton Murphy*, A037 214 467 (BIA April 16, 2002) (recognizing the validity of a Connecticut pardon under the Clause). It is important to note that Connecticut is not the only state that vests the pardoning power in a board through statute. Alabama has a constitutional provision relative to pardons. Ala. Const. Art. V, § 124 (amended by Al. Const. Amend. No. 38). But that provision explicitly vests the state's pardoning power in the state legislature: "The legislature shall have power to provide for and to regulate the administration of pardons…" The Alabama legislature, not the state constitution, created that state's pardons board. And, like Connecticut's, Alabama's Board grants valid pardons under the Clause.

III. DENYING CONNECTICUT PARDON RECIPIENTS THE BENEFIT OF THE CLAUSE WOULD VIOLATE THE FIFTH AND TENTH AMENDMENTS AND THE CONSTITUTIONAL PRINCIPLE OF EQUAL SOVEREIGNTY

A. Discriminating Against Connecticut Pardons Violates the Tenth Amendment and the Constitutional Principle of Equal Sovereignty

A refusal to recognize the validity and efficacy of Connecticut's full and unconditional pardons under the Pardon Waiver Clause would violate Connecticut's Tenth Amendment rights and the constitutional principle of equal sovereignty.

The Tenth Amendment to the United States Constitution 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 their own governmental structure. '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). The BIA has eloquently explained that a state's choice about how to exercise its pardoning power is integral to its sovereignty: "[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).

By disregarding Connecticut's pardon, ICE purports to condition eligibility for a federal benefit on whether Connecticut has structured its pardoning power in a way that pleases a federal agency. That position impermissibly intrudes into Connecticut's sovereign power to structure its own government. Critically: ICE seeks to dictate not just the *content* of Connecticut law – which, depending on the circumstances, might not violate the Tenth – but the *processes* and *mechanisms* by which Connecticut makes its law. Indeed, a suggestion that the State cannot secure the benefits of the Pardon Waiver Clause through a statutory pardon mechanism would effectively force the Constitution State to rewrite its constitution. The federal government does not have that power.

ICE also appears to purport to identity specifically which executive-branch official must implement Connecticut's pardon power. That is a bridge too far: The federal government simply does not have the authority to either dictate the content of legislation passed by a state or to commandeer and supervise the state's executive officers, such as by ordering a specific officer to be the conduit for pardons. *See New York v. United States*, 505 U.S. 144 (1992).

Disregarding Connecticut's pardons does not merely threaten Connecticut's sovereignty as a state under the Tenth Amendment: It also threatens 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)).

By seeking to remove Ms. Walton, ICE effectively proposes to treat Connecticut's pardon system, and residents who receive pardons, differently from those of any other state – even those five other states whose systems are functionally identical to Connecticut's – deviating in the process from the BIA's long history of recognizing the authentic and correct meaning of 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. 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.

B. Denying Waiver of Removal to Ms. Walton Would Violate Her Fifth Amendment Right to Equal Protection

Denying Ms. Walton the benefits of a Connecticut pardon violates her constitutional right, and threatens the right of all of Connecticut's non-citizen residents, to equal protection of the law under the Fifth Amendment.

The Fifth Amendment's Due Process Clause prohibits the federal government from denying equal protection to any person present in the United States. *United States v. Windsor*, 570 U.S. 744, 774 (2013). So Connecticut's residents who have been granted pardons cannot be singled out and treated differently from similarly situated residents of other states unless the government can articulate a valid interest behind the discrimination.

In Ms. Walton's case, it is solely because *Connecticut* issued her pardon that she faces removal and separation from her family. Had New York or Massachusetts – or, indeed, Alabama or Georgia, each of which also vests its power in a Board – issued the pardon, based on laws that are no more reliable or procedurally fair than Connecticut's, Ms. Walton would be exempt from removal 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 – or whether the state pardon system is authorized by statute or state constitution. 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 based on 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://tinyurl.com/y56sw6wo (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).

Because such unjustifiably disparate treatment of Connecticut residents violates the Fifth Amendment, Ms. Walton's pardon should be respected, and she should be afforded a waiver of removal.

C. To the Extent There Is any Ambiguity, the Clause Should Be Read to Respect Connecticut Pardons and Protect Wayzaro Walton in Accordance with the Doctrine of Constitutional Avoidance, the Federalism Canon of Statutory Interpretation, and the Rule of Lenity

The Pardon Waiver Clause means that Ms. Walton's functionally executive state pardon mandates waiver of removal, and any removal would violate the Fifth and Tenth Amendments and the principle of equal sovereignty. To the extent that there remains any ambiguity in the Clause's meaning, though, it must be read to benefit Ms. Walton under three applicable principles of interpretation: The doctrine of constitutional avoidance; the federalism canon of statutory interpretation, and the rule of lenity.

As explained above: Reading the Clause to single-out Connecticut pardons for disfavorable treatment would result in multiple constitutional violations. The doctrine of constitutional avoidance means that such a reading must be avoided. In the doctrine's most famous articulation, by Justice Brandeis: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that

this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936). Here, a construction of the Clause that avoids constitutional difficulty is not only "fairly possible" but also the most reasonable reading – a reading that is validated by legislative and interpretive history, and which the BIA itself followed in *Ainsleton Murphy*. The BIA should continue to adopt that reading and to find that Ms. Walton's Connecticut pardon mandates waiver of removal under the Clause.

Next: The federalism canon. As the BIA has explained, the power to structure a pardoning system is characteristic of, and integral to, state sovereignty. As the Supreme Court has taught, reviewing courts "must assume that Congress does not exercise lightly" its prerogative to legislate in areas of traditional state sovereignty. *Gregory*, 501 U.S. at 460. The federalism canon of statutory interpretation gives effect to that assumption by requiring that a federal statute speak "unmistakably clear[ly]" to Congress' intent to alter the traditional federal/state balance of power before it will be interpreted to accomplish that result. *Id*. Here, as discussed above, a reading of the Clause that would invalidate Connecticut's pardons would deeply intrude on core areas of state sovereignty by dictating to the state not just the content of its laws but the way in which law must be made – by constitutional amendment, rather than by statute – and the identity of officials that must apply the law. The Clause does not "clearly" or "unmistakably" authorize such intrusions – and so such a reading must be avoided in favor of the historically-accurate reading proposed here by the State.

Finally: The rule of lenity. Where a statute with criminal implications is susceptible to two different readings, "it is appropriate, before [the Court] choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v.*

Bass, 404 U.S. 336, 347 (1971). In the immigration context in particular, there is a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *I.N.S. v. St. Cyr*, 533 U.S. 289, 320 (2001). Lenity means that, to the extent there is any ambiguity at all in the Clause, it must be read to benefit Ms. Walton by allowing her to benefit from the State's full and unconditional pardoning of her criminal offenses.

CONCLUSION

ICE's attempt to removal Ms. Walton despite her full and unconditional Connecticut pardon violates the Pardon Waiver Clause and inflicts a deep injury to Ms. Walton's rights and to Connecticut's sovereignty within our federal system. The Board of Immigration Appeals should grant her motion to reopen and should conclusively hold that Connecticut's pardons are valid and must be respected under the Clause.

Respectfully submitted,

Amicus Curiae
State of Connecticut

WILLIAM TONG
ATTORNEY GENERAL
STATE OF CONNECTICUT

CLARE KINDALL
SOLICITOR GENERAL

By: _____
JOSHUA PERRY (CT 439166)
Special Counsel for Civil Rights
Connecticut Attorney General's Office
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Tel: (860)808-5372
Fax: (860) 808-5347
Email: Joshua.perry@ct.gov

Counsel for Amicus Curiae
State of Connecticut

CERTIFICATION OF SERVICE

I hereby certify that I caused the foregoing brief to be served on counsel for all parties by Federal Express delivery, postage prepaid, on the day of filing, this 18th day of October, 2019.

By: _____

Joshua Perry (CT 439166)
Special Counsel for Civil Rights
Connecticut Attorney General's Office
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Tel: (860)808-5372
Fax: (860) 808-5347
Email: Joshua.perry@ct.gov