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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

RESPONSE TO AMICUS INVITATION 18-06-27

BRIEF FOR IMMIGRANT LEGAL RESOURCE CENTER ET AL. TO APPEAR AS AMICUS CURIAE RESPONDING TO INVITATION NO. 18-06-27

AND REQUEST TO APPEAR AS AMICUS

REQUEST TO APPEAR AS AMICUS

Amici curiae the Immigrant Legal Resource Center, American Immigration Lawyers Association, Catholic Charities of the Diocese of Stockton, Legal Services for Children, Legal Aid Society of San Mateo County, Community Legal Services of East Palo Alto, East Bay Community Law Center, Asian Pacific Islander Legal Outreach, Immigrant Access to Justice Assistance, United Farm Workers Foundation, Immigrant Legal Services of the Central Coast, Inc., Contra Costa Immigrant Rights Alliance, CARECEN (Central American Resource Center), Watsonville Law Center, Office of the San Francisco Public Defender, Office of the San Diego Public Defender, Contra Costa Public Defender's Office, California Public Defenders Association/Ventura County Public Defender, Washington Defender Association's Immigration Project, National Lawyers' Guild Los Angeles Chapter, National Lawyers Guild San Francisco Chapter, San Jose State University Record Clearance Project, Criminal Justice Clinic at the University of California Irvine School of Law, Immigrant Rights Clinic at University of California Irvine School of Law, UC Davis School of Law Immigration Clinic, Community Justice Clinics at University of California Hastings College of Law, Western State College of Law Immigration Clinic, Social Justice Collaborative, Think Dignity, Root and Rebound, Youth Justice Coalition, Silicon Valley De-Bug, SIREN (Services, Immigrant Rights and Education Network), Open Immigration Legal Services, Oakland Law Collaborative, Social Justice Collaborative, Pangea Legal Services, Law Offices of Norton Tooby, Law Offices of David B. Gardner, Inc., Law Offices of A. Sam Akintimoye, LIJT Law, Law Offices of Patricia M. Corrales, and Colin Immigration Law, request permission to submit this *Amicus Curiae* Brief in response to the Board's *Amicus* Invitation No. 18-06-27.

The issue below is whether the Board should treat convictions vacated pursuant to Cal. Penal Code § 1203.43 as convictions for federal immigration purposes. The above-referenced entities are legal services organizations, legal associations, law firms, public defender's offices and law school clinics that seek to advance the interests of noncitizens impacted by the immigration consequences of criminal convictions, including through the legal representation of individuals who have vacated their convictions pursuant to Cal. Penal Code § 1203.43 or who have participated in California's former Deferred Entry of Judgment program. Amici curiae have an interest in ensuring that noncitizens receive accurate information about the immigration consequences of accepting guilty pleas, and also have a strong interest in rational, consistent and just decision-making by the Executive Office for Immigration Review.

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

TABLE OF CONTENTS

STATEMENT OF THE ISSUES

(1) Whether Cal. Penal Code § 1203.43 is rehabilitative in nature in light of existing Board authority, including whether relief under § 1203.43 is dependent on successful completion of a deferred adjudication program and whether defendants will continue to receive misinformation prospectively;

(2) Whether the Board is required to give full faith and credit to a judgment issued under Cal. Penal Code § 1203.43 in light of the conviction definition found at § 101(a)(48)(A) of the Immigration and Nationality Act, and if a noncitizen has actually been informed of the immigration consequences of his or her plea pursuant to Cal. Penal Code § 1016.5 or otherwise;

(3) Whether the legislative history of Cal. Penal Code § 1203.43 reflects that this statute was enacted for the purpose of providing courts with a mechanism to eliminate the immigration consequences of convictions; and

(4) Whether § 1203.43 is preempted by federal law.

SUMMARY OF THE ARGUMENT

California Penal Code § 1203.43 was created to fix a simple but devastating mistake in the state's former Deferred Entry of Judgment (DEJ) program. All defendants who were asked to participate in the DEJ program were advised the following: if they gave up their right to trial and pled guilty, but then fulfilled all of the DEJ program requirements, they would not have a conviction "for any purpose," Cal. Penal Code § 1000.1(d) (2017) and their pleas would not preclude them from receiving "any benefit." *Id.* at 1000.4(a). But the DEJ advisals were simply not true. Defendants continued to face secondary consequences of their pleas, including adverse immigration sanctions. By providing noncitizen defendants with blatantly incorrect assurances about the immigration impact of their participation in DEJ, the state created legally invalid pleas.

The California Legislature drafted § 1203.43 to address this legal error and provide a remedy to correct the affirmative misadvice given to DEJ participants after January 1, 1997. Section 1203.43(a) finds as a matter of law that the convictions of defendants who received the DEJ statute's flawed advisals are legally "invalid," and that the invalidity is "based on this misinformation and the potential harm" caused by the inaccurate statements in the DEJ statute. Section 1203.43(b) provides a mechanism for individuals who successfully completed the former DEJ program requirements—and who therefore fulfilled their part of the supposed bargain—to petition the relevant courts and withdraw their guilty pleas for cause, based on legal invalidity. Effective January 1, 2018, Cal. Penal Code § 1000 et seq. was amended by California Assembly Bill 208 to provide for pre-plea diversion so that individuals who participate in diversion in California will no longer receive the misinformation.

Convictions vacated pursuant to § 1203.43 have therefore been vacated due to the legally defective misinformation upon which the defendants relied when they agreed to plead guilty.

Existing Board precedent leaves no doubt: these vacated convictions do not meet the definition of a "conviction" for immigration purposes. Section 1203.43 is not a rehabilitative statute, because it exists to remedy the legal defect created by incorrect advisals. Treating § 1203.43(b) as anything other than a remedy for legal defect would contravene well-settled Supreme Court and other authority on the constitutional right of noncitizens to receive accurate advisals—or, as in this case, to not receive affirmative misadvice— about the immigration consequences of a guilty plea.

The full faith and credit statute at 28 U.S.C. § 1783 requires the Board to recognize the findings of the California legislature and court judgments entered pursuant to § 1203.43 as having preclusive effect. As a result, the Board must accept the California legislature's and courts' judgment that the false advisals provided as part of the former DEJ program led to the recurring creation of legally defective convictions. The Board and federal courts have repeatedly extended full faith and credit to state judgments when assessing whether given convictions fall within the definition of a conviction at INA § 101(a)(48)(A), and have done so in accordance with principles of comity and federalism and with Board precedent interpreting § 101(a)(48)(A). Given the absence of a clear, explicit repeal or irreconcilable conflict, 28 U.S.C. § 1783 compels the Board to accept California's findings regarding the legal validity of pleas treated under § 1203.43.

The requirement to give full faith and credit prevents the Board from substituting its own judgment as to what constitutes reversible error under state law. The Board may not go behind state judgments to determine whether defendants were "actually" accurately advised, despite the systematic errors associated with the former DEJ program. Even if examined, the existence of statutory requirements for courts to give generalized warnings about potential immigration

consequences of pleading guilty, such as Penal Code § 1016.5, does not change the fact that prospective participants in the former DEJ program received specific and affirmative misadvisals. If anything, the existence of such court-based advisals would create confusion amongst defendants and further prevent them from gaining a clear expectation regarding the immigration consequences of their pleas.

The full faith and credit statute likewise prevents the Board from going behind the California legislature's explicitly stated reason for enacting § 1203.43: to correct the legal invalidity arising out of DEJ misadvisals. Nevertheless, an examination of the legislative history of § 1203.43 demonstrates that mere humanitarian concern for immigration consequences was not the sole motivation—or even a primary motivation—for creating the law. Rather, the Legislature found that the state had provided "misinformation" to defendants in a way that caused "potential harm," and it identified adverse immigration consequences as one type of harm caused by the error. Section 1203.43(a). Board and federal court precedent suggests that where convictions are vacated *solely* to ameliorate immigration consequences, without finding a legal defect, the conviction may be treated as rehabilitative and therefore still a conviction under the INA. But the mere existence of immigration consequences as an unfair adverse consequence to be addressed by post-conviction relief is permissible, so long as the record indicates that the vacatur is based on legal invalidity or some other defect. While the Board need not delve into the legislative history in order to uphold the validity of vacaturs under § 1203.43, the legislative history demonstrates that § 1203.43 was created to remedy misinformation on multiple issues—not exclusively immigration—that impacted defendants.

Finally, § 1203.43 does not stand as an obstacle to federal law. Although the Board lacks the authority to declare state laws preempted or unconstitutional, § 1203.43 would nonetheless

survive any preemption challenge. Congress cannot directly regulate the State of California under the Tenth Amendment. Furthermore, § 1203.43 falls squarely within the state's power to enforce criminal law, thus giving rise to a strong presumption against preemption. The purpose of Congress is the most relevant factor in the preemption inquiry, and Congress has not even attempted to preempt state law in light of the language of INA § 101(a)(48)(A). The federal immigration law instead demonstrates Congress' intent to rely on state law judgments to assess whether a conviction exists for immigration purposes. The legislative history does not change the preemption analysis. Even if the practical effect of § 1203.43 is to reduce the number of convictions that lead to immigration sanctions, the impact of the state law is irrelevant to determining whether preemption has occurred. Focusing on such effect misunderstands the complexity and balancing of factors involved in the federal immigration laws.

ARGUMENT

I. CAL. PENAL CODE § 1203.43 FINDS CERTAIN CONVICTIONS TO BE INVALID AND SUBJECT TO VACATUR DUE TO LEGAL DEFECTIVENESS, NOT FOR REHABILITATIVE PURPOSES, THEREBY CAUSING THOSE VACATED CONVICTIONS TO FALL OUTSIDE THE DEFINITION OF A CONVICTION FOR IMMIGRATION PURPOSES

The purpose of Cal. Penal Code § 1203.43 was to remedy systematic defects that caused all defendants who participated in California's former DEJ program to receive misinformation about the real consequences of pleading guilty, including the immigration consequences. Treating convictions vacated under § 1203.43 as outside the definition of a conviction for immigration purposes is consistent with and required by existing Board authority. Board authority treats as "convictions" offenses expunged for rehabilitative purposes or convictions dismissed solely to avoid immigration consequences. But Board authority does not recognize as

"convictions" offenses vacated due to legal or constitutional defects—including for failure to properly advise a noncitizen defendant of the immigration consequences of a plea.

A. The Explicit and Primary Purpose of Cal. Penal Code § 1203.43 is to Remedy Legal Defects in the Underlying Proceedings—Including Misinformation Provided to All Noncitizen Defendants—Created by California's Former Deferred Entry of Judgment Program

California Penal Code § 1203.43 went into effect on January 1, 2016. Its purpose was to correct an error that had infected the criminal proceedings of the thousands of persons charged with minor drug offenses who had participated in the Deferred Entry of Judgment (DEJ) program since January 1, 1997 (when the program was created). The California legislature found that the statute required persons considering participating in DEJ to be provided with information about the supposed benefits of the program, and that this information was in fact misleading and potentially harmful. Cal. Penal Code § 1203.43(a) (2018). The DEJ statute falsely promised that the "defendant's plea of guilty pursuant to this chapter *shall not* constitute a conviction for *any purpose*. . . ." and with no exceptions. Cal. Penal Code § 1000.1(d) (2017) (emphasis added). With respect to arrests, the DEJ statute falsely informed defendants that "[u]pon successful completion of a deferred entry of judgment program, the arrest upon which the judgment was deferred *shall* be deemed to have *never* occurred" and "*shall* not, without the defendant's consent, be used in *any* way that could result in the denial of *any*...benefit...." *Id.* at 1000.4(a) (emphasis added). In fact, defendants were told that they "may indicate in response to any question concerning his or her prior criminal record that he or she *was not arrested* or granted deferred entry of judgment for the offense." *Id* (emphasis added). The only exception applicable to the disclosure of arrests existed for future police officers. *Id.* at § 1000.4(b).

The California DEJ statutory language thus systematically mandated the delivery of multiple false legal promises to defendants, with the goal of persuading them to plead guilty in

reliance upon these promises. Although California law purported to erase the convictions "for any purpose," *id.* at 1000.1(d), the Board concluded in 1998 that deferred adjudications were indeed convictions for immigration purposes. *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998). The California legislature did nothing to amend the DEJ advisals, and instead continued to erroneously assure all defendants, including noncitizens, that after their participation in DEJ their convictions would no longer exist.

Furthermore, the DEJ statute required the prosecution to present these false promises in writing to all defendants who were deemed to be eligible to join the program. *See* Cal. Penal Code at § 1000.1(a)(5) (2017) (mandating that the prosecuting attorney "shall" advise defendants in writing of "the defendant's rights relative to answering questions about his or her arrest and deferred entry of judgment following successful completion of the program"); § 1000.1(a)(3) (requiring prosecutor to provide defendant with a "clear statement" that upon successful completion of DEJ the "court shall dismiss the charge or charges against the defendant").

The former DEJ program created a clear and legitimate expectation for all defendants that after completing DEJ their convictions would not prevent them from receiving *any benefit*. This statement was wrong. As a result, examples of individuals who were harmed by the chronic misinformation provided pursuant to § 1203.43 abound. Often, noncitizens have found themselves facing deportation many years after the completion of DEJ. For instance, Jose Francisco Gonzalez was a lawful permanent resident who "pled guilty to marijuana cultivation in 2001 to participate in [California's DEJ program] and was told he no longer had a criminal record after successful completion," nonetheless, after thirteen years, "ICE came to his home, [] arrested him" and placed him in removal proceedings. *See* HUMAN RIGHTS WATCH, A PRICE TOO HIGH: US FAMILIES TORN APART BY DEPORTATIONS FOR DRUG

OFFENSES (2015), available at https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses (describing case of Mr. Gonzalez and other examples, including an individual who successfully completed California DEJ ten years prior to initiation of removal proceedings but was nonetheless deported prior to the enactment of § 1203.43, and a noncitizen who had entered U.S. on tourist visa at age seven, wasmarried to U.S. citizen, but whose DEJ conviction barred him from adjusting status); *Soria-Alcazar*, A 077 595 788 (BIA Sept. 7, 2016) (noncitizen ordered removed by IJ approximately 16 years after agreeing to plead through DEJ), attached as Exhibit A.

In 2015, the California legislature finally acted to remedy the years of chronic misinformation given to defendants participating in the state's DEJ program. The explicit text of § 1203.43 states that former § 1000.4 provided "misinformation about the actual consequences of making a plea," Cal. Penal Code § 1203.43(a)(1) (2018), and "finds and declares that based on this misinformation and the potential harm, the defendant's prior plea *is invalid*." *Id.* at § 1203.43(a)(2). Section 1203.43(b) provides a mechanism to permit defendants who received the flawed advisals and who completed program requirements to withdraw their pleas and instead enter a plea of not guilty. *Id.* at § 1203.43(b). To change one's plea, an individual must file a petition with the relevant state criminal court, and the court must enter an order consistent with the legislation and the individual's record. *Id.* Given that the legal errors infecting all DEJ advisals were systemic and created by the California legislature, it is appropriate that the remedy for those legal errors was also systemic and created by the state legislature. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev'pt Com'n*, 461 U.S. 190, 215 (1983) ("[w]hile California is certainly free to make these decisions on a case-by-case basis, a state is not foreclosed from reaching the same decision through a legislative judgment, applicable to all

cases.").

Basic principles of contract law and due process support the state legislature's characterization of § 1203.43 as a mechanism to remedy legal defects in the initial criminal proceedings. Pursuant to the DEJ statute, in every prospective DEJ case, the prosecutors asked defendants to give up the significant constitutional rights they had in criminal proceedings and to plead guilty. In exchange, the prosecutor promised that all defendants who fulfilled program requirements would emerge with no conviction for any purpose, and no arrest record unless they sought to become police officers. Defendants relied upon this promise when they agreed to give up their rights. Any valid contract assumes that the parties received the benefit of the bargain. But the reality was that thousands of noncitizens found that they had been misled, and instead faced severe immigration consequences following their pleas. The state legislature made it impossible for any of the pleas entered by noncitizens to be knowing, voluntary, and intelligent, as required by due process. *See Brady* v. *United States,* 397 U.S. 742, 748 (1970); *United States* v. *Delgado-Ramos,* 635 F.3d 1237, 1239 (9th Cir. 2011). Section 1203.43 remedies the system-wide error by restoring noncitizen defendants to positions originally promised to them.

B. Section 1203.43 is Not a Rehabilitative Statute Under Existing Board Precedent, Such That Convictions Vacated Pursuant to that Provision Should Not be Treated as Convictions for Immigration Purposes

Board and federal court precedent draws a clear and reasonable distinction between (1) convictions that are "expunged" pursuant to state rehabilitative programs, which remain convictions for immigration purposes; and (2) convictions that are vacated due to a legal or constitutional defect in the underlying proceedings, which are not convictions under the immigration law. *See Matter of Roldan*, 22 I&N Dec. 512, 523 (BIA 1999) (state actions "purporting to erase all evidence of the original determination of guilt through a rehabilitative

procedure" are convictions, but situations "wherein the court determines that vacation of the conviction is warranted on the merits, or on grounds relating to a violation of a fundamental statutory or constitutional right in the underlying proceedings" are not); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000)(conviction vacated under New York law "on the legal merits" not a conviction); *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (conviction vacated under Ohio law due to court's failure to provide a statutory warning about immigration consequences is not a conviction). The crux of the analysis depends on whether the conviction is vacated due to "a procedural or substantive defect in the underlying proceedings." *Matter of Pickering* 23 I&N Dec. 621, 624-25 (BIA 2003). Federal courts have repeatedly upheld the requirement that a conviction vacated due to legal error in the proceeding is not a conviction for immigration purposes. *Pinho v. Gonzales,* 432 F.3d 193, 212 (3d Cir. 2005); *Pickering v. Gonzales*, 465 F.3d 263, 271 (6th Cir. 2006); *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011); *Sandoval v. INS*, 240 F.3d 577, 583 (7th Cir. 2001).

Treating § 1203.43 as anything other than a remedy to correct systemic legal errors perpetuated by state law against noncitizen defendants would contradict firmly settled Board, Supreme Court and state authority regarding the rights of noncitizen defendants to be accurately informed of the immigration consequences of a guilty plea. The United States Supreme Court has left no doubt that the right of a noncitizen defendant to be accurately advised of the immigration consequences of a guilty plea is constitutionally protected. *Padilla v. Kentucky*, 559 U.S. 356 (2010). The State of California has likewise affirmed the centrality of the right to accurate advisals and consideration of the immigration impact during the plea negotiation process through longstanding case law that predates *Padilla*. *See People* v. *Soriano,* 194 Cal.App.3d 1470, 1478 (1987); *In re Resendiz*, 25 Cal. 4th 230, 235 (2001), overruled on other

grounds by *Padilla*, 559 U.S. at 370-71. Other statutory provisions of California law similarly reflect the state legislature's legitimate—and constitutionally required—concern with providing accurate information to noncitizen defendants. *See* Cal. Penal Code § 1473.7 (2018) (permitting certain individuals to file motions to vacate for, *inter alia*, failure to have been advised of the immigration consequences of a plea); *id.* at § 1016.5 (requiring the court to inform the noncitizen defendant that the plea may result in exclusion, deportation, or the denial of citizenship); *id.* at § 1016.3 (requiring both defense counsel and prosecutor to take immigration consequences into account during presentation of defense and in plea negotiation). The plain text of § 1203.43, whose purpose is to cure the legal invalidity arising from the fact that defendants received "misinformation about the actual consequences of making a plea," is squarely in line with these well-settled authorities. *Id.* at § 1203.43(a).

Section 1203.43 is readily distinguishable in numerous ways from the Board's description of rehabilitative statutes that do not insulate certain convictions from immigration consequences. In *Roldan*, the BIA held that convictions dismissed under state rehabilitative statutes that seek to ameliorate the impact of a guilty plea remain convictions for immigration purposes when the state action has "absolutely no relation to the merits of the charge." 22 I&N Dec. at 523. Defendants typically earn such rehabilitative relief through statutorily-required conditions of behavior. *See id.* at 515-16 (describing state programs). *Roldan* also identified state rehabilitative statutes that purport to automatically erase certain convictions—for instance, for young people or first time offenders—as nonetheless constituting convictions from an immigration perspective. However, the Board explicitly recognized that the definition of a conviction for immigration purposes at INA § 101(a)(48)(A), amended in 1996, would continue to exclude a number of scenarios. Those scenarios included "the situation where the alien has

had his or her conviction vacated by a state court on direct appeal, wherein the court determines that vacation of the conviction is warranted on the merits, [] on *grounds relating to a violation of a fundamental statutory or constitutional right in the underlying criminal proceedings*," or "noncollateral challenges to a conviction on these grounds that are pending in state court while an alien is in deportation proceedings." *Id.* (emphasis added). Convictions vacated under § 1203.43 fall squarely outside the scope of the Board's holding in *Roldan* because they are vacated as a result of deprivations of the constitutional right to be accurately informed of the immigration consequences of a plea.

Comparing § 1203.43 to other provisions of California law that do provide for rehabilitative expungement underscores the fact that § 1203.43 is clearly distinct, as a remedy intended to address legal invalidity in prior criminal proceedings. Cal. Penal Code § 1203.4 and related statutes, for instance, provide for an entirely different dismissal remedy available to certain defendants in the court's discretion based on a number of factors, including the defendant's compliance with the terms of probation. *See* Cal. Penal Code § 1203.4 (2018). *See also id.* at § 1203.4a, 1203.41, 1203.42 (authorizing a court expunge certain classes of offense based on successful compliance with the terms of probation). Section 1203.43, by comparison, specifically identifies a constitutionally-recognized error in the proceeding: affirmative misadvice as to the consequences of the plea. Also, § 1203.43(b) entirely eliminates the conviction, as compared to rehabilitative relief which often only partially eliminates a conviction. *See, e.g., id.* at § 1203.4(a)(1)-(2); 1203.4a(c)(2)-(3); 1203.41(b); 1203.42(b) (listing numerous exceptions applicable after grant of dismissal).

The California legislature created a remedy to withdraw a guilty plea entered pursuant to the former DEJ in § 1203.43(b) only for individuals who successfully completed DEJ, but this

decision in no way renders 1203.43(b) rehabilitative. *See id.* at § 1203.43(b). After recognizing the problem of the misadvisals delivered to all who participated in DEJ, the legislature was free to create a vehicle for the more limited class of those who successfully completed DEJ. *See Martinez v. Mukasey*, 519 F.3d 532, 545 ("[A] legislature has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,'" quoting *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969)). The legislature's decision to limit the scope of § 1203.43(b) to certain individuals is consistent with the overall scheme of the former DEJ program, which falsely purported to result in complete dismissal of the plea for only those persons who finished DEJ. *See* Cal. Penal Code § 1000.4(a) (2017) (providing for withdrawal of plea only in cases involving "successful completion of [DEJ] program"); § 1000.3 (describing consequences of unsatisfactory performance in DEJ program). The decision was also reasonable in light of the fact that, from a plea bargaining perspective, the government must fulfill the promises made during a plea agreement. Because the defendant had complied with the terms of the contract, the government too must comply by vacating the conviction in its entirety. The legislature's creation of relief only for those who completed DEJ does not change the fact that the purpose of § 1203.43 is to remedy an underlying legal defect in the proceedings.

Furthermore, § 1203.43(b)'s limitation to those who successfully completed DEJ program requirements does not turn § 1203.43 into a rehabilitative statute due to the distinction between the *grounds* for vacaturs and the *vehicles* that enable individuals to pursue vacaturs. The legal *ground* for vacating the conviction is the harmful misinformation, *see* Cal. Penal Code at § 1203.43(a) (2018). The legal *vehicle*, however, gives the criminal court jurisdiction to vacate the conviction under this particular statute. *See id.* at § 1203.43(b). Generally, legal vehicles to

obtain post-conviction relief set out some limitations that do not characterize or may not even pertain to the legal grounds. For example, under California law a person may move to vacate a plea based on ineffective assistance of counsel using a petition for habeas corpus (which requires, among other things, that the person be in actual or constructive custody, *see* Cal. Penal Code § 1473) or a motion pursuant to Cal. Penal Code § 1473.7 (which requires, among other things, that the person *not* be in custody). The legal grounds for both vehicles may be ineffective assistance of counsel, even if the requirements (e.g., custody status) of the different legal vehicles vary. In this case, the legislature decided to restrict the vehicle in § 1203.4(b) to persons who had successfully completed the program. But the legal basis remains the misadvisal.

After January 1, 2018, individuals who complete California DEJ will no longer be misadvised. In recognition of the flawed advisory language contained in the old § 1000.4, effective January 1, 2018, the California legislature amended the Penal Code to eliminate the possibility of future misadvisals by replacing the post-plea DEJ program with a pre-plea diversion program. Cal. Penal Code § 1000 et seq. (2018). After January 1, 2018, individuals who successfully comply with the terms of the California DEJ program will not be "convicted" for any purpose, thereby fulfilling the original purpose of DEJ as envisioned by the state.

II. THE BOARD MUST EXTEND FULL FAITH AND CREDIT TO THE FINDINGS OF THE CALIFORNIA LEGISLATURE AND CALIFORNIA COURTS, WHICH STATE THAT CONVICTIONS VACATED PURSUANT TO CAL. PENAL CODE § 1203.43 ARE THE RESULT OF LEGAL DEFECTS IN THE CRIMINAL PROCEEDINGS

The full faith and credit statute at 28 U.S.C. § 1783 requires the Board to treat the California legislature and courts' conclusions regarding the legal basis for vacaturs under § 1203.43 as having preclusive effect. If the state authorities represent that the reason convictions are vacated pursuant to Cal Penal Code § 1203.43 is the result of legal defects in the underlying

criminal proceedings, then the Board may not question the states' conclusions. No federal statute has expressly or impliedly repealed the full faith and credit statute, and the California authorities' findings with respect to § 1203.43 are wholly consistent with Board authority as well as the statutory definition of a conviction at INA § 101(a)(48)(A).

A. The Full Faith and Credit Statute Requires the Board to Treat the Findings of the California Legislature and California Courts as Having Preclusive Effect, Such that the Board Cannot Look Behind the State Authorities' Final Judgments Regarding the Reasons for Vacaturs Under § 1203.43

Federal statute requires that "acts [of the legislature], records and judicial proceedings" of any state "shall have the same full faith and credit in every court within the United States..." 28 U.S.C. § 1738. The courts have long recognized that 28 U.S.C. § 1738 extends the Constitution's full faith and credit clause to federal courts and promotes federalism, comity and judicial efficiency. *See Pinho v. Gonzales*, 432 F.3d at 212 (comity and federalism upheld by extension of full faith and credit from immigration authorities to state judgments); *Exxon Mobil v. Saudi Basic Industries*, 544 U.S. 280, 294 (2005). Under the statute, federal courts must extend full faith and credit not only to state court judgments, but to acts of the state legislature. *See Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277, 1281 (2016).

Extending full faith and credit means that a subsequent court must give preclusive effect to the initial legal action, such that the judgment must be treated as final, granted full legal effect, and "should not be permitted to [be] relitigate[d]." *See San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 336 (2005) (describing 28 U.S.C. § 1783 as "long understood to encompass the doctrines of res judicata, or 'claim preclusion,' and collateral estoppel, or 'issue preclusion," and noting that the general rule "predates the Republic"). "Federal courts may not 'employ their own rules ... in determining the effect of state judgments,' but must 'accept the

rules chosen by the State from which the judgment is taken.'" *Matsushita Elec. Indus. Co. Ltd. v. Epstein*, 516 U.S. 367, 372 (1996), quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982).

Federal courts must extend full faith and credit to acts of state legislatures unless Congress has, through federal statute, either expressly or impliedly repealed the preclusive effect of § 1783. *Allen v. McCurry*, 448 U.S. 90, 99 (1980). Express repeals must be "plainly stated by Congress," and demonstrate a "'clearly manifest' [] intent to depart from § 1738." *San Remo Hotel*, 545 U.S. at 344 (internal citation omitted). The judiciary may not "create exceptions to 28 U.S.C. § 1783 wherever courts deem them appropriate." *Id.* Indeed, the Supreme Court has "seldom, if ever, held that a federal statute impliedly repealed §1783." *Matsushita*, 516 U.S. at 380. Implied repeals of the full faith and credit statute are rare "due to the relatively stringent standard for such findings, namely that there be an 'irreconcilable conflict' between the two [] statutes at issue." *Id.*, quoting *Kremer*, 456 U.S. at 468.

The BIA and federal courts have correctly followed the full faith and credit statute in the immigration context, particularly in cases involving whether a state's vacatur of a conviction rendered the conviction invalid for immigration purposes. In *Rodriguez-Ruiz*, the Board examined a New York State court judgment that stated, on its face, that the noncitizen's conviction had been "in all respects vacated, on the legal merits..." 22 I&N Dec. at 1379. Despite the existence of both an individualized order and a state law demonstrating the existence of a legal defect in the prior conviction, DHS sought to engage in additional factual and legal investigation to question the validity of the state court's judgment. Citing 28 U.S.C. 1738, the BIA rejected DHS's attempts to relitigate the merits of the judgment and accorded full faith and credit to the state court judgment, finding that the conviction had not been vacated for

immigration purposes because of "the explicit language of the state court judgment." *Id.* at 1379-80. The outcome in *Rodriguez-Ruiz* was not only compelled by 28 U.S.C. § 1783, but by "longstanding principles of federal respect for state decisions as to the meaning of state law," principles owed "no less by federal agencies than by federal courts." *Pinho v. Gonzales*, 432 F.3d at 212. Under basic federalism principles, "[t]he BIA correctly declined the government's invitation in *Rodriguez-Ruiz* to 'look behind' a state court ruling and decide whether that ruling was correct under state law." *Id.* at 213.

Full faith and credit thus requires that the Board accept the basis given by a state for its legal judgments, and not question its conclusions. In *Rodriguez-Ruiz*, the State of New York cited legal invalidity as the basis for the vacatur, and the Board was required to accept that finding. *Id.* In *Adamiak*, an Ohio state court order cited legal defect under a state statute requiring the court to advise on immigration consequences of guilty pleas, and the Board was required to extend full faith and credit to that finding. *See also Matter of Cota Vargas*, 23 I&N Dec. 849 (BIA 2005) (extending full faith and credit to state court judgment reducing sentence, even where evidence suggests reduction made solely for immigration purposes).[1] The Board can still "distinguish among vacated convictions based on the reasons for the vacatur," so long as the Board relies on reasons supplied directly by the state, and "that appear on the record." *Pinho*, 432 F.2d at 213. It does not, however, allow the Board to go beyond the reasons cited by a state for its actions or second-guess the state's plain conclusions regarding the reasons for a vacatur.

[1] Full faith and credit does not necessarily benefit noncitizens. *See Pickering*, 12 I&N Dec. at 625 (examining wording of Canadian order quashing conviction, and finding no evidence of legal defect); *Vieira Garcia v. INS*, 239 F.3d 409, 414 (1st Cir. 2001) (citing 28 U.S.C. 1738 and constitutional full faith and credit clause to find accept state court judgment that noncitizen defendant had been treated as adult).

Applying the full faith and credit statute to § 1203.43 requires that the Board accept the California legislature's finding that, as a matter of state law, noncitizens who successfully completed DEJ prior to January 1, 2018 received legally defective pleas. *See supra* Part I.A; Cal. Penal Code § 1203.43(a). California defendants who have received judgments under § 1203.43 have both individualized state orders as well as explicit legislative findings to establish that their prior convictions were vacated as a result of those legal defects.

Therefore, the Board's only remaining task is to determine whether such legally defective convictions are "convictions" under the federal immigration laws. Here, Board precedent is clear that they are not. As explained *supra* at Part I.B, § 1203.43 is not a rehabilitative statute. The full faith and credit statute precludes the Board from questioning the validity and impact of these judgments as well as the legislative findings that render them invalid as convictions for immigration purposes. It is no surprise that multiple BIA panels have concluded that the full faith and credit statute compels the Board to accept that convictions vacated under § 1203.43 should not be treated as convictions for immigration purposes. *See Soria-Alcazar*, A 077 595 788; *Suazo Suazo*, A 077 074 203 (BIA Feb. 9, 2017), attached as Exhibit B; *Pacheco*, A 096 979 225 (BIA Mar. 1, 2018) (citing full faith and credit in remanding to IJ to consider conviction vacated under § 1203.43), attached as Exhibit C.

No express or implied repeal of 28 U.S.C. § 1783's preclusive effect on Cal. Penal Code §1203.43 exists in the INA. Any express repeal would require a plain legislative statement regarding § 1783, which is not present in the INA. No implied repeal exists, either, given that no irreconcilable conflict between the INA definition of a conviction and § 1203.43 exists. *See Adamiak*, 23 I&N Dec. at 880 ("In the absence of a statutory directive to the contrary, we are required by 28 U.S.C. § 1738 (2000) to give full faith and credit to this State court judgment")

Indeed, § 1203.43 is entirely consistent with the statutory definition of a "conviction" in the INA, particularly as interpreted by Board precedent. The plain language of § 101(a)(48)(A) requires a "formal judgment of guilt *by a court*" or in the case of withheld adjudications, certain findings by a "*judge*" or "*jury*." INA § 101(a)(48)(A) (emphasis added). The text of § 101(a)(48)(A) is "silent regarding the effect of a vacated conviction on an alien's immigration status." *Matter of Marquez Conde*, 27 I&N Dec. 251, 255 (2018). In view of this, the Board has filled the gap and has interpreted § 101(a)(48)(A) to treat convictions vacated for legal invalidity as excluded from the definition. *See, e.g., Pickering*, 23 I&N Dec. at 624-45. Neither the statutory text nor its legislative history changes the requirement that full faith and credit be extended to state court judgments finding legal errors in prior guilty pleas.

B. Full Faith and Credit Prohibits the Board from Questioning the State's Judgment that Defendants were Misadvised, But Even if Permitted to Make Such an Inquiry, the Existence of an Advisal Under Penal Code § 1016.5 Would Not Change the Fact that Defendants Received Misinformation At the Conclusion of the DEJ Program

Full faith and credit prevents the Board from questioning whether defendants were "actually" accurately advised notwithstanding the systematic errors associated with the former DEJ program. But even if examined, the existence of other state laws such as Cal. Penal Code § 1016.5, which requires courts to provide warnings to noncitizens prior to the entry of certain pleas, does not change the fact that defendants participating in DEJ programs were misinformed about the consequences of their convictions.

The court-based advisals under § 1016.5 do not serve as an antidote to already incorrect advice provided by criminal defense counsel under current law, and should not have such an impact for advisals under DEJ. In *People v. Patterson*, the California Supreme Court held that even if a defendant is properly informed pursuant to § 1016.5(a) that certain adverse immigration

consequences "may" result, that a defendant may withdraw her plea if she has either been misadvised or not advised at all about the "actual" immigration consequences. 2 Cal. 5th 885, 895-96 (2017). As the court emphasized, "the standard section 1016.5 advisement that a criminal conviction 'may' have adverse immigration consequences 'cannot be taken as placing [the defendant] on notice that, owing to his particular circumstances, he faces an actual risk of suffering such.'" *Id.* at 896 (internal citation omitted). Similarly, in *United States v. Rodriguez-Vega,* the Ninth Circuit rejected the government's argument that the provision of a court-based advisal ameliorated criminal defense counsel's failure to accurately advise a noncitizen defendant of the immigration consequences of a plea. 797 F.3d 781, 787 (9th Cir. 2015). As the court explained, "Warning of the possibility of a dire consequence is no substitute for warning of its virtual certainty," and provided the following example: "'Well, I know every time that I get on an airplane that it could crash, but if you tell me it's going to crash, I'm not getting on.'" *Id.* at 790 (citation omitted).

The existence of advisals under Cal. Penal Code § 1016.5 and § 1000.4 together instead only compound the confusion experienced by noncitizen defendants with contradictory and incorrect information. Section 1016.5 advisals often inaccurately overstate the impact of a conviction, and are generalized. Cal. Penal Code § 1016.5(a) (requiring that offense "may have" immigration consequences). Furthermore, as the legislative history to § 1203.43 recognized, § 1016.5 advisals do not include reference to programs like DEJ, in which convictions or arrests purport to be dismissed. Cal. Sen. Pub. Safety Comm., 2015-2016 Reg. Sess., Hearing on AB 1352 at 3-4 (June 30, 2015). The existence of a conflicting, incomplete and incorrect advisal that immigration consequences "may" follow a guilty plea pursuant to § 1016.5 does not cancel out the legal defect caused by the contradictory misinformation created by the former § 1000.4.

III. THE LEGISLATIVE HISTORY'S RECOGNITION OF IMMIGRATION CONSEQUENCES AS ONE OF THE HARDSHIPS FACED BY NONCITIZENS PURSUANT TO CALIFORNIA'S DEJ PROGRAM DOES NOT TRANSFORM § 1203.43 INTO A REHABILITATIVE STATUTE

The full faith and credit statute precludes the Board from inquiring into the legitimacy of the California legislature's finding that guilty pleas entered through the former DEJ program were invalid, as discussed *supra* in Part II. But the legislative history of § 1203.43 nonetheless confirms that convictions vacated under the provision are not convictions for immigration purposes. In assessing whether post-conviction proceedings should impact the immigration consequences that attach to a particular conviction, the Board and federal courts allow for the possibility that a state might be motivated by a desire to ameliorate the immigration consequences of a given conviction. A law or court judgment that purports to vacate a conviction "*solely* for immigration purposes"—meaning solely to ameliorate immigration sanctions and without regard for legal or constitutional invalidity—might not be a permissible means of removing the charge from the federal immigration law definition of a conviction. In *Pickering*, the Board observed that a Canadian judgment appeared to have quashed conviction for "sole purpose" of eliminating immigration sanctions, and summarized its concerns as follows:

> [I]f a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A). If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes.

23 I&N Dec. at 624-25.

To determine whether immigration consequences were the "sole" reason for the vacatur, federal courts look to the record associated with the vacatur, and have found that a desire to avoid immigration consequences can serve as one motivation behind the post-conviction action. After the Board's decision in *Matter of Pickering*, the Sixth Circuit determined that the Board in *Pickering* had incorrectly found, based on the record, that the noncitizen's conviction had been quashed by Canadian authorities "solely" for immigration reasons. *Pickering v. Gonzales*, 465 F.3d at 271. The court repeatedly emphasized that the entire record must support the conclusion that the conviction was vacated "*solely* for rehabilitative reasons," *id.* at 270 (emphasis in original), such that where the record referenced Canadian law providing a legal basis for invalidating the plea, the conviction was not rehabilitative in nature. *Id.* at 269. In *Reyes-Torres v. Holder*, the Ninth Circuit emphasized that "the petitioner's motive is not the crucial inquiry" because "the inquiry must focus on the state court's rationale for vacating the conviction." 645 F.3d at 1077. Furthermore, "the burden is on the government to prove that it was vacated '*solely* for rehabilitative reasons or reasons related to his immigration status'. *Id.* (emphasis in original) (citation omitted). *See also Sandoval v. INS*, 240 at 583 (citing "sole reason" standard and explaining that "even if the state court's decision to modify Sandoval's sentence was motivated by the consequences of the federal immigration law, that fact would not render the modification ineffective for immigration purposes").

Given the weight of authority behind the right of a noncitizen defendant to receive accurate advice about the immigration consequences of a plea, it is well-settled that a failure in the immigration advisal serves as a wholly adequate basis for vacatur. In *Reyes-Torres v. Holder*, the Ninth Circuit found that a conviction vacated because the noncitizen was not properly informed of the immigration consequences before taking the plea could not serve as a

basis for removability. 645 F.3d 1073, 1077-78 (9th Cir. 2011). *See generally Padilla*, 559 U.S. 356. Convictions vacated due to the failure of a court or defense counsel to accurately advise noncitizens of the immigration consequences of a plea thus lack the requisite procedural integrity to fit within the immigration law definition of a conviction.

The history of § 1203.43 demonstrates that the California legislature was motivated primarily by a desire to correct years of systemic misinformation provided to many defendants facing minor drug charges who were invited to participate in the state's DEJ program. While a key focus was a desire to address adverse immigration consequences that had occurred due to this error, the language of § 1203.43(a)(2) reflects the Legislature's concern that inaccurate advisals sanctioned by the law had infected the validity of the pleas:

> The Legislature finds and declares that the statement in Section 1000.4, that "successful completion of a deferred entry of judgment program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate" *constitutes misinformation about the actual consequences of making a plea in the case of some defendants, including all noncitizen defendants,* because the disposition of the case may cause adverse consequences, including adverse immigration consequences. (2) Accordingly, the Legislature finds and declares that based on this misinformation and the potential harm, the defendant's prior plea is invalid.

Cal. Penal Code § 1203.43(a) (emphasis added).

There is no legal requirement that state authorities provide post-conviction relief for reasons entirely unrelated to immigration law, especially where a misadvisal about immigration consequences is the basis for the legal invalidity. Convictions vacated due to failure to give specified immigration warnings can only impact noncitizens, for instance. In *Adamiak*, the Board gave effect to the order vacating the noncitizen's conviction after the court failed to provide the immigration warning under state law, holding that the "court's order permitting withdrawal of the respondent's guilty plea is based on a defect in the underlying proceedings,

i.e., the failure of the court to advise the respondent of the possible immigration consequences of his guilty plea, as required by Ohio law." *Adamiak*, 23 I&N Dec. at 879.

In the case of § 1203.43, the legislative text is already clear that faulty advisals were the primary basis for the law, thereby clearing the "sole reason" standard. While not required, the legislative history also confirms that immigration consequences served as one concern, but not the exclusive concern, that motivated the legislature to enact § 1203.43. Both the Assembly Committee on Public Safety and Senate Committee on Public Safety on then-Assembly Bill (AB) 1352 acknowledged that "[e]ven for U.S. citizens, these guilty pleas can carry long-term negative consequences, including loss of federal housing and educational benefits." Cal. Assemb. Pub. Safety Comm., 2015-2016 Reg. Sess., Hearing on AB 1352 at 6 (Apr. 21, 2015) (internal citation omitted); Sen. Pub. Safety Comm., 2015-2016 Reg. Sess., Hearing on AB 1352 at 8 (June 30, 2015) (internal citation omitted). The legislature repeatedly recognized throughout the consideration of the bill that the law would allow individuals to obtain relief upon a showing that, contrary to the advisal they had received, the plea might "result in the denial or loss to the defendant of any employment, benefit, license, or certificate, *including, but not limited to*" immigration consequences. *See, e.g., id.* at 4 (emphasis added). *See also id.* at 7 (convictions under DEJ "may lead to a denial of a benefit, including adverse immigration consequences"). Indeed, one of the arguments in opposition to the passage of AB 1352 was that it would have "many negative consequences on the public, particularly regarding both employment and licensing for specified professions." Notes of Cal. Sen. Fisc. Comm., AB 1352 (Eggman), (Sept. 3, 2015).

The fact that the Legislature recognized the damaging effects of the misadvisal on noncitizens does not alter the explicit, primary goal of § 1203.43: to remedy misinformation,

prejudice and legal defects. The legislative history emphasizes that a vacated conviction under § 1203.43 "will make right the injustice inadvertently committed against the immigrant defendant who relied upon P.C. [§] 1000.4 in deciding to enter a guilty plea." Assemb. Bill 1352, 2015-2016 Reg. Sess., Cal. Assemb. Floor Analysis of AB 1352. The Senate Floor Analyses and Senate Committee on Public Safety recognized that guilty pleas are "valid only where...knowingly and voluntarily made," that invalid pleas may be withdrawn, and that noncitizen defendants must be accurately advised by both the court and their counsel of the immigration consequences of a plea. Cal. Sen. Rules Comm, Sen. Floor Analyses of AB 1352, 2015-2016 Reg. Sess. At 4 (September 10, 201). *See also* Cal. Sen. Pub. Safety Comm., 2015-2016 Reg. Sess., Hearing on AB 1352 at 7 (June 30, 2015) ("A defendant's lack of knowledge of immigration consequences can constitute good cause to withdraw a guilty plea.").

IV. CAL. PENAL CODE § 1203.43 IS NOT PREEMPTED BY FEDERAL LAW

As a threshold matter, this Board cannot decide the constitutionality of a state statute. *Matter of Cenatice*, 16 I&N Dec. 162 (BIA 1977) ("it is not within the province of this Board to pass upon the constitutionality of statutes it administers, but rather is solely within the power and capacity of the United States courts to declare them unconstitutional.")

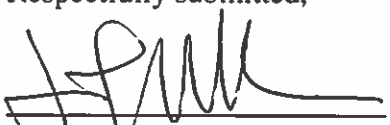
Nonetheless, § 1203.43 poses no obstacle to federal law and is not preempted. First, under the Tenth Amendment's anti-commandeering principles, Congress cannot dictate to the State of California how to structure its criminal laws. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018). Second, a presumption against preemption applies, given that the California legislature acted firmly within its traditional policing power in the regulation and enforcement of state criminal law. "In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest

purpose of Congress.'" *Arizona v. United States*, 567 U.S. 387, 400 (2012). Third, Congress chose to rely on state court judgments in determining whether a conviction exists for immigration purposes, with INA § 101(a)(48)(A) referencing a "formal judgment of guilt...entered by a court." *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188 (2014) ("The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them.") (internal citations omitted). By tying the removal statute to state criminal law, Congress knew states would make a range of choices about which charges to prosecute and expunge and ceded a measure of control over to the states. That reflects a balance of considerations, including respect for the States and ease of administration. Fourth, the legislative text and history confirm the California legislature's concern with correcting the systemic provision of misadvisals to certain defendants, including noncitizens, and in a manner consistent with the federal definition of a conviction. *See supra* at Part III (discussing legislative history). Finally, even if the practical effect of § 1203.43 is to reduce the number of convictions that lead to immigration sanctions, the impact of the state law is irrelevant to determining whether preemption has occurred. Focusing on such effect misunderstands the complexity and balancing of factors involved in the federal immigration laws. *See generally* Brief of American Civil Liberties Union et al. (arguing that § 1203.43 is not preempted).

CONCLUSION

For the foregoing reasons, the Board should find that convictions vacated pursuant to Cal. Penal Code § 1203.43 do not meet the definition of a conviction for federal immigration purposes.

Respectfully submitted,



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APPENDIX

Exhibit

A	*In re Soria-Alcazar*, A 077 595 788 (BIA Sept. 7, 2016)
B	*In re Suazo Suazo*, A 077 074 203 (BIA Feb. 9, 2017)
C	*In re Pacheco*, A 096 979 225 (BIA Mar. 1, 2018)

Exhibit A

File: A077 595 788 – San Diego, CA

Date: SEP - 7 2016

In re: HUGO SORIA-ALCAZAR

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Barbara K. Strickland, Esquire

ON BEHALF OF DHS: Kathryn E. Stuever
Senior Attorney

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Cancellation of removal; voluntary departure

This matter was last before the Board on April 1, 2015, when we dismissed the respondent's appeal from an Immigration Judge's decision denying his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The respondent thereafter filed a petition for review with the United States Court of Appeals for the Ninth Circuit, which has now remanded the matter for further consideration. The record will be remanded to the Immigration Judge.

The respondent, a native and citizen of Mexico, concedes that he is removable from the United States because of his unlawful presence. *See* section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i). Therefore, the only issue in dispute is whether he qualifies for cancellation of removal. In our decision of April 1, 2015, we found the respondent ineligible for such relief pursuant to section 240A(b)(1)(C) of the Act because he had sustained a 1999 "conviction" for use or being under the influence of a controlled substance—a violation of section 11550(a) of the California Health and Safety Code and an "offense under" section 212(a)(2)(A)(i)(II) of the Act.

On remand, the respondent has filed a motion requesting that we take administrative notice of a judicial record which purports to be a January 2016 judgment of a California Superior Court dismissing his 1999 conviction pursuant to section 1203.43 of the California Penal Code. In a supporting brief, moreover, the respondent argues that the aforementioned dismissal has eliminated his 1999 conviction, thereby permitting him to apply for cancellation of removal.[1]

[1] The respondent also argues that the guilty plea underlying his 1999 conviction was constitutionally infirm, but that argument is not properly before us. This Board has no authority to review the validity of criminal convictions. *E.g., Matter of Cuellar*, 25 I&N Dec. 850, 854-55 (BIA 2012).

As the respondent argues, section 240A(b)(1)(C) of the Act bars cancellation of removal for aliens who stand "convicted" of certain crimes, including controlled substance violations. In 1999, the respondent pled guilty to using or being under the influence of a controlled substance (methamphetamine) in violation of section 11550(a) of the California Health and Safety Code, as a result of which he was granted a "deferred entry of judgment" under section 1000 et seq. of the California Penal Code. Despite the respondent's arguments to the contrary, a diversionary disposition under section 1000 et seq. of the California Penal Code is a "conviction" under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), because it requires a "plea of guilty"—Cal. Penal Code § 1000.1(b)—and the judicial imposition of a "restraint on ... liberty" in the form of mandatory compliance with "education, treatment, or rehabilitation"—Cal. Penal Code §§ 1000(c), 1000.3. *See de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1025 n.3 (9th Cir. 2007); *see also Contreras-Negrete v. Lynch*, --- F' Appx. ----, No. 14-72650, 2016 WL 801938, at *1 (9th Cir. Mar. 1, 2016). There is no indication from the present record that the respondent's participation in the deferred entry of judgment program was suspended by the sentencing judge, and thus the Ninth Circuit's decision in *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010), is inapposite.

According to the respondent, however, his 1999 diversionary disposition no longer qualifies as a "conviction" under section 101(a)(48)(A) of the Act because it was vacated pursuant to section 1203.43 of the California Penal Code, which went into effect on January 1, 2016. Section 1203.43 reads as follows, in its entirety:

> **§ 1203.43. Successful completion of deferred entry of judgment program in cases where criminal charges were dismissed; permission for defendant to withdraw plea of guilty or nolo contendere**
>
> (a)(1) The Legislature finds and declares that the statement in Section 1000.4, that "successful completion of a deferred entry of judgment program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate" constitutes misinformation about the actual consequences of making a plea in the case of some defendants, including all noncitizen defendants, because the disposition of the case may cause adverse consequences, including adverse immigration consequences.
>
> (2) Accordingly, the Legislature finds and declares that based on this misinformation and the potential harm, the defendant's prior plea is invalid.
>
> (b) For the above-specified reason, in any case in which a defendant was granted deferred entry of judgment on or after January 1, 1997, has performed satisfactorily during the period in which deferred entry of judgment was granted, and for whom the criminal charge or charges were dismissed pursuant to Section 1000.3, the court shall, upon request of the defendant, permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty, and the court shall dismiss the complaint or information against the defendant. If court records showing the case resolution are no longer available, the defendant's declaration, under penalty of perjury, that the charges were dismissed after he or

> she completed the requirements for deferred entry of judgment, shall be presumed to be true if the defendant has submitted a copy of his or her state summary criminal history information maintained by the Department of Justice that either shows that the defendant successfully completed the deferred entry of judgment program or that the record is incomplete in that it does not show a final disposition. For purposes of this section, a final disposition means that the state summary criminal history information shows either a dismissal after completion of the program or a sentence after termination of the program.

The upshot of section 1203.43 is that any alien who may face "adverse immigration consequences" because he pled guilty to an offense and successfully completed a deferred entry of judgment program is conclusively presumed to have pled guilty on the basis of "misinformation" about the plea's consequences.[2] As a result of that presumption, the alien is entitled to withdraw his guilty plea, enter a "not guilty" plea instead, and have the charge dismissed, thereby ostensibly eliminating the "plea of guilty" required for a "conviction" under section 101(a)(48)(A)(i) of the Act.

We conclude that 28 U.S.C. § 1738 obliges immigration adjudicators to extend full faith and credit to a California court order vacating a guilty plea and dismissing a drug charge under section 1203.43 of the California Penal Code. *See Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379-80 (BIA 2000). Under this Board's precedents, a "conviction" ceases to be effective for immigration purposes if it is vacated because of a substantive or procedural defect in the underlying criminal proceedings, *see Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006), but a conviction remains effective if it is vacated solely for rehabilitative purposes or to alleviate immigration hardships. *See Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (rehabilitation); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (immigration hardships). In section 1203.43, the California Legislature has determined that California law systematically "misinform[s]" alien defendants about the possible "adverse immigration consequences" of their guilty pleas to first-time minor drug offenses, thereby necessitating vacatur of those pleas and dismissal of the charges to which those pleas were entered. This "misinformation" qualifies as a "substantive" defect in the criminal proceedings, notwithstanding its connection to the consequences of immigration enforcement. *Accord Matter of Adamiak, supra* (holding that an Ohio conviction was no longer effective for immigration purposes where it was vacated based on a failure to properly inform the defendant that his plea could have adverse immigration consequences).[3]

---

[2] Deferred entry of judgment under section 1000 et seq. of the California Penal Code is available only to first offenders who plead guilty to minor drug crimes, such as simple possession, possession of drug paraphernalia, or (as here) use or being under the influence. It is not available to recidivists or to individuals who plead guilty to selling or trafficking in drugs.

[3] We note that a state court judgment is entitled to full faith and credit even if it is erroneous as a matter of state law and even if the error implicates matters of federal law. *See Turnbow v. Pac. Mut. Life Ins. Co.*, 934 F.2d 1100, 1103 (9th Cir. 1991).

Although a section 1203.43 dismissal is entitled to full faith and credit in immigration proceedings, on the present record we are unable to determine whether the respondent's conviction was dismissed under that section. Specifically, while the respondent submitted a copy of a document purporting to be a judgment vacating his 1999 conviction, the document is not signed by a judge or court clerk and contains inconsistent information. Near the top of the document a box is checked next to text which states "Petition for dismissal PC 1203.4," but the number "3" is added through hand-written interlineation after "1203.4" to make it appear like the dismissal was ordered under section "1203.43." No initials are included to identify the person who made this amendment. Later in the same document, moreover, a box is checked next to text which states that "Defendant's Petition for Dismissal pursuant to PC 1203.4 is granted." That text contains no hand-written reference to section 1203.43. A dismissal pursuant to section 1203.4 of the California Penal Code is rehabilitative in nature and has no effect upon the validity of the underlying conviction for immigration purposes. *See Ramirez-Castro v. INS*, 287 F.3d 1172, 1175 (9th Cir. 2002). Given the ambiguity of the record, we conclude that additional fact-finding is required to determine whether the respondent's conviction was in fact dismissed pursuant to section 1203.43 of the California Penal Code. *See* 8 C.F.R. § 1003.1(d)(3)(iv).

In conclusion, the respondent remains removable as charged but his eligibility for cancellation of removal is now an open question given the uncertain status of his 1999 California conviction for using or being under the influence of a controlled substance. Accordingly, the record will be remanded for supplemental fact-finding and for such further proceedings (and the entry of such further orders) as the Immigration Judge deems necessary and appropriate.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

Exhibit B

File: A077 074 203 – Los Angeles, CA

Date: FEB - 9 2017

In re: JUAN CARLOS SUAZO-SUAZO

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Stacy Tolchin, Esquire

APPLICATION: Reopening

This case was previously before the Board on August 4, 2016, when we dismissed the respondent's appeal. The respondent filed a timely motion to reopen and remand based on the California state court's dismissal of his 1999 and 2008 drug convictions. The Department of Homeland Security ("DHS") has not filed a brief in opposition to the motion. For the reasons set out below, the respondent's motion to reopen will be granted.

The respondent argues that we should reopen the proceedings and vacate the Immigration Judge's March 17, 2015, order of removal because the Superior Court of California, County of Los Angeles, has granted his motion to withdraw his guilty or nolo contendere plea pursuant to CPC §1203.43 for his 1999 conviction for possession of marijuana in violation of California Health and Safety Code section 11357(b) and his 2008 conviction for possession of a controlled substance in violation of California Health and Safety Code section 11350(a) (Motion at Tabs E-I). He also argues that his remaining 2003 conviction for possession of marijuana in violation of California Health and Safety Code section 1157(b) has been purged according to California Law, citing *Lujan-Armendariz v. INS*, 222 F.3d 778, 737 (9th Cir. 2000) (Motion at 1, Tabs J, K).

We conclude that 28 U.S.C. § 1738 obliges immigration adjudicators to extend full faith and credit to a California court order vacating a guilty plea and dismissing a drug charge under section 1203.43 of the California Penal Code. *See Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379-80 (BIA 2000). Under this Board's precedents, a "conviction" ceases to be effective for immigration purposes if it is vacated because of a substantive or procedural defect in the underlying criminal proceedings, *see Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006), but a conviction remains effective if it is vacated solely for rehabilitative purposes or to alleviate immigration hardships. *See Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (rehabilitation); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (immigration hardships). In section 1203.43, the California Legislature has determined that California law systematically "misinform[s]" alien defendants about the possible "adverse immigration consequences" of their guilty pleas to first-time minor drug offenses, thereby necessitating vacatur of those pleas and dismissal of the charges to which those pleas were entered. This "misinformation" qualifies as a "substantive" defect in the criminal proceedings, notwithstanding its connection to the consequences of immigration enforcement. *Accord Matter of Adamiak*, *supra* (holding that an Ohio conviction was no longer effective for immigration purposes where it was vacated based on a failure to properly inform the defendant that his plea could have adverse immigration consequences).

We deem it appropriate to reopen the proceedings and remand the record to the Immigration Court for further proceedings. The respondent's submission demonstrates that two of his state convictions were dismissed on substantive grounds and thus no longer appear to be a convictions for immigration purposes (Motion at Tabs E-I). *See Matter of Adamiak, supra.* On remand, the Immigration Judge may receive any additional evidence he deems appropriate to the full resolution of this matter, including additional or substituted charges of removability, if any. *See* 8 C.F.R. §§ 1003.30 and 1240.10(e). Accordingly, the record will be remanded to the Immigration Judge for further consideration of the respondent's removability and if necessary, his eligibility for relief from removal.

ORDER: The respondent's motion to reopen is granted.

FURTHER ORDER: The record is remanded to the Immigration Court for proceedings not inconsistent with the foregoing decision.[1]

FOR THE BOARD

[1] The parties should advise the United States Court of Appeals for the Ninth Circuit of the Board's decision.

Exhibit C

2018 WL 1897667 (BIA)

Unpublished

** THIS IS AN UNPUBLISHED DECISION - NOT INTENDED FOR CITATION AS PRECEDENT **

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

IN RE: FELIPE JESUS PACHECO

File: A096 979 225 - Los Angeles, CA
March 1, 2018

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

Mario Acosta, Jr., Esquire

APPLICATION: Reopening

*1 The Board entered the final administrative decision on June 12, 2012, when we dismissed the respondent's appeal of the Immigration Judge's decision pretermitting the respondent's adjustment of status application, given his controlled substance-related conviction under Cal. Health & Safety Code § 11379.5, and ordering him removed to Mexico. The respondent has filed a motion to reopen to reapply for adjustment of status, based on a California criminal court granting his request to withdraw his guilty plea to the controlled substance-related offense pursuant to Cal. Penal Code § 1203.43. The Department of Homeland Security has not responded to the motion. 8 C.F.R. § 1003.2(g)(3).

Given the legislatively-nullified conviction, we will remand the proceedings to the Immigration Judge for further consideration of the respondent's adjustment of status application. *See generally Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) (observing that Immigration Judges and the Board must give full faith and credit to nunc pro tunc sentence modifications). *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (convictions eliminated for immigration purposes when vacated based on procedural or substantive defect).

Accordingly, the motion will be granted and the record will be remanded to the Immigration Judge.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this order.

Edward R. Grant
FOR THE BOARD

2018 WL 1897667 (BIA)

End of Document

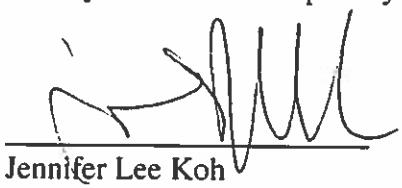
PROOF OF SERVICE

I, Jennifer Koh, am over the age of eighteen and my business address is 1 Banting, Irvine CA 92618.

On July 26, 2018, I mailed a copy of this BRIEF FOR AMICUS CURIAE, IMMIGRANT LEGAL RESOURCE CENTER ET AL. AND REQUEST TO APPEAR AS AMICUS, by Federal Express, Overnight Mail to the following address:

Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

Hereby sworn to under penalty of perjury on July 26, 2018



Jennifer Lee Koh