Nos. 16−71196 and 21-631

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE ADALBERTO ARIAS JOVEL,
Petitioner,

v.

MERRICK GARLAND, ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
Respondent.

On Petitions for Review of Orders of
the Board of Immigration Appeals
(No. A 092 142 072)

PETITIONER'S OPENING BRIEF (NO. 21-631)

NON-DETAINED

ADDISON B. THOMPSON
COVINGTON & BURLING LLP
415 Mission Street, Suite 5400
San Francisco, CA 94105-2615
(415) 591-6000

TOMOAKI B. TAKAKI
COVINGTON & BURLING LLP
1999 Avenue of the Stars, Suite 3500
Los Angeles, CA 90067-4643
(424) 332-4800

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

CONSTITUTION

FEDERAL STATUTES

STATE STATUTES

FEDERAL REGULATIONS

FEDERAL RULES

OTHER AUTHORITIES

LOCAL RULES

INTRODUCTION

Jose Adalberto Arias Jovel ("Jose") has lived in the United States virtually his entire life. AR 2499-500.[1] Growing up in a difficult neighborhood of Los Angeles, he became addicted to narcotics, leading to two convictions for possessing controlled substances. AR 1499, 1828-31, 1973-74, 2508, 2512. But decades later, as a 45-year old, he works to support his family, including his parents, [redacted]

Both of Jose's controlled substance convictions were vacated due to procedural or substantive defects in the underlying criminal proceedings. AR 154-55, 1735, 1768-71. During plea negotiations in one case, Jose was not informed of immigration consequences, and in the other, his counsel did not act with "the most rudimentary understanding of the deportation consequences" to seek alternative pleas without immigration consequences. *See Padilla v. Kentucky*, 559 U.S. 356, 370 (2010); AR 114, 158-70, 1735, 1768-71. The government concedes that one conviction—"Disposition B," vacated under California Penal Code ("PC")

[1] AR references the Administrative Record, Dkt. No. 10 (No. 21-631).

§ 1016.5—can no longer support deporting Jose. AR 1662. But the government still relies on the other vacated conviction—"Disposition A," vacated under PC § 1473.7(a)(1)—to seek to deport Jose to El Salvador, where he has no family and would face almost-certain persecution. AR 1233, 1451-94, 1596-617.

The statutory text, structure, history, purpose, past Board of Immigration Appeals ("BIA") decisions, and general legal canons show that convictions vacated under § 1473.7(a)(1) categorically cannot support deportation. This Court need go no further. But if this Court were to re-adjudicate Jose's vacatur, it should hold Jose's conviction was vacated due to the procedural or substantive defect of deficient counsel or due process violation. The government did not meet its burden to clearly and convincingly show otherwise. Moreover, vacated convictions should not be able to support deportation at all. This Court should grant Jose's petition for review and vacate the order of removal.

JURISDICTIONAL STATEMENT

"[T]his court has jurisdiction to review Board decisions denying *sua sponte* reopening for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error." *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016).

Jose is not detained.

STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities are reproduced in the Addendum.

ISSUES PRESENTED

This case presents the following issues for review:

1. Whether a state court judgment vacating a conviction under PC § 1473.7(a)(1) as legally invalid due to prejudicial error demonstrates there was a substantive or procedural defect in the underlying criminal proceedings, rendering the vacated conviction invalid for immigration purposes.

2. Whether the BIA erroneously re-adjudicated the state court's determination to conclude that Jose's vacated conviction could support removal.

3. Whether the BIA ignored Ninth Circuit precedent by placing the burden on the noncitizen to prove non-removability.

4. Whether the term "conviction" as defined in 8 U.S.C. § 1101(a)(48)(A) includes vacated convictions.

STATEMENT OF THE CASE

I. Factual History

Jose, a citizen of El Salvador, was admitted into the United States in 1981, when he was three years old. AR 2499-500. In May 1990, when he was 12 years old, Jose became a U.S. lawful permanent resident. AR 2499. Jose's mother and

two sisters are U.S. citizens, his father is a lawful permanent resident, and his extended family all live in the United States and are either U.S. citizens or lawful permanent residents. AR 1960-64. Jose has no relatives in El Salvador. AR 1233.

[redacted] Jose worked to provide for his family, leaving school after 11th grade to work in a restaurant. AR 682-83, 1577.

Jose's traumatic childhood caused him to join a gang in his teens, where he received the moniker "Big Man" due to his weight. Jose phased out his gang involvement over 20 years ago. AR 928, 1578, 1584, 1988-89, 2137. In 1997, Jose was a victim of a drive-by shooting. AR 468-72. [redacted]

[redacted]

Jose began using substances to deal with his pain and became addicted to cocaine. AR 1973-74. Jose's addiction led to two separate arrests for drug possession and related charges. On October 7, 2007, Jose was arrested for allegedly possessing 0.7 grams of cocaine. AR 2468. On April 15, 2008, Jose pleaded *nolo contendere* to violating California Health and Safety Code ("HSC") § 11350(a), possession of a controlled substance (California case no. SA066140; hereinafter "Disposition A").[2] AR 1499, 2512. In 2015, a California judge reduced this felony conviction to a misdemeanor and later expunged it under PC § 1203.4. AR 153-54, 1171.

In March 2019, Jose moved to vacate his April 2008 plea, Disposition A, in California state court under PC § 1473.7(a)(1). AR 114, 158-70. Jose argued that, contrary to state law, his defense counsel had failed to explore alternative pleas without immigration consequences or inform Jose of this possibility. *Id.* On April 3, 2019, after a hearing, a California judge vacated this conviction, Disposition A, as legally invalid under PC § 1473.7(a)(1). AR 154-55. The court minutes cite

[2] Jose was originally charged with violating HSC § 11350(b), but pleaded no contest to violating § 11350(a). AR 1499, 2513. Jose reiterates that the government failed to carry its burden of proof that he was convicted of any predicate crime for deportation. *See* Dkt. No. 13 (No. 16-71196); Reply Brief (No. 16-71196).

prejudicial error as the basis for vacatur. *Id.*[3] The government now relies on this vacated conviction, rooted in prejudicial error, as its sole basis for removal. AR 1662.

Separately, on April 27, 2008, Jose was arrested for allegedly possessing one gram of rock cocaine and a firearm locked in his vehicle's glove compartment (California case no. SA067567; hereinafter "Disposition B"). AR 1584, 2509-10. On December 23, 2008, Jose pleaded *nolo contendere* to violating HSC § 11370.1(a), possessing a controlled substance while armed. AR 1828-31, 2508. In 2011, a California judge vacated Jose's HSC § 11370.1(a) conviction (Disposition B) under PC § 1016.5 due to the defective underlying criminal proceedings. AR 1735, 1768-71. Jose then pleaded *nolo contendere* to possessing an unspecified controlled substance, HSC § 11350(a), and possessing a weapon, PC § 12020(a). *Id.* The government concedes that Disposition B, a *nolo contendere* plea that did not specify the controlled substance, cannot be the basis for Jose's removal. AR 1662.

[3] Other than the court minutes, there are no other documents in the record showing the state court's findings. AR 13.

II. Procedural History

A. Agency Proceedings and Petitions for Review Prior to PC § 1473.7(a)(1) Vacatur (2009-2019)

In July 2009, the Department of Homeland Security ("DHS") initiated removal proceedings against Jose. DHS initially charged removability based on Dispositions A and B. AR 2557-59. *See* 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii) (removal based on aggravated felony conviction); 1227(a)(2)(B)(i) (removal based on controlled substance conviction). In September 2009, DHS withdrew its charge of removal under § 1101(a)(43)(B) and § 1227(a)(2)(A)(iii), acknowledging that Disposition A and Disposition B were not aggravated felonies, and sought removal based only on § 1227(a)(2)(B)(i). AR 2536, 2552, 2557-59. Jose then applied for cancellation of removal under 8 U.S.C. § 1229b(a). AR 2499-507.

In January 2010, the Immigration Judge ("IJ") denied Jose's request for cancellation of removal as a matter of discretion. AR 1929-44. In June 2010, the BIA adopted and affirmed the IJ's decision. AR 1879. Jose petitioned for review to this Court. *See Jovel v. Holder*, 501 F. App'x 708 (9th Cir. 2012). In September 2010, Jose filed a timely[4] motion to reopen at the BIA, which denied

[4] Noncitizens may file a motion under 8 U.S.C. § 1229a(c)(7)(C)(i) "within 90 days" of the final removal order. Separately, noncitizens can file a "*sua sponte*" motion asking the BIA to reopen removal proceedings on its own authority. *See* 8 C.F.R. § 1003.2(a); *Mata v. Lynch*, 576 U.S. 143, 145 (2015).

the motion in October 2010. AR 1809-10, 1815-25. Jose petitioned for review of the BIA's denial of his timely motion to reopen, and this Court consolidated the cases. *See Jovel*, 501 F. App'x 708. In December 2012, this Court denied in part and dismissed in part the two consolidated petitions for review. *Id.*

In November 2012, Jose filed a *sua sponte* motion to reopen at the BIA after a California court vacated his possession of controlled substance while armed conviction (no. SA067567, Disposition B). AR 1747-53. In January 2013, the BIA granted his motion. AR 1735. The BIA noted that the California court had vacated the HSC § 11370.1(a) conviction (Disposition B) under PC § 1016.5, which requires "a non-citizen defendant [to] be informed of the immigration consequences of a guilty plea." *Id.* The BIA observed that the vacatur itself was "evidence that the conviction was vacated due to a procedural defect in the underlying criminal proceedings." *Id.* The BIA remanded for the IJ to reconsider Jose's application for cancellation of removal. *Id.* In February 2013, the reopened IJ proceedings began. AR 1651, 1732.

In October 2014, DHS conceded that neither the vacated conviction nor the possession of an unnamed controlled substance and possession of an unnamed weapon convictions that comprise Disposition B can support removal. AR 1662. DHS instead charged removability solely on Disposition A—the April 15, 2008,

HSC § 11350(a) drug possession conviction (no. SA066140). *Id.* The IJ tentatively found Jose was removable. AR 1651.

In April 2015, Jose applied for asylum, withholding of removal, and Convention Against Torture relief. AR 882-95, 1550-70. Jose also raised new factors supporting cancellation of removal, including his sobriety, church attendance, enrollment in GED courses, letters of recommendation, and his parents' worsened health conditions. AR 1451-94, 1596-617. Jose also pointed to country conditions evidence that he would suffer targeted violence and murder in El Salvador due to his former gang membership and evangelical Christian faith, while facing extreme difficulty accessing medical care for his ailments. *Id.*

In October 2015, the IJ denied Jose's application for cancellation of removal, and his application for asylum, withholding of removal, and CAT relief. AR 309-22.

Jose appealed to the BIA, which adopted and affirmed the IJ's decision in March 2016. AR 233-37. The BIA concluded Jose was removable. AR 234. It denied cancellation of removal, "[s]pecifically" focusing on Disposition A—Jose's conviction for possessing a controlled substance. *Id.* The BIA also denied Jose's asylum, withholding of removal, and CAT claims for relief. AR 235-37.

In April 2016, Jose petitioned this Court for review. Dkt. No. 1 (No. 16-71196).

B. The Decision Below: Proceedings after Conviction Vacated under PC § 1473.7(a)(1) (2019-2022)

In April 2019, a California court vacated Jose's HSC § 11350(a) conviction (Disposition A), the conviction underpinning the BIA's decision. Jose filed a second *sua sponte* motion to reopen at the BIA, arguing that the vacated conviction cannot sustain removal.[5] AR 108-227. In November 2020, the BIA requested supplemental briefing on whether the PC § 1473.7 vacatur of Disposition A "conclusively establish[ed] that there was a substantive or procedural defect in the underlying state court criminal proceeding, or d[id] [Jose] continue to have the burden to show that the state court vacatur of his conviction under [PC] § 1473.7 was not done to avoid the immigration consequences of the conviction." AR 105.

In July 2021, the BIA denied the second *sua sponte* motion to reopen in an unpublished, non-precedential opinion. AR 3-15. The BIA analyzed "whether the vacatur was 'solely for immigration purposes,' or whether it related to a substantive or procedural defect in the underlying criminal proceedings." AR 6 (quoting *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *rev'd, Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006)). It noted that convictions vacated due to substantive or procedural defect cannot sustain removal. *Id.* The BIA concluded

[5] This Court continued appellate proceedings in No. 16-71196 pending the BIA's adjudication of the motion to reopen. Dkt. No. 35 (No. 16-71196).

incorrectly that Jose's conviction was not vacated due to such procedural or substantive defect and therefore could support removal. AR 14.

The BIA recognized that California has procedural protections ensuring the legal validity of the plea bargaining process. AR 7-9. It also acknowledged that § 1473.7(a)(1)'s text (as of 2019) mandated a conviction to be "legally invalid" when "prejudicial error damag[es] the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." AR 4. But the BIA interpreted § 1473.7's text and legislative history as "explicitly allow[ing] for vacatur of a criminal conviction or sentence solely to alleviate its immigration consequences." AR 9-13. It understood § 1473.7(a)(1) to allow vacaturs based on a defendant's error alone, citing the intermediate California appellate court decision in *People v. Mejia*, 36 Cal. App. 5th 859, 871 (2019). In a footnote, the BIA placed the burden on Jose to show that the § 1473.7(a)(1) vacatur "was due to a substantive or procedural defect in the underlying criminal proceedings." AR 5.

The BIA then re-adjudicated the state court's § 1473.7(a)(1) vacatur decision and found that Jose had not met this burden. AR 13-14. Specifically, the BIA "look[ed] to the law under which the state court issued its order, the terms of the order itself, and the reasons presented by the respondent in requesting that the court vacate the conviction." AR 7 (citing *Matter of Pickering*, 23 I&N Dec. at

625); *but see Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011) ("[T]he petitioner's motive is not the crucial inquiry."). The BIA thus concluded that Disposition A—Jose's vacated HSC § 11350(a) conviction—remained valid for immigration purposes. AR 14-15.

In August 2021, Jose petitioned for review of the BIA's denial of his second *sua sponte* motion to reopen. Dkt. No. 1 (No. 21-631). In February 2022, this Court consolidated Nos. 16-71196 and 21-631 into one appeal. Dkt. No. 12.

SUMMARY OF THE ARGUMENT

I. California, like all states, codifies procedural requirements for obtaining legally valid criminal convictions. PC § 1473.7(a)(1) was enacted to vacate legally invalid convictions due to prejudicial error. A judge's determination to vacate a conviction under § 1473.7(a)(1) due to prejudicial error necessarily means there was a substantive or procedural defect in the underlying criminal proceedings. Convictions vacated due to such defect cannot sustain removal.

II. The BIA erroneously re-adjudicated the state court's determination that Jose's conviction was legally invalid. It ignored California statutes and precedent identifying prejudicial errors that are substantive or procedural defects during plea negotiations with potential immigration consequences.

III. The BIA ignored Ninth Circuit precedent by placing the burden on the noncitizen to prove he is not deportable. Statute and precedent place the burden on the government to prove deportability by clear and convincing evidence.

IV. The plain text of 8 U.S.C. § 1101(a)(48)(A), which defines convictions that can support removability, does not include vacated convictions. Therefore, Jose's vacated conviction cannot in any event sustain his removal.

STANDARD OF REVIEW

This Court "review[s] de novo the BIA's conclusions on questions of law—including whether a particular state conviction is a removable offense under the INA." *Fregozo v. Holder*, 576 F.3d 1030, 1034 (9th Cir. 2009). This Court "do[es] not defer to the BIA's interpretation of state or federal criminal statutes, because the BIA does not administer such statutes or have any special expertise regarding their meaning." *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 852 (9th Cir. 2013). And this Court only regards a "non-precedential BIA opinion's interpretation of the INA or its regulations" for its persuasive value, if any. *Morales-Garcia v. Holder*, 567 F.3d 1058, 1061 (9th Cir. 2009).

ARGUMENT

Jose is not removable under 8 U.S.C. § 1227(a)(2)(B)(i) based on his defective conviction (Disposition A) vacated under PC § 1473.7(a)(1). A vacatur under § 1473.7(a)(1) requires courts to find prejudicial error. Prejudicial error, in

turn, means there was a substantive or procedural defect in the underlying criminal proceedings. The statutory text, structure, history, purpose, past BIA decisions, and legal canons support holding that any conviction vacated under § 1473.7(a)(1) categorically cannot sustain removal.

If this Court were to re-adjudicate Jose's § 1473.7(a)(1) vacatur a third time, which is not necessary, then it should find that Jose's vacated conviction cannot sustain removal because Jose's attorney erred by failing to explore immigration-neutral pleas. Moreover, the BIA improperly placed the burden on Jose to prove he is not deportable.

Finally, this Court's precedent deferring to dated BIA decisions on what constitutes a conviction under 8 U.S.C. § 1101(a)(48)(A) should not control. Any vacated conviction should not sustain deportability based on § 1101(a)(48)(A)'s plain text.

I. Convictions Vacated Under California Penal Code § 1473.7(a)(1) Are Invalid for Immigration Purposes

Whether a vacated conviction can sustain removal depends on the reason for vacatur. "A vacated conviction can serve as the basis of removal *only if* the conviction was vacated for reasons 'unrelated to the merits of the underlying criminal proceedings,' that is, for equitable, rehabilitation, or immigration hardship reasons." *Nath v. Gonzales*, 467 F.3d 1185, 1188–89 (9th Cir. 2006) (quoting

Matter of Pickering, 23 I&N Dec. at 624) (emphasis added). Conversely, "a conviction vacated because of a 'procedural or substantive defect' is not considered a 'conviction' for immigration purposes and cannot serve as the basis for removeability." *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006). Jose's conviction was vacated due to such defect and cannot support removal.

The BIA incorrectly interpreted § 1473.7(a)(1) to "explicitly allow[] for vacatur of a criminal conviction or sentence solely to alleviate its immigration consequences." AR 13. But the statutory text, structure, history, purpose, dozens of other BIA decisions, and general legal canons demonstrate the BIA was incorrect. Indeed, a California judge may vacate convictions under § 1473.7(a)(1) *only if* there was a procedural or substantive defect in the underlying criminal proceedings. Thus, a conviction vacated under § 1473.7(a)(1) necessarily "cannot serve as the basis for removeability." *See Cardoso-Tlaseca*, 460 F.3d at 1107.

This Court has not defined "procedural or substantive defect." Generally, a "defect" is "[a]n imperfection or shortcoming." Defect, Black's Law Dictionary (11th ed. 2019). A "procedural error" is "[a] mistake in complying with the rules or steps in the legal process." Error, *id.* A "substantial" or "substantive error" "affects a party's substantive rights or the outcome of the case." *Id.* Thus, convictions vacated due to any imperfection or shortcoming in complying with the

rules or steps in the legal process, or that affect a party's substantive rights or the outcome, would not support removal. *See Cardoso-Tlaseca*, 460 F.3d at 1107; *Nath*, 467 F.3d at 1189.

This Court has identified examples of procedural or substantive defects. Not being "adequately informed of the immigration consequences of the plea" is one. *Reyes-Torres*, 645 F.3d at 1075, 1077; *see also Cardoso-Tlaseca*, 460 F.3d at 1104 (same). A procedural or substantive defect under California law need not violate a federal constitutional right. *Cardoso-Tlaseca* was decided four years before the Supreme Court held in *Padilla* that counsel's failure to provide immigration advice can violate the Sixth Amendment. 559 U.S. at 370. Even convictions vacated for "'good cause,' without further explanation," cannot sustain removal so long as they were not vacated solely "for equitable, rehabilitation, or immigration hardship reasons." *Nath*, 467 F.3d at 1188–89.

The BIA has not specified what it believes qualifies as "procedural or substantive defect." The BIA suggests that such defect exists when "vacation of the conviction [wa]s warranted on the merits, or on grounds relating to a violation of a fundamental statutory or constitutional right." *Matter of Roldan-Santoyo*, 22 I&N Dec. 512, 523 (BIA 1999), *vacated, Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). A court order vacating a conviction "on the legal merits" (without further explanation) meant that the conviction could not sustain removal. *Matter of*

Rodriguez-Ruiz, 22 I&N Dec. 1378, 1379 (BIA 2000), *overruled, Matter of Thomas and Thompson*, 27 I&N Dec. 674 (AG 2019). But the BIA clarified in *Matter of Pickering* that convictions vacated "for reasons unrelated to the merits" can still support removal. 23 I&N Dec. 621, 622–24 (BIA 2003). Attorney General Barr later "extend[ed] th[is] *Pickering* test to all forms of sentence alterations." *Matter of Thomas and Thompson*, 27 I&N Dec. at 685. According to the BIA's reasoning, therefore, any conviction vacated "on the merits"—*i.e.*, for any imperfection or shortcoming in the underlying proceedings—is not valid for immigration purposes. *See also Cardoso-Tlaseca*, 460 F.3d at 1108 (remanding for BIA's "determination whether Cardoso's original conviction was vacated on the merits or because of immigration consequences").

As explained below, a conviction can only be vacated under PC § 1473.7(a)(1) due to prejudicial error, which constitutes "procedural or substantive defect." Accordingly, any conviction vacated under § 1473.7(a)(1) cannot sustain removal, meaning there is no basis for Jose's removal.[6]

A. Background

States have the "power" to define elements of state crimes and "regulate procedures" for reaching legally valid convictions. *See Patterson v. New York*, 432

[6] The terms "deportation" and "removal" are used interchangeably. *See Calcano-Martinez v. INS*, 533 U.S. 348, 350 n.1 (2001).

U.S. 197, 201–02 (1977). Likewise, states alone exercise "judgment" how "cumbersome, [] expensive, [or] inaccurate" a rule might be. *See id.* at 209.

State procedures must comply with the U.S. Constitution, which "guarantees a fair trial" with certain minimum procedural protections, including effective assistance of counsel under the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 684, 686 (1984). And as relevant here, the Supreme Court held in *Padilla* that the Sixth Amendment requires counsel to inform a noncitizen defendant "whether his plea carries a risk of deportation." 559 U.S. at 374. But states can impose procedural protections above this federal constitutional floor. *See, e.g.*, *Tabares v. City of Huntington Beach*, 988 F.3d 1119, 1122 (9th Cir. 2021) ("States may surely construe their own laws as imposing more stringent constraints . . . than does the Federal Constitution." (cleaned up)); *People v. Fields*, 13 Cal. 4th 289, 298 (1996) (California laws can be "more protective of defendants' rights than the federal Constitution.").

California laws apply more rigorous requirements on plea bargaining than the U.S. Constitution. For decades prior to *Padilla*, California courts had required noncitizens to be informed of the "dire consequences" of deportation during plea bargaining. *People v. Superior Ct. (Giron)*, 11 Cal. 3d 793, 798 (1974). California courts vacated convictions where defendants were not informed of immigration consequences during plea bargaining. *People v. Wiedersperg*, 44 Cal. App. 3d

550, 554 (1975); *People v. Kim*, 45 Cal. 4th 1078, 1104 (2009). California also enacted statutory provisions "requir[ing] a court to advise a defendant of the immigration consequences of the plea, or risk vacation." *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999); *In re Resendiz*, 25 Cal. 4th 230, 240 (2001). Since 1978, PC § 1016.5 has "required trial courts to ensure that defendants are advised of immigration consequences before accepting a guilty plea." *People v. Codinha*, 71 Cal. App. 5th 1047, 1065 n.9 (2021).[7]

In 2015, California codified *Padilla*'s holding into "an independent statutory duty that does not require finding a violation of the Sixth Amendment." *Id.* at 1065. Specifically, PC § 1016.3(a) "requires criminal defense counsel to 'provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and . . . defend against those consequences.'" *Id.* Moreover, PC § 1016.3(b) "goes further than *Padilla* by also requiring prosecutors, when developing and considering plea offers, to 'consider the avoidance of adverse immigration consequences in the plea negotiation process.'" *Id.* California's criminal procedural protections for noncitizen defendants during plea bargaining thus exceed those guaranteed by the U.S. Constitution. *See id.*; PC § 1016.2

[7] "Receipt of this statutory warning, however, is not a bar to a noncitizen defendant seeking to withdraw a guilty plea on the basis of the lack of advice of the adverse immigration consequences of the plea." *Id.*

(legislature sought to "codify Padilla v. Kentucky and related California case law and to encourage the growth of such case law").

Against this backdrop, California enacted PC § 1473.7, effective January 2017. *People v. Camacho*, 32 Cal. App. 5th 998, 1005 (2019). As originally enacted, §1473.7(a) allowed individuals no longer in custody "to vacate a conviction or sentence" for two reasons.[8] Relevant here, § 1473.7(a)(1) permits courts to vacate convictions that are "legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere."[9]

California amended § 1473.7, effective January 2019. *Camacho*, 32 Cal. App. 5th at 1006. Some courts interpreting § 1473.7 before 2019 had required movants to show constitutionally ineffective assistance of counsel under *Strickland*. *Id.* at 1005. As amended, § 1473.7(a)(1) clarifies "[a] finding of legal invalidity may, but need not, include a finding of ineffective assistance of

---

[8] Section 1473.7(a)(2) allows vacatur if "[n]ewly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice." The 2022 version of § 1473.7 includes a third ground for vacatur, which, like (a)(2), is not relevant.

[9] For brevity, this Brief refers to "guilty pleas" to include the legal effects of "pleas of nolo contendere," though they differ. *See* PC § 1016; *Loftis v. Almager*, 704 F.3d 645, 649 (9th Cir. 2012) ("Defendants who plead nolo contendere simply refuse to admit guilt." (cleaned up)).

counsel." *Id.* at 1006. The 2019 amendments also provided "a presumption of legal invalidity" where the underlying plea specified that the arrest and conviction was "never to have occurred" once the moving party completed specific requirements (*e.g.*, a plea resulting in pretrial diversion). PC § 1473.7(e)(2). And the amendments clarified that a court need not specify the exact basis for vacatur under § 1473.7(a)(1). PC § 1473.7(e)(4). A California court vacated Jose's conviction under the 2019 version of § 1473.7(a)(1), citing prejudicial error without specifying the precise nature of the error. AR 4, 154-55.

B. The Text of § 1473.7(a)(1) Requires Procedural or Substantive Defect

Section 1473.7(a)(1) requires judges to find two elements before vacating a conviction: error and prejudice. *People v. Vivar*, 11 Cal. 5th 510, 528 (2021). There are two types of legal error warranting § 1473.7(a)(1) vacatur: due process violations and deficient performance of defense counsel. *See id.* at 529; *People v. Perez*, 19 Cal. App. 5th 818, 828 (2018); *In Re: Jose Jesus Arredondo Gomez*, 2018 WL 3007175, at *1 (BIA 2018); *In Re: Jeffery Jabanilla Borillo* (IJ 2019), at 6 ("'[P]rejudicial error' could potentially include violations of due process rights independent of ineffective assistance of counsel.").[10] The federal Constitution and California law provide separate standards for due process and deficient counsel during plea bargaining. *E.g.*, PC §§ 1016.3(b), 1016.5, 1016.8(a); *Giron*, 11 Cal.

[10] Decisions not available on Westlaw are reproduced in the Addendum.

3d at 797; *Vivar*, 11 Cal. 5th at 533; *People v. Lopez*, 66 Cal. App. 5th 561, 564–65 (2021). Either form of error constitutes a procedural or substantive defect satisfying *Nath* and *Cardoso-Tlaseca*.

Besides error, courts must find prejudice: that if the error had not occurred, "it's reasonably probable the moving party would not have entered the plea." *Vivar*, 11 Cal. 5th at 534. Here, the BIA erroneously thought that constitutionally ineffective assistance of counsel was the only error warranting § 1473.7(a)(1) vacatur before 2019. AR 9-10. The 2019 amendments clarified that constitutionally ineffective assistance of counsel was not the only error warranting § 1473.7(a)(1) vacatur. The BIA mistook these amendments to conclude that, after 2019, California courts need only look at the defendant's mindset—*i.e.*, at prejudice—to see if § 1473.7(a)(1) vacatur was warranted. *Id.*

1. Statutory Analysis

General principles of statutory interpretation guide the analysis of § 1473.7(a)(1). "[T]he inquiry must focus on the state court's rationale for vacating the conviction" and the statutory grounds for vacatur. *Reyes-Torres*, 645 F.3d at 1077; *see also Pinho v. Gonzale*s, 432 F.3d 193, 215 (3d Cir. 2005). This is a statute-by-statute analysis. *See, e.g.*, *Poblete Mendoza v. Holder*, 606 F.3d 1137, 1142 (9th Cir. 2010) (extending holding to "any vacatur under this particular statute"). Some statutes, such as PC § 1203.4, permit expunging convictions for

rehabilitative purposes. Because there is no need to show any defect in the underlying proceedings, these convictions can still support removal. *See, e.g.*, *Ramirez-Castro v. INS*, 287 F.3d 1172, 1175 (9th Cir. 2002) ("[S]ection 1203.4(a) provides only a limited expungement even under state law."); *Marinelarena v. Garland*, 6 F.4th 975, 979 (9th Cir. 2021) (a conviction expunged under section 1203.4 "remains a 'conviction' for federal immigration purposes"). But other statutes, such as § 1473.7(a)(1), categorically permit vacatur only if a court finds there was a defect in the underlying proceedings.

When interpreting statutes, this Court "begin[s] with the statutory text, and end[s] there as well if the text is unambiguous." *Connell v. Lima Corp.*, 988 F.3d 1089, 1097 (9th Cir. 2021) (quotation omitted). Courts "look to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (quotation omitted). "[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning" at the time of enactment. *Id.* (quotation omitted). Section 1473.7(a)(1)'s text plainly shows courts may vacate convictions under § 1473.7(a)(1) only when the underlying proceedings were procedurally or substantively defective, and not solely for immigration purposes.

On its face, § 1473.7(a)(1) (2019) only permits courts to vacate convictions that are "legally invalid due to prejudicial error" impacting a plea. The statute's

plain language does not permit courts to vacate error-free convictions solely to secure immigration benefits. PC § 1473.7(a)(1) (2019) ("The conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere."). Rather, movants "must show" both "an error" and that the error was "prejudicial." *Vivar*, 11 Cal. 5th at 528. Courts "consider the totality of the circumstances" to assess if prejudicial error occurred. *Id.* at 529.

An error under § 1473.7(a)(1) qualifies as a procedural or substantive defect under *Nath*/*Cardoso-Tlaseca*, thus precluding removal. Because § 1473.7(a)(1) does not define the word "error," we look to its "ordinary, contemporary, common meaning." *See Connell*, 988 F.3d at 1097. Black's Law Dictionary defines error as a "mistake of law or of fact in a tribunal's judgment, opinion, or order." Error, Black's Law Dictionary, *supra*. Notably, Black's definition of error is virtually identical to its definition of "procedural or substantive defect." *See id.* (defining "procedural error" and "substantial" or "substantive" error); Defect, Black's Law Dictionary, *supra*. Thus, the "ordinary, contemporary, common meaning" of "error" alone shows that errors under § 1473.7(a)(1) satisfy the *Nath* standard for "procedural or substantive defect."

Case law provides examples of two types of legal errors that satisfy § 1473.7(a)(1) vacatur: due process violations or deficient counsel. *See, e.g.*, *Vivar*, 11 Cal. 5th at 529; *Perez*, 19 Cal. App. 5th at 828; *see also In Re: Jose Jesus Arredondo Gomez*, 2018 WL 3007175, at *1 (conviction vacated under § 1473.7(a)(1) for due process violation could not support removal). Either type of error could result in prejudice during the plea process. Without such error, vacatur would not be available, even if the judge thought the immigration consequences to be unjust. *See, e.g.*, *Vivar*, 11 Cal. 5th at 529.

First, due process violations under either the Fifth Amendment or California law qualify as § 1473.7(a)(1) predicate errors. Constitutional due process requires that guilty pleas be knowing, voluntary, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 243 & n.5 (1969). California has codified federal due process rights while also adding procedural protections. *E.g.*, PC § 1016.8(a); *Godinez v. Moran*, 509 U.S. 389, 402 (1993) ("States are free to adopt [] standards that are more elaborate than" those imposed by the Due Process clauses.). For example, the California Supreme Court established "a plea of guilty may be withdrawn for mistake, ignorance or inadvertence or any other factor overreaching defendant's free and clear judgment." *Giron*, 11 Cal. 3d at 797 (quotation omitted). And PC §§ 1016.5 and 1016.3(b) impose duties on courts to ensure noncitizen defendants

know the "severe collateral consequences," *id.* at 798,[11] of pleading guilty, and prosecutors to consider avoiding such consequences during negotiations. Due process requires defendants to fully understand immigration-related consequences before pleading guilty. *Cf. United States v. Heredia*, 768 F.3d 1220, 1230 (9th Cir. 2014) (Wardlaw, J.) (The "desirable" "considerations" of plea bargaining "presuppose fairness" during the bargaining process (citation omitted)).

Second, deficient defense counsel can be predicate error. The federal standard for constitutionally ineffective assistance of counsel is less exacting than California's standard for deficient counsel. Under *Strickland*/*Padilla*, counsel cannot affirmatively provide erroneous advice or passively omit correct advice about deportation. *United States v. Bonilla*, 637 F.3d 980, 983–84 (9th Cir. 2011). Between 2017 and 2018, many California courts "assumed" *Strickland* also governed § 1473.7(a)(1). *Vivar*, 11 Cal. 5th at 525. But the 2019 amendments to § 1473.7 clarified that vacaturs should not have been limited to *Strickland*/*Padilla* errors. *See id.* at 526.

California law imposes greater expectations on counsel than *Strickland*/*Padilla*'s standard, and violations of either can constitute error warranting vacatur under 1473.7(a)(1). *See, e.g.*, *People v. Lopez*, 66 Cal. App. 5th

[11] A federal analogue is Federal Rule of Criminal Procedure Rule 11(b)(1)(O), which requires courts to provide immigration advisories. "[I]t is error if the district court fails to provide this warning during any defendant's plea colloquy." *United States v. Ataya*, 884 F.3d 318, 324 (6th Cir. 2018).

561, 564–65 (2021) (It is not "necessary for a defendant to clear the high bar of ineffective assistance of counsel in order to establish his or her defense attorney did not meet the relevant standard. Further, what was once adequate advice may no longer meet the statutory requirements[.]"). For example, counsel cannot merely recite "generic advisement" on immigration consequences from a plea form. *Id.* at 577–78, 580; *see also Vivar*, 11 Cal. 5th at 533; *People v. Espinoza*, 27 Cal. App. 5th 908, 917 (2018).

In California, counsel's representation is deficient if they do not make "an effort to negotiate an acceptable plea bargain with the relevant immigration consequences in mind." *Lopez*, 66 Cal. App. 5th at 564–65; *see also Padilla*, 559 U.S. at 373 (counsel with "the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation"). "One technique" is "to plead to a different but related offense"—even "plead up" to an offense with more jail time but fewer immigration consequences. *People v. Bautista*, 115 Cal. App. 4th 229, 240, 242 (2004). An "attorney's failure to investigate, advise, and utilize defense alternatives" like negotiating different pleas is deficient performance. *Id.* Indeed, for decades "[e]ffective assistance at sentencing require[d] the defense attorney to investigate relevant dispositions and their consequences." *People v. Barocio*, 216

Cal. App. 3d 99, 109 (1989). Thus, defense counsel errs by not exploring immigration-neutral pleas.

Finally, under § 1473.7(a)(1), judges must also find an error to be prejudicial. *Vivar*, 11 Cal. 5th at 528. The California Supreme Court, agreeing with the U.S. Supreme Court, held that showing prejudice "means demonstrating a reasonable probability that the defendant would have rejected the plea if the defendant had correctly understood its actual or potential immigration consequences." *Id.* at 529 (citing *Lee v. United States*, 137 S. Ct. 1958, 1961 (2017)).

Here, the state court vacated Jose's conviction in Disposition A due to an unspecified prejudicial error. AR 154-55. This finding of prejudicial error necessarily establishes that there was either a due process violation or deficient counsel. Either type of error, in turn, constitutes a procedural or substantive defect under *Nath*. Moreover, either type of error shows the "vacation of the conviction [wa]s warranted on the merits, or on grounds relating to a violation of a fundamental statutory or constitutional right," not for immigration purposes. *Matter of Roldan-Santoyo*, 22 I&N Dec. at 523; *Cardoso-Tlaseca*, 460 F.3d at 1108. Ultimately, this renders any conviction vacated under § 1473.7(a)(1) "legally invalid" for immigration purposes. *See Estrada-Rosales v. INS*, 645 F.2d 819, 821 (9th Cir. 1981) ("[A] deportation based upon an invalid conviction is []

not legally executed." (quotation omitted)). Under Ninth Circuit precedent in *Nath* and *Cardoso-Tlaseca*, as well as the BIA's own decisions, any conviction vacated under § 1473.7(a)(1) categorically cannot support removal.

2. BIA's Analysis

Notwithstanding the above, the BIA concluded that § 1473.7(a)(1) "explicitly provides for vacatur of state convictions or sentences for the sole purpose of alleviating their immigration consequences." AR 10. The BIA's analysis is at odds with § 1473.7's text and other California statutes and precedent.

First, as explained above, § 1473.7(a)(1) requires courts to find prejudicial error. Without such error, vacatur cannot be granted, regardless how severe the immigration consequences may be. The BIA's contrary conclusion has no textual basis. *See United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*, 837 F.3d 1055, 1062 (9th Cir. 2016) (Hurwitz, J.) ("We ordinarily resist reading words or elements into a statute that do not appear on its face." (cleaned up)).

Second, the BIA conflated the "prejudice" and "error" analyses. The BIA erroneously interpreted the 2019 amendments as changing (rather than clarifying) the law to make showing error by counsel unnecessary. AR 10-11; *contra Vivar*, 11 Cal. 5th at 526. Under the BIA's interpretation, California courts analyze error by focusing on "the defendant's mindset and what he or she understood" during

plea bargaining. AR 10-11. The BIA thus appears to have concluded incorrectly that § 1473.7(a)(1) vacaturs can be granted for prejudice alone. *Id.*

The California Supreme Court made clear that § 1473.7(a)(1) vacaturs require both a predicate error and prejudice resulting from such error. *Vivar*, 11 Cal. 5th at 528.[12] *Vivar* (and *Lee*) centered on the question of prejudice, since all parties agreed that counsel had committed a predicate error. *Vivar*, 11 Cal. 5th at 523; *Lee*, 137 S. Ct. at 1962. Analyzing prejudice, not error, requires courts to review evidence of the defendant's mindset. *Vivar*, 11 Cal. 5th at 529–30; *Lee*, 137 S. Ct. at 1966, 1967 n.3 (whether error prejudicially "affected a defendant's understanding of the consequences of his guilty plea" is analyzed "from the defendant's perspective"). Thus, California (and U.S.) Supreme Court precedent belies the BIA's conclusion that a defendant's mindset and understanding alone can warrant § 1473.7(a)(1) vacatur.[13]

---

[12] Though the U.S. Constitution's standard for constitutionally ineffective counsel is different than California's standard for deficient counsel, the constitutional two-step analysis is similar. *See Lee*, 137 S. Ct. at 1964.

[13] The BIA relied on a single, pre-*Vivar* state intermediate decision suggesting that the defendant's mindset is the focus for assessing error, not prejudice. AR 11 (citing *Mejia*, 36 Cal. App. 5th at 871). *Mejia* states this proposition in the due process context: that is, a defendant's due process is violated if he pleads without knowingly and intelligently understanding the immigration consequences, regardless of whether counsel was deficient. *See Mejia*, 36 Cal. App. 5th at 865-86. But even assuming the BIA's reading of *Mejia* is correct, its proposition is unfounded in light of *Vivar*. *See Tabares*, 988 F.3d at 1124 ("When interpreting

Adopting the BIA's reasoning would effectively "rewrite California law" to read the word "error" as identical to "prejudice." *See United States v. Rodriguez-Gamboa*, 946 F.3d 548, 552 (9th Cir. 2019) (Hurwitz, J.). This reading impermissibly "render[s] words 'superfluous, void, or insignificant.'" *Connell*, 988 F.3d at 1097 (quotation omitted). The BIA's conclusion that § 1473.7(a)(1)'s "sole purpose" is to redress a defendant's error is unsupported by the text. *Reyes-Torres*, 645 F.3d at 1077 ("[T]he petitioner's motive is not the crucial inquiry."). The BIA's conclusion also fails to appreciate the different standards for counsel under the U.S. Constitution and California law. *See, e.g.*, *Vivar*, 11 Cal. 5th 510 at 526; *Lopez*, 66 Cal. App. 5th at 564–65; *Bautista*, 115 Cal. App. 4th at 240, 242. Because constitutionally ineffective assistance of counsel is not the sole standard governing counsel's performance, but rather the floor—which is clear after the 2019 amendments—the BIA ignored other ways in which pleas can fail to satisfy *California's* procedural requirements.

The BIA also failed to acknowledge the scope of potential due process errors affecting pleas. For one, prosecutors might not have "consider[ed] the avoidance of adverse immigration consequences in the plea negotiation process." PC § 1016.3(b). Likewise, courts might fail to advise on immigration consequences. PC § 1016.5. Additionally, translator's error, a defendant's mental incompetence,

---

state law, we are bound to follow the decisions of the state's highest court." (cleaned up)).

or a defendant's uninformed *pro se* plea to a removable offense could also be relevant errors. These errors are also procedural or substantive defects satisfying *Nath* and *Cardoso-Tlaseca*.

C. Section 1473.7's Structure Shows that a Procedural or Substantive Defect Is Required

The statutory structure of § 1473.7(a)(1)'s neighboring provisions also supports a conclusion that vacaturs require prejudicial error. And the BIA misinterpreted §§ 1473.7(e)(1), 1473.7(b)(1)(2), 1473.7(e)(2), and 1473.7(e)(4) to support its incorrect conclusion that § 1473.7(a)(1) vacatur could be "granted[] solely to alleviate the immigration consequences." AR 11-12. None of these provisions support the BIA's conclusion.

First, § 1473.7(e)(1) requires movants to prove by a preponderance of the evidence that their convictions were "legally invalid due to prejudicial error." PC § 1473.7(e)(1). Section 1473.7(e)(1) also requires movants to show that convictions have immigration-related consequences, though this does not change the need to prove prejudicial error. Imposing this burden of proof and limiting vacaturs to situations involving specified immigration consequences achieves judicial economy by preventing cases where defendants cannot show prejudicial

error[14] or where convictions do not have specific immigration consequences. The U.S. Supreme Court requires a showing of prejudicial immigration consequences, but that does not make the Sixth Amendment rehabilitative. *See Lee*, 137 S. Ct. at 1967. Nor do the Federal Rules of Criminal Procedure solely alleviate immigration consequences because Rule 11(b)(1)(O) requires immigration advisories. By imposing a burden of proof on movants, Section 1473.7(e)(1) obviates the need for courts to rule on inconsequential vacatur petitions.

Second, § 1473.7(b)(2), which governs when a motion for vacatur under § 1473.7(a)(1) must be filed, does not render the statute into one "granted solely to allow movants to avoid [] immigration consequences." *Contra* AR 12.[15] The time limit reasonably serves to limit the workload on California courts and does not affect the requirement that movants show prejudicial error. Moreover, imposing a time limitation based on prejudicial immigration consequences of error does not mean that the statute is designed solely for immigration purposes. *See Lee*, 137 S. Ct. at 1967; Fed. R. Crim. P. 11(b)(1)(O). Instead, like § 1473.7(e)(1), this time limit serves judicial economy.

Third, the BIA's reliance on § 1473.7(e)(2)—which states that certain pleas are subject to a presumption of invalidity under § 1473.7(a)(1)—was misplaced.

---

[14] For example, counsel may have been deficient, but there may not be objective evidence supporting any "reasonable probability" that the defendant would have pleaded differently. *See Vivar*, 11 Cal. 5th at 529.

[15] The BIA erroneously referred to this as "subdivision (b)(1)(2)." AR 12.

As an initial matter, this provision has no bearing on this case because the plea underlying Jose's now-vacated conviction did not implicate § 1473.7(e)(2).

Regardless, § 1473.7(e)(2) does not support the BIA's conclusion. This provision applies to certain programs such as deferring entry of judgment for first-time nonviolent drug offenders. *See* PC § 1000.8 *et seq.*; *see also* PC § 1210.1. These programs allowed defendants to perform certain actions—such as substance abuse treatment—after which the state dismissed the charge. PC § 1000.8(f); PC § 1210.1(e)(1).

Under state law provisions relevant to the programs covered by § 1473.7(e)(2), defendants were informed that their "plea of guilty pursuant to this chapter shall not constitute a conviction for any purpose." PC § 1000.1(d) (2017); *see also* PC § 1000.4 (2017) (records cannot "be used in any way that could result in the denial of any . . . benefit"); PC § 1210.1(e)(3) (same). In fact, notwithstanding this language, defendants who pled to charges under these programs still faced immigration consequences for their dismissed convictions. *See, e.g.*, *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1025 & n.3 (9th Cir. 2007); *Matter of Punu*, 22 I&N Dec. 224, 230 (BIA 1998).

The California legislature later recognized that this flawed advice about the absence of immigration effects meant defendants unknowingly and unintelligently accepted plea deals under these programs. PC § 1203.43(a)(1) ("[T]he statement

in Section 1000.4 . . . constitutes misinformation about the actual consequences of making a plea."); *see also Santobello v. New York*, 404 U.S. 257, 261–62 (1971) ("The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known."). This "misinformation" meant that defendants entered guilty pleas that were unknowing and unintelligent, violating their due process. *See Boykin*, 395 U.S. at 243 & n.5; *Giron*, 11 Cal. 3d at 798; PC §§ 1016.3, 1016.5, 1016.8. Essentially, there was a procedural defect in these dismissed convictions because every defendant was statutorily misadvised as to the potential consequences.

Moreover, counsel would affirmatively have misadvised clients that there would be no immigration consequences based on these statutes' flawed advisals. *See Lee*, 137 S. Ct. at 1964; *Vivar*, 11 Cal. 5th at 533. If defendants knew the actual immigration consequences, they might not enter these programs or negotiate alternative dispositions. *See id.* Thus, these statutes resulted in legally invalid pleas obtained through systemic misinformation as to immigration consequences. *See* PC § 1203.43(a)(2).

In light of this statutory misinformation (inapposite to this case), § 1473.7(e)(2) provides a presumption of legal invalidity for pleas based on incorrect advice in deferred entry of judgment programs. This presumption does

not show that the statute was enacted purely for immigration purposes, as the BIA contends.

Fourth, the BIA's reference to § 1473(e)(4) is unavailing. Section 1473.7(e)(4) specifies that a court must find "the conviction is legally invalid due to prejudicial error" to grant § 1473.7(a)(1) vacatur, but need not specify the exact basis for its conclusion. It is not clear why the BIA believes a judicial finding of prejudicial error without explanation means vacaturs are granted solely for immigration relief. Consistent with judicial economy, the California Supreme Court explained that this section helps "[o]verburdened trial courts" to "choose to consider only whether there was 'prejudicial error,'" the essential showing to grant § 1473.7(a)(2) vacaturs. *See Vivar*, 11 Cal. 5th at 526. Under the pre-2019 version of the statute, "a defendant could prevail [under § 1473.7(a)(1)] only on judicially created findings. The 'grounds for the motions' were not included in the statute." *People v. Ruiz*, 49 Cal. App. 5th 1061, 1067 (2020). The amendments "corrected this problem by eliminating [previously required] judicially created grounds" to make it simpler for courts and movants. *See id.* Together, these neighboring provisions reinforce that § 1473.7(a)(1) vacaturs can be granted only for prejudicial error, *i.e.*, a procedural or substantive defect affecting a plea.

D. Section 1473.7's History and Purpose Shows Convictions Are Vacated Due to Procedural or Substantive Defect

Besides the text and structure, the history and purpose of § 1473.7 support concluding that § 1473.7(a)(1) vacaturs require procedural or substantive defects satisfying *Cardoso-Tlaseca* and *Nath*. Californians facing deportation for legally invalid convictions historically could petition for a writ of *coram nobis*.[16] But the California Supreme Court held in 2009 that *coram nobis* could not vacate legally invalid convictions based on mistakes of law. *Kim*, 45 Cal. 4th at 1102. The Court invited legislative action, stating "Section 1016.5 especially shows the Legislature's concern that those who plead guilty or no contest to criminal charges are aware of the immigration consequences of their pleas [and] the Legislature remains free to enact further statutory remedies for those in [this] position." *Id.* at 1107.

California enacted § 1473.7(a)(1) "to fill a gap in California criminal procedure by . . . providing a means to challenge a conviction by a person facing possible deportation who is no longer in criminal custody and thus for whom a petition for a writ of habeas corpus is not available." *People v. Fryhaat*, 35 Cal. App 5th 969, 976 (2019) (cleaned up). Section 1473.7(a)(1) serves as an analogue to habeas corpus to replace the prior writ of *coram nobis* unavailable after *Kim*. It is a statutory remedy to grant relief for procedural or substantive defects in

[16] "[C]oram nobis affords a remedy to attack an unconstitutional or unlawful conviction in cases when the petitioner already has fully served a sentence." *Telink, Inc. v. United States*, 24 F.3d 42, 45 (9th Cir. 1994).

underlying criminal proceedings, following a long line of similar traditional common law remedies. *See, e.g.*, Note, *The Need for Coram Nobis in the Federal Courts*, 59 Yale L.J. 786, 788 (1950) (noting state courts going back to the 1800s have granted *coram nobis* to vacate "guilty pleas obtained through fraud, duress, or mistake" or "deprivation of right to counsel"); *Pickett's Heirs v. Legerwood*, 32 U.S. (7 Pet.) 144, 147 (1833) ("[T]he appropriate use of the writ of error *coram vobis* is, to enable a court to correct its own errors-those errors which precede the rendition of judgment.").[17] Contrary to the BIA's implication, § 1473.7(a)(1) is not a novel rehabilitative remedy. Rather, it is meant to address prejudicial errors constituting procedural or substantive defects in the underlying criminal proceedings.

E. The BIA Consistently Held § 1473.7 Vacated Convictions Cannot Sustain Removability

Assessing the same text, structure, history, and purpose, virtually every other BIA decision has concluded that convictions vacated under § 1473.7 cannot sustain removal.

The BIA decision here contradicts dozens of prior BIA decisions. *E.g.*, *In Re: [REDACTED]* (BIA 2022); *In Re: Jose Yudiel Mejia-Rosas* (BIA 2022); *In Re: Juan Manuel Corrales* (BIA 2020); *In Re: C-J-* (BIA 2020); *In Re: Carlos*

[17] *Coram nobis* and *coram vobis* are the same. Lester B. Orfield, *Writ of Error Coram Nobis*, 8 Ind. L.J. 247, 248 (1934).

Jaimes (BIA 2020); *In Re: Antonio Antunez Delgado* (BIA 2020); *In Re: C-H-C-* (BIA 2020); *Khatkarh v. CDCR*, No. 2:14-cv-00079 (E.D. Cal. Feb. 25, 2020), ECF No. 57-1, at 71-72; *In Re: Leni Margarita Saco Cotito*, 2020 WL 1169206 (BIA 2020); *In Re: Elpidio Mendoza Sotelo*, 2019 WL 8197756 (BIA 2019); *In Re: Ernesto Rios Rodriguez*, 2019 WL 7859271 (BIA 2019); *In Re: Arutyun Demirchyan*, 2019 WL 7168795 (BIA 2019); *In Re: Victor Enrique Moran*, 2019 WL 5086717 (BIA 2019); *In Re: Daniel Jose Torres* (BIA 2019); *In Re: Erick Javier Villatoro Padilla*, 2019 WL 3857791 (BIA 2019); *In Re: Jose Valencia-Mata* (BIA 2019); *In Re: Albert Limon Castro*, 2018 WL 8333468 (BIA 2018); *In Re: Jose Jesus Arredondo Gomez*, 2018 WL 3007175; *In re Jose Pablo Hernandez Valdez*, 2018 WL 4611530 (BIA 2018); *In Re: Oscar George Thetford*, 2017 WL 4418352 (BIA 2017); *see also In Re: Wenross St. George Perry* (BIA 2020); *In Re: Ahmed Hamdy Elamary* (BIA 2020); *In Re: Jose Luis Pazarin-Castrejon*, 2017 WL 4946948 (BIA 2017); *In Re: Borillo* (IJ 2019). By comparison, Jose's counsel have located only one other BIA decision consistent with the one here. *See Ramsis v. Garland* (No. 21-1093).[18]

The BIA has repeatedly decided "that vacatur under Cal. Pen. Code § 1473.7 is available only in cases of legal invalidity or actual innocence." *E.g.*, *In Re: Arutyun Demirchyan*, 2019 WL 7168795, at *1; *In Re: Albert Limon Castro*, 2018

[18] Respondent's counsel noted that other cases listed in Form 17 are related, but Jose's counsel have not located any of these BIA decisions.

WL 8333468, at *1. Likewise, consistent with § 1473(e)(4), the BIA has held that a "legally invalid" conviction vacated under § 1473.7(a)(1) cannot sustain removal, even when "the motion materials do not indicate the specific reason for the state court's action." *In Re: Arutyun Demirchyan*, 2019 WL 7168795, at *1, *2. Moreover, the BIA has held expressly that PC § 1473.7 is not a "rehabilitative statute." *In Re: Leni Margarita Saco Cotito*, 2020 WL 1169206, at *1.

Finally, this case's procedural history emphasizes how the BIA's decision here is anomalous. The BIA "regularly grants" requests to reopen "when the alien's underlying conviction has been vacated due to a substantive or procedural defect in the original criminal proceedings," because "such a change in the facts constitutes 'exceptional circumstances' justifying further review of the alien's case." *Planes v. Holder*, 652 F.3d 991, 996 (9th Cir. 2011). Jose had one such conviction, Disposition B, vacated under a similar statute, PC § 1016.5. The BIA—in this case—held the § 1016.5 vacatur required reopening. AR 1735. And the government concedes that Disposition B, the vacated § 1016.5 conviction, could not sustain removability. AR 1662. The similarities between the § 1016.5 and § 1473.7(a)(1) vacaturs show there is no logical reason why the BIA reopened in one but not the other.

The BIA cannot repeatedly decide that convictions vacated under PC § 1473.7(a)(1) are legally invalid for immigration purposes, but conclude Jose's

vacated conviction can sustain removal. It cannot be that § 1473.7(a)(1) means one thing for one person, and a different thing for another. By essentially "flipping a coin" on this issue, the BIA's decision here is "arbitrary and capricious." *See Judulang v. Holder*, 565 U.S. 42, 55 (2011).

F. Canons of Federalism and Full Faith and Credit Require Recognizing § 1473.7(a)(1) Vacaturs as Conclusive

The statutory text, structure, history, and purpose show that § 1473.7(a)(1) vacaturs, standing alone, establish that prejudicial error occurred, and thus the underlying proceedings were procedurally or substantively defective. Additionally, canons of federalism and full faith and credit require the BIA to recognize duly adjudicated state court vacaturs under § 1473.7(a)(1). *See Bond v. United States*, 572 U.S. 844, 862-63 (2014).

Courts and agencies should not "disturb a State's decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts." *Martin v. Ohio*, 480 U.S. 228, 232 (1987). "[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area." *Medina v. California*, 505 U.S. 437, 445–46 (1992). "Ultimately," federal entities must "respect[] the fundamental principles of federalism and deference owed by federal courts to state courts in processing their own criminal cases," and recognize

"[t]he federal system relies heavily on state courts in sentencing defendants and it's wrong and pernicious to call these judgments into question." *United States v. Yepez*, 704 F.3d 1087, 1107 (9th Cir. 2012) (Wardlaw, J., dissenting) (cleaned up).

The BIA, a federal administrative body, should give full faith and credit to state court judgments that a conviction was legally invalid due to prejudicial error under § 1473.7(a)(1). *Cf. Allen v. McCurry*, 449 U.S. 90, 96 (1980) ("Congress has specifically required all federal courts to give preclusive effect to state–court judgments." (citing 28 U.S.C. § 1738)); *Nakamoto v. Ashcroft*, 363 F.3d 874, 883 (9th Cir. 2004) ("The final judgment of the [state] court is entitled to full faith and credit."). The BIA itself has previously held that "Immigration Judges and the Board must give full faith and credit to nunc pro tunc sentence modifications." *In Re: Jose Pablo Hernandez Valdez*, 2018 WL 4611530, at *1 (citing *Matter of Cota-Vargas*, 23 I&N Dec. 849, 849 (BIA 2005)); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. at 1380 ("We will instead accord full faith and credit to this state court judgment."); *but see Matter of Thomas and Thompson*, 27 I&N Dec. at 687 n.2 (overruling *Matter of Rodriguez-Ruiz*).

The BIA's decision here contravenes both canons of federalism and full faith and credit for this particular statute. The BIA essentially read the plain meaning out of the California statute at issue. Moreover, if this Court adopts the BIA's position, it would impose additional obligations on an already overburdened

immigration system by requiring re-adjudication of all state court orders granting vacatur under § 1473.7(a)(1). AR 13. State judges are most familiar with state criminal procedural requirements and laws. They are best suited to adjudicate § 1473.7(a)(1) vacaturs. *See Medina*, 505 U.S. at 445–46; *Kugler v. Helfant*, 421 U.S. 117, 124 (1975).

Adopting the BIA's position requiring IJs to re-adjudicate § 1473.7(a)(1) vacaturs presents serious practical concerns. "[T]he [BIA], an administrative agency, is not competent to inquire into the validity of state criminal convictions." *Contreras v. Schiltgen*, 122 F.3d 30, 32 (9th Cir. 1997). And an overburdened immigration court system would have to review often incomplete and old (even decades-old) records. *Cf. Yepez*, 704 F.3d at 1098 (Wardlaw, J., dissenting) ("[T]he system would unravel if district courts were to second-guess the motives of every state court judge who had previously convicted or sentenced a defendant."). Section § 1473.7(a)(1) motions "are ordinarily brought many years after the plea." *Vivar*, 11 Cal. 5th at 526. State courts hearing these motions are best placed to locate witnesses, attorneys, and relevant documentation after the fact. IJs, by contrast, can rely solely on outside documentation and witnesses, which are often incomplete or inaccessible. 8 C.F.R. §§ 1003.35, 1287.4(a)(2)(ii); *e.g.*, AR 13 n.11. IJs have agreed that California courts, "in considering the contextual nature of the [] criminal proceedings, combined with the district attorney's understanding

of the record, [are] in a better position . . . to determine the presence of an underlying procedural defect."). *In Re: Borillo* (IJ 2019) at 7. Forcing noncitizens to re-adjudicate § 1473.7(a)(1) vacaturs would be unworkable and unjust, given such evidentiary barriers.

II. Even if the BIA Were Permitted to Re-Adjudicate § 1473.7 Motions, Its Analysis Here Was Incorrect

A court decision vacating a conviction under § 1473.7(a)(1) categorically shows there was a prejudicial error affecting a plea. Such error, in turn, establishes that the underlying proceedings were procedurally or substantively defective. But even assuming IJs or the BIA could look behind the curtain to re-adjudicate § 1473.7(a)(1) vacaturs, the BIA's re-adjudication of Jose's motion to vacate his conviction was incorrect. First, the BIA mistook state law in deciding there had been no error in the underlying proceedings. Second, the BIA improperly imposed the burden on Jose, the noncitizen, rather than the government.

A. The State Judge Vacated This Conviction Due to Substantive or Procedural Defects

The BIA erred in re-adjudicating Jose's vacatur.[19] First, it repeatedly stated that Jose "plead[ed] guilty" and referred to "his guilty plea"—though he never

[19] The BIA analyzed the legal question whether the state judge vacated Jose's conviction due to legal invalidity, AR 14, which is reviewed de novo. *See United States v. Chilaca*, 909 F.3d 289, 291 (9th Cir. 2018). If this Court believes this is a mixed question of law and fact, it is also reviewed de novo. *See Guerrero-*

pleaded guilty. AR 1499, 1735, 1768-71, 2512. Rather, he pleaded "nolo contendere," or "no contest," which is an entirely different plea. *Id.*; PC § 1016; *Loftis*, 704 F.3d at 649 ("Defendants who plead nolo contendere simply refuse to admit guilt." (cleaned up)). The BIA noted that Jose argued his "attorney in his criminal proceedings did not seek an 'immigration safe neutral alternative' to the plea he took, such as agreeing to a plea to an 'interlineated charge without a mention of the identity of the drug.'" AR 14. But it concluded there was "no legal support for his argument that his counsel's failure to renegotiate his plea rose to the level of a substantive or procedural defect." *Id.* The BIA also noted Jose's plea colloquy "reflects that the prosecutor advised him" on the plea's immigration consequences. *Id.* It decided Jose had "not met his burden" to show "his conviction is no longer valid for immigration purposes." *Id.*

The BIA's errors underline the reasons why re-adjudicating § 1473.7(a)(1) vacaturs is unwise. This case rests on an incomplete and stale, 13-year-old record. AR 13 n.11. Only the court minutes show what the state court ordered or found. AR 154-55. And the BIA re-adjudicated this decision without remanding to the IJ, removing any possibility of issuing subpoenas for witnesses or additional documents. *See* 8 C.F.R. §§ 1003.35, 1287.4(a)(2)(ii).

Lasprilla v. Barr, 140 S. Ct. 1062, 1069 (2020); *Kaur v. Wilkinson*, 986 F.3d 1216, 1221 (9th Cir. 2021). But, if the BIA did conduct fact-finding, then it erred by not remanding to the IJ. *See Rodriguez v. Holder*, 683 F.3d 1164, 1173 (9th Cir. 2012) ("The BIA may not make its own factual findings." (citations omitted)).

Moreover, in dismissing a duly-adjudicated state court judgment, the BIA misapprehended California criminal procedure and precedent. California law establishes that counsel err when they do not make "an effort to negotiate an acceptable plea bargain with the relevant immigration consequences in mind." *Lopez*, 66 Cal. App. 5th at 565; *Bautista*, 115 Cal. App. 4th at 240. An "attorney's failure to investigate, advise, and utilize defense alternatives" like negotiating pleas without immigration consequences is error. *Bautista*, 115 Cal. App. 4th at 242; *see also Padilla*, 559 U.S. at 373 (counsel with "the most rudimentary understanding of" the law can "plea bargain creatively with the prosecutor" to avoid adverse immigration consequences).

Here, Jose's attorney did not explore immigration-neutral pleas, rendering their performance deficient and resulting in substantive or procedural defects. Jose's defense attorney never advised Jose that had he pleaded no contest to the same charge of violating HSC § 11350 without reference to a specific drug, his conviction would be ineligible for removal. AR 164-65, 169-70. Accordingly, Jose's counsel performed deficiently. *See Padilla*, 559 U.S. at 373; *Lopez*, 66 Cal. App. 5th at 565; *Bautista*, 115 Cal. App. 4th at 240; AR 197. There is no reason why Jose would have knowingly pleaded no contest to a charge with adverse immigration consequences instead of the same charge and sentence without such consequences.

Moreover, there is every reason to believe the prosecutor would have accepted this modified plea. A California prosecutor has an independent duty under PC § 1016.3(b) to "consider the avoidance of adverse immigration consequences in the plea negotiation process." *Codinha*, 71 Cal. App. 5th at 1065 n.9. Notably, in 2011, the prosecution accepted Jose's amended plea to replace his separate HSC § 11370.1(a) conviction in Disposition B with HSC § 11350(a) and PC § 12020(a) convictions based on an unspecified drug. AR 1735, 1768-71. DHS conceded that, as amended, the charges cannot support removability. AR 1662. It stands to reason that amended charges would have been similarly available here.

The BIA suggests that the standard plea colloquy advice provided by the court means Jose was "given proper advisals." AR 14. However, "[t]he government's performance in including provisions in the plea agreement, and the court's performance at the plea colloquy, are simply irrelevant to the question whether *counsel's* performance fell below" standard. *United States v. Rodriguez-Vega*, 797 F.3d 781, 787 (9th Cir. 2015) (emphasis added). "[H]ad [Jose] been properly and timely advised, [Jose] could have instructed h[is] counsel to attempt to negotiate a plea that would not result in h[is] removal." *Id.*

The question is whether Jose's attorney's performance or the process afforded to Jose was deficient. "[T]hat a defendant may have received valid

section 1016.5 advisements from the court does not entail that he has received effective assistance of counsel in evaluating or responding to such advisements." *People v. Ogunmowo*, 23 Cal. App. 5th 67, 80 (2018). A "court's warning" is not the same as "a private discussion with a defendant's own counsel that incorporates the particular circumstances of the defendant's case." *Id.*; *see also People v. Patterson*, 2 Cal. 5th 885, 898 (2017) ("The generic advisement under section 1016.5 is not designed, nor does it operate, as a substitute for such advice."); *United States v. Urias–Marrufo*, 744 F.3d 361, 369 (5th Cir. 2014) ("[C]ounsel's failure cannot be saved by a plea colloquy."). Indeed, "a defendant's in-court responses to rights advisements should not be made 'off the cuff.' Instead, they should reflect informed decisions he has reached after meaningful consultation with his attorney." *People v. Soriano*, 194 Cal. App. 3d 1470, 1481 (1987). The evidence establishes that Jose's attorney erred by not attempting to negotiate an immigration-neutral plea, which is a procedural or substantive defect.

This Court's test for whether vacated convictions are valid for immigration purposes does not include a prejudice prong. *Cardoso-Tlaseca*, 460 F.3d at 1107; *see Nath*, 467 F.3d at 1189. It requires only that a conviction be vacated due to substantive or procedural defect. *Id.* Regardless, and as required by § 1473.7, Jose proved in state court that he was prejudiced by this error. AR 155.

To recap prejudice: Jose has lived lawfully in the United States since age three. AR 2499-500. Jose's family lives in the United States as U.S. citizens or lawful permanent residents. AR 1960-64. Moreover, Jose is a 45-year old gunshot victim with serious health issues, [redacted] Without Jose's financial support and caregiving, his family would suffer. *Id.* These considerations show "that, had he been made aware of the deportation consequences of his conviction, he would have explored the option of renegotiating his plea agreement." *United States v. Kwan*, 407 F.3d 1005, 1017 (9th Cir. 2005); *United States v. Murillo*, 927 F.3d 808, 818 (4th Cir. 2019).

For Jose, as in *Lee*, "deportation was the determinative factor []; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. His priority was remaining in the United States." *Ogunmowo*, 23 Cal. App. 5th at 79 (cleaned up). Jose's overriding motivation was to avoid "the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification." *Hernandez-Guadarrama*, 394 F.3d at 682–83. The failure to explore alternative immigration-neutral pleas was a substantive or procedural defect in the underlying proceedings.

And though not necessary to this Court's test, it is beyond dispute that Jose was prejudiced by this error. The state court found Jose had proved prejudicial error and vacated his conviction as legally invalid under § 1473.7(a)(1). This Court should honor that judgment.

B. The Government Bears the Burden of Showing Removability

This Court need not reach the issue of burden, because the record shows Jose's conviction was vacated for procedural or substantive defect, regardless of who bears the burden. Thus, "the evidence of record is legally insufficient" and "the order for removal must be reversed" regardless of the BIA's decision on burden. *Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1130 (10th Cir. 2005).

But if this Court decides to reach the burden issue, the government, not noncitizens, bears the burden of "prov[ing] with clear, unequivocal and convincing evidence, that the [noncitizen's] conviction was quashed solely for rehabilitative reasons or reasons related to his immigration status, i.e., to avoid adverse immigration consequences." *Cardoso-Tlaseca*, 460 F.3d at 1107 n.3 (citation omitted); *Reyes-Torres*, 645 F.3d at 1077–78 ("[T]he burden is on the government to prove that it was vacated solely for rehabilitative reasons or reasons related to his immigration status."); *Nath*, 467 F.3d at 1189 ("The government has [] failed to carry its burden of proof on the question of the reasons the state set aside the first

conviction.").[20] These holdings are not "advisory opinion[s], but [] conclusive decision[s] not subject to disapproval or revision by another branch of the federal government." *Castillo v. Barr*, 980 F.3d 1278, 1283 (9th Cir. 2020). "The BIA must [] follow the decisions of [this] court." *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003).

Other circuits and the BIA itself have agreed the government bears the burden of proof in this context. *See, e.g.*, *Sutherland v. Holder*, 769 F.3d 144, 147 n.1 (2d Cir. 2014) ("The Sixth, Ninth, and Tenth Circuits have held that the government bears the burden."); *Pickering v. Gonzalez*, 465 F.3d 263, 269 n.4 (6th Cir. 2006) ("[W]e agree with the determination of the BIA, the Seventh Circuit and the Tenth Circuit that the government bears the burden of proving that a vacated conviction remains valid for immigration purposes."); *Barakat v. Holder*, 621 F.3d 398, 403 (6th Cir. 2010) (same); *Cruz-Garza*, 396 F.3d at 1130 (same); *In Re: Erick Javier Villatoro Padilla*, 2019 WL 3857791, at *2 ("DHS has the burden to prove whether the vacatur or dismissal occurred for immigration hardship reasons or, on the other hand, for substantive reasons.").

But the BIA here imposed the burden on Jose, the noncitizen, in a footnote. AR 6-7. To rationalize its position, the BIA dismissed this Court's voluminous

[20] *See also Medina-Lara v. Holder*, 771 F.3d 1106, 1113 (9th Cir. 2014) ("[T]he government bears the burden of proof to show by 'clear and convincing evidence'" that a conviction is valid for immigration purposes)); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 682–83 (9th Cir. 2005) (same).

precedent as only "apply[ing] in the context of determining removability and not in the context of sua sponte reopening." *Id.* It cited a single unpublished Ninth Circuit case, *Romero-Romero v. Holder*, and Attorney General Barr's decision in *Matter of Thomas and Thompson*. *Id.* The BIA was wrong for two reasons.

First, it is well established that "[t]he government bears the ultimate burden of establishing all facts supporting deportability by clear, unequivocal, and convincing evidence." *Mondaca-Vega v. Lynch*, 808 F.3d 413, 419 (9th Cir. 2015). Jose's conviction "was the sole ground of his deportation, and that conviction is itself erased and cannot serve to establish that he has committed a crime" to sustain removal. *See Wiedersperg v. INS*, 896 F.2d 1179, 1182 (9th Cir. 1990). "Both this court and the Supreme Court have held that where the legal basis of a finding of deportability has been nullified, a new deportation hearing is warranted." *Id.* at 1183. Indeed, Jose already had proved to a state judge that prejudicial error existed and his conviction was legally invalid. PC § 1473.7(e)(1); *People v. Rodriguez*, 68 Cal. App. 5th 301, 322 (2021) ("[M]ovants under section 1473.7 must provide evidence corroborating their assertions.").

The government effectively agreed with this conclusion in this very case. DHS conceded that Disposition B—the vacated charges from Jose's April 27, 2008 arrest—could not support removability. AR 1662. There are no other offenses that could sustain removability. Therefore, the government must show that Jose is

removable based on his now-vacated April 15, 2008 conviction, without which it has no legal basis to deport him. *Id.* Otherwise, the BIA's conclusion would mean that the government could deport someone without legal basis. This Court must "ensure the federal government does not exceed its statutory license." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021).

Second, neither *Romero-Romero* nor *Matter of Thomas and Thompson* support the BIA's decision. *Romero-Romero* is an unpublished, non-precedential decision. 466 F. App'x 630 (9th Cir. 2012); Ninth Circuit Rule 36-3(a). *Romero-Romero* does not include any factual or procedural background, or any explanation why it believed *Nath* was distinguishable. 466 F. App'x at 631.[21] No Ninth Circuit precedent supports the BIA's conclusion that *Nath* does not apply here. *See, e.g.*, *Reyes-Torres*, 645 F.3d at 1077; *Nath*, 467 F.3d at 1188; *Cardoso-Tlaseca*, 460 F.3d at 1107.

[21] This Court has disclaimed any reliance on unpublished decisions because "the rule of law is not announced in a way that makes it suitable for governing future cases." *See Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001); *see also* Alex Kozinski & Stephen Reinhardt, *PLEASE DON'T CITE THIS! Why We Don't Allow Citation to Unpublished Opinions*, 20 Cal. Law. 43 (June 2000) ("Using the language of a memdispo to predict how the court would decide a different case would be highly misleading.") (Judges Kozinski and Reinhardt decided *Romero-Romero*); *Lopez v. Barr*, 925 F.3d 396, 405 (9th Cir. 2019), *on reh'g en banc sub nom. Lopez v. Garland*, 998 F.3d 851 (9th Cir. 2021) (Korman, J.) ("We are unpersuaded by this cursory analysis" from an unpublished non-precedential opinion). *Romero-Romero* also erred in deciding there was no jurisdiction to review *sua sponte* motions to reopen. *Compare* 466 F. App'x at 631, *with Bonilla*, 840 F.3d at 588 (agreeing with three other circuits that this Court may review *sua sponte* motions "for legal or constitutional error").

Matter of Thomas and Thompson, 27 I&N Dec. at 689, does not support the BIA either. In fact, Attorney General Barr actually "decline[d] to address the burden-shifting issue," though he reiterated "the government bears the burden of proving deportability by clear and convincing evidence." *Id.* In any event, Attorney General Barr's decision altogether is unpersuasive and not binding on this Court.

III. Vacated Convictions Cannot Sustain Removal

A vacated conviction should not sustain removal, regardless of why it was vacated. Congress defined "conviction" under 8 U.S.C. § 1101(a)(48)(A) in 1996 as "a formal judgment of guilt of the alien entered by a court." *Murillo-Espinoza v. INS*, 261 F.3d 771, 773 (9th Cir. 2001). The statutory definition nowhere mentions "vacated" convictions. The Supreme Court consistently has held vacated "convictions are invalid judgments that may not be used to establish [] guilt." *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 365 (2016); *Bullington v. Missouri*, 451 U.S. 430, 442 (1981) ("[T]he original conviction has been nullified and the slate wiped clean." (cleaned up)). Such a "plain meaning" of vacated convictions is "common-sense." *See Lewis v. United States*, 445 U.S. 55, 60–61 & n.5 (1980).

When enacting § 1101(a)(48)(A), Congress presumably was aware of the judicial understanding that vacated convictions cannot sustain future restrictions.

See United States v. Castleman, 572 U.S. 157, 162 (2014) ("[A]bsent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." (Internal quotation marks and citation omitted.)). Because § 1101(a)(48)(A) does not mention vacated convictions, one cannot sustain removal.

However, this Court deferred to the BIA's 1999 decision in *Matter of Roldan-Santoyo*, 22 I&N Dec. 512, stating that "rehabilitative[ly] expunge[d]" convictions can sustain removal. *Murillo-Espinoza*, 261 F.3d at 774. Without citing *Chevron* or engaging in any analysis of deference, including whether the agency may have exceeded or abused its authority under the Administrative Procedure Act, this Court later looked at the BIA's decision in *Matter of Pickering* in creating its current "procedural or substantive defect" test for whether a conviction is invalid for immigration purposes. *Cardoso-Tlaseca*, 460 F.3d at 1107; *see also* 5 U.S.C. §§ 706(2)(A)-(C).

Since *Murillo-Espinoza* was decided, both the Supreme Court and this Court have clarified that deference to administrative agencies is more limited, especially for statutes with dual civil-criminal applications. *See, e.g.*, *Torres v. Lynch*, 578 U.S. 452, 454 (2016) (interpreting Immigration and Nationality Act's criminal definition without ever citing *Chevron*); *United States v. Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute

is entitled to any deference."); *Lopez v. Barr*, 925 F.3d 396, 403 (9th Cir. 2019), *on reh'g en banc sub nom. Lopez v. Garland*, 998 F.3d 851 (9th Cir. 2021) (Korman, J.) ("The lack of ambiguity in the statutory language provides us with yet another reason to not resort to *Chevron* deference, and to not accord any deference to the BIA's contrary holding, as it was unmoored from the text."); *Niz-Chavez*, 141 S. Ct. at 1480 (same); *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1059 (9th Cir. 2020) (Wardlaw, J.) ("Deferring to the BIA's construction of a statute with criminal applications raises serious constitutional concerns."); *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 816 (9th Cir. 2016). Indeed, no party in *Murillo-Espinoza* addressed whether the dual-application term "conviction" should be subject to *Chevron* deference at all. *See Valenzuela Gallardo*, 968 F.3d at 1060. Given this "intervening higher authority," *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc), this Court should squarely address this issue to hold that vacated convictions cannot sustain removal.

CONCLUSION

This Court should hold that any conviction vacated under § 1473.7(a)(1) was vacated due to procedural or substantive defect. Therefore, the Court should grant Jose's petition for review and vacate the order of removal, "[a]s the BIA has ruled on the Government's theories of removability, a remand would be both unnecessary and inappropriate." *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1112

(9th Cir. 2011) (cleaned up); *Wiedersperg*, 896 F.2d at 1182; *see also In Re: Erick Javier Villatoro Padilla*, No. 2019 WL 3857791, at *2 (terminating removal proceedings when "respondent is no longer removable as charged" due to vacated conviction).

If the Court decides to redo the BIA's re-adjudication of the § 1473.7(a)(1) vacatur, it should hold that regardless of whom bears the burden, Jose's conviction was vacated due to procedural or substantive defect. Thus, it should similarly grant Jose's petition for review and vacate the order of removal.[22]

[22] If this Court decides to reach the question of burden and finds "the BIA applied the wrong burden of proof," it could "grant the petition and remand for reconsideration under the correct burden." *Romero v. Garland*, 7 F.4th 838, 839 (9th Cir. 2021) (per curiam). However, remand is not necessary because "the interpretation of a state criminal statute was not an issue committed to the agency's expertise, and the BIA already had considered whether the petitioner's offense was a crime" rendering Jose eligible for deportation. *Latu v. Mukasey*, 547 F.3d 1070, 1076 (9th Cir. 2008). This Court need not remand where "the record on remand would consist only of those documents already in the record, no further agency expertise was required to determine removability, and the BIA already had considered the issue." *Id.* (quotation omitted). Moreover, the Court should resolve the § 1473.7(a)(1) vacatur question now for purposes of efficiency and finality. *See Cruz-Garz*a, 396 F.3d at 1132 ("[W]e are compelled to grant the petition for review, because the weakness of the administrative record does not satisfy the stringent evidentiary standard for deportation."). For over 14 years, Jose has faced possible removal from his family and the only home he has ever known. AR 123. He was detained in immigration custody for six years while his health, and that of his family, deteriorated. AR 119-20. The BIA might simply come to the same erroneous conclusion regarding § 1473.7(a)(1) vacaturs, causing this Court to reconsider the same complicated facts, procedural history, and laws at a much later time.

Alternatively, this Court may hold that any vacated conviction cannot sustain removal.

Dated: June 27, 2022

Respectfully submitted,

COVINGTON & BURLING LLP

By: s/ *Tomoaki B. Takaki*
TOMOAKI B. TAKAKI

1999 Avenue of the Stars, Suite 3500
Los Angeles, CA 90067-4643
(424) 332-4800

ADDISON B. THOMPSON
COVINGTON & BURLING LLP
415 Mission Street, Suite 5400
San Francisco, CA 94105-2615
(415) 591-6000

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number(s) **16−71196 and 21-631**

The undersigned attorney or self-represented party states the following:

[ ] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[X] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Ramsis v. Garland (No. 21-1093) petitions for review of the Board of Immigration Appeals' denial of a motion to terminate that raises the same or closely related issues on the validity of vacaturs under California Penal Code § 1473.7.

Respondent's counsel informed Petitioner's counsel that three other cases are also related: *Nolasco-Alonzo v. Garland* (No. 22-525); *Larios-Espinosa v. Garland* (No. 22-502); and *Luna v. Garland* (No. 22-987).

Respondent's counsel informed Petitioner's counsel that four other cases may involve California Penal Code § 1473.7, but do not turn on a finding by the BIA that a § 1473.7 vacatur does not count for immigration purposes: *Diaz v. Garland* (No. 22-538); *Mikhalenko v. Garland* (No. 21-113); *Padilla Collazo v. Garland* (No. 21-70478); and *Aquino-Camiro v. Garland* (No 21-70602, No. 22-417).

Signature **s/Tomoaki B. Takaki** **Date** **June 27, 2022**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) __21-631_____

I am the attorney or self-represented party.

This brief contains __13,258_____ **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature ____s/Tomoaki B. Takaki_____ **Date** ____June 27, 2022_