

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, United States Attorney General,
Respondent.

On Petition for Review from
the Board of Immigration Appeals

**BRIEF OF AMICI CURIAE PANGAEA LEGAL SERVICES ET AL. IN
SUPPORT OF PETITIONER JOSE ADALBERTO ARIAS JOVEL**

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FRAP 29(a)(4)(A) CORPORATE DISCLOSURE STATEMENT

None of the amici involved in this action are corporations with a parent corporation, or corporations owned by publicly held corporations.

FRAP 29(a)(4)(E) STATEMENT

Pursuant to Rule 29(a)(4)(E), amici confirm that neither party nor a party's counsel has authored this brief, in whole or in part, or contributed money intended to fund the preparation or submission of this brief. No person contributed money that was intended to fund preparation or submission of this brief.

IDENTITY AND INTERESTS OF AMICI CURIAE

Amici are nonprofit legal service providers, community organizations, public defenders, and law school clinics that advocate on behalf of immigrant communities and provide support and legal representation to noncitizens in removal proceedings and in motions for post-conviction relief under California Penal Code section 1473.7(a)(1). As organizations that work closely with noncitizens, their families, and their communities, amici have a strong interest in ensuring that the Court consider these voices when resolving the legal issues in this case. This amicus brief presents the stories of noncitizens who have successfully obtained post-conviction relief through California Penal Code section 1473.7(a)(1) motions and successfully defended against removal.

All parties have consented to the filing of this amicus brief. *See* F.R.A.P. 29(a)(2).

Amici are the following organizations: Pangea Legal Services; African Advocacy Network; Alameda County Public Defender; California Collaborative for Immigrant Justice; Community Action Board of Santa Cruz County, Inc.; Community Legal Services in East Palo Alto; Council on American-Islamic Relations, California; Criminal Justice Clinic, U.C. Irvine School of Law; Dolores Street Community Services; Florence Immigrant & Refugee Rights Project; Immigrant Defenders Law Center; Immigrant Legal Defense; Immigrant Legal

Services of the Central Coast, Inc.; Immigration Resource Center of San Gabriel Valley; Indigent Defense Association of Sonoma County, LLC; Jewish Family & Community Services - East Bay; Latin Advocacy Network (LATINAN); Los Angeles Center for Law and Justice; Los Angeles County Alternate Public Defender; National Immigration Project of the National Lawyers Guild (NIPNLG); Open Immigration Legal Services; Oregon Justice Resource Center; Organization for the Legal Advancement of La Raza, Inc. (O.L.A. Raza); Organized Communities Against Deportations; Public Counsel; San Francisco Office of the Public Defender; San Joaquin College of Law, New American Legal Clinic; Santa Clara County Office of the Public Defender; SB County Immigrant Legal Defense Center; Silicon Valley De-Bug; Stand Together Contra Costa; Texas A&M School of Law Immigrant Rights Clinic; U.C. Davis Immigration Law Clinic; U.C.I. Law Immigrant Rights Clinic; University of San Francisco Immigration & Deportation Defense Clinic; and the Washington Defender Association.

More detailed descriptions of amici are included in the appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief to provide stories of noncitizens in California who have obtained vacatur of prior convictions under California Penal Code Section 1473.7(a)(1). These stories demonstrate that a conviction can only be vacated under that section if a California court finds a legal defect with the conviction. Every conviction vacated under Section 1473.7(a)(1) is based on a legal error. The Board erred in holding otherwise.

Amici agree with Petitioner Jose Adalberto Arias Jovel that his conviction was vacated under Section 1473.7 to remedy for a legal error in his underlying criminal proceedings: namely, that he could not “meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of [his] conviction or sentence.” Cal. Penal Code § 1473.7(a)(1). Because a California court vacated Mr. Arias’s conviction to correct a legal error, and not to alleviate the immigration consequences of his conviction, Mr. Arias’s conviction is no longer a “conviction” under the Immigration and Nationality Act (INA). *See* 8 U.S.C. § 1101(a)(48)(A) (defining conviction). *See also In re Pickering*, 23 I. & N. Dec. 621, 624 (B.I.A. 2003), *rev’d on other grounds sub*

nom., *Pickering v. Gonzales*, 454 F.3d 525 (6th Cir. 2006) (holding that only vacatur for legal error vacates convictions for immigration purposes).¹

Amici offer the stories of individuals who have obtained vacatur under Section 1473.7(a)(1) to underscore two points. First, the Board erred in holding that only some Section 1473.7(a)(1) vacatur—those in which a California court made an explicit finding of Sixth Amendment ineffective assistance of counsel—correct for legal error. Administrative Record (A.R.) 14, 14 n.13. As the stories in this brief demonstrate, Section 1473.7(a)(1) corrects for several legal errors beyond Sixth Amendment ineffective assistance of counsel. Every noncitizen who succeeds in obtaining a vacatur under Section 1473.7(a)(1) must demonstrate a legal defect in the underlying proceedings: they must show that they did not “meaningfully understand, defend against, or knowingly accept” the immigration consequences of their plea. *See* Cal. Penal Code § 1473.7(a)(1). A noncitizen can meet this standard not only by demonstrating ineffective assistance under the Sixth Amendment, but also by showing they received incorrect advice from counsel in violation of California state law. *See, e.g.*, Cal. Penal Code §§ 1016.2, 1016.3. In addition, a noncitizen may show that they did not meaningfully understand or

¹ Amici also agree with Petitioner that the definition of “conviction” in 8 U.S.C. § 1101(a)(48)(A) does not include *any* vacated convictions and so the requirement to show legal error under *In re Pickering* is incorrect. Pet. Br. 54-55, Dkt. 22. However, this amicus brief illustrates that even under the *Pickering* standard, Section 1473.7(a)(1) vacatur is effective for immigration purposes.

knowingly accept a plea for a range of other reasons, including for example because of poor translation. In all of these circumstances, the plea itself is legally defective. Because Section 1473.7(a)(1) vacatur corrects for only such legal defects, Section 1473.7(a)(1) vacates convictions for immigration purposes. *See Pickering*, 23 I. & N. Dec. at 624 (finding that convictions vacated to remedy legal errors are no longer convictions for immigration purposes).

Second, the stories in this brief illustrate how the Board misunderstood Section 1473.7(a)(1)'s dual requirements of: (1) legal error and (2) prejudice. California courts adjudicate Section 1473.7(a)(1) motions through a two-step process. First, and as a threshold matter, the courts consider whether a noncitizen has established legal error by demonstrating that they did not “meaningfully understand, defend against, or knowingly accept” the immigration consequences of their plea. Cal. Penal Code § 1473.7(a)(1). If a noncitizen satisfies this requirement, then they must demonstrate that they were prejudiced by this legal error. *People v. Vivar*, 485 P.3d 425, 433 (Cal. 2021). The Board misunderstood this two-step process, incorrectly conflating the showing of prejudice with the requirement of legal error. *See* A.R. 13 (finding that 1473.7 “allows for vacatur of a criminal conviction...solely to alleviate its immigration consequences”). As the stories in this brief illustrate, *every* noncitizen who obtains a Section 1473.7(a)(1)

vacatur must establish legal error before demonstrating that the error resulted in prejudice.

Amici urge the Court to grant Mr. Arias’s petition for review and to reverse the decision of the Board.

ARGUMENT

When a noncitizen like Mr. Arias successfully vacates a conviction under Section 1473.7(a)(1), the conviction is no longer a “conviction” for the purposes of the INA. That is because, as the California Supreme Court has held, a noncitizen is required to establish a legal defect in the criminal proceedings—namely that they did not “meaningfully understand, defend against, or knowingly accept” the immigration consequences of the conviction—in order to obtain a vacatur under Section 1473.7(a)(1). *Id.* at 437. When, as with Section 1473.7 vacatur, a conviction is vacated to correct for a legal defect in the underlying criminal proceedings, the conviction does not operate as a “conviction” within the meaning of the INA. *See Pickering*, 23 I. & N. Dec. at 624. *See also In re Adamiak*, 23 I. & N. Dec. 878, 880 (B.I.A. 2006) (holding that a vacatur to correct for a violation of state law vacated the conviction for immigration purposes); *Nath v. Gonzales*, 467 F.3d 1185, 1188-89 (9th Cir. 2006) (holding that a vacated conviction remains a conviction for immigration purposes when it is vacated for equitable or

rehabilitative purposes); *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006) (same).

Every time a noncitizen establishes that they did not meaningfully understand, defend against, or knowingly accept the immigration consequences of a conviction, as they must to obtain a vacatur under Section 1473.7(a)(1), the noncitizen establishes legal error. A legal error arises when, in the course of a criminal proceedings, a substantive or procedural right guaranteed to a criminal defendant is violated—that is, when a right guaranteed to noncitizen defendants by federal or state constitutional or statutory law is violated. *See Pickering*, 23 I. & N. Dec. at 624 (distinguishing vacaturs based on the “validity of the guilty plea and the original conviction themselves” from those based on “post-conviction events.”). *See also Adamiak*, 23 I. & N. Dec. at 880 (finding a violation of state law constituted a legal defect). As the stories in this brief illustrate, when a noncitizen does not meaningfully understand, defend against, or knowingly accept the immigration consequences of a plea, it is for one of two reasons. First, the noncitizen may not be able to knowingly accept or defend against the immigration consequences of a conviction because the conviction occurred in violation of a noncitizen’s right to effective assistance of counsel, under the U.S. or California constitutions, or under California statute. Second, when a noncitizen does not meaningfully understand and knowingly accept the immigration consequences of a

plea, the plea is in violation of the noncitizen's due process rights, as guaranteed by federal and state law. Thus, contrary to the Board's reasoning in Mr. Arias's case, the legal errors corrected by Section 1473.7(a)(1) extend beyond ineffective assistance of counsel violations under the Sixth Amendment of the U.S. Constitution.

This brief offers the stories of California noncitizens to illustrate the range of legal errors that underlie vacatur under Section 1473.7(a)(1). These legal errors include ineffective assistance of counsel, mental incompetence, inadequate translation, pleading pro se (without counsel) and without proper understanding of the immigration consequences, and insufficient and inaccurate court advisals. The stories demonstrate a second point as well: in vacating convictions under Section 1473.7(a)(1), California courts first decide whether there was legal error before determining whether this error prejudiced the noncitizen. Only after a California court finds legal error does the court determine prejudice—that is, whether there is a reasonable probability that the noncitizen would have attempted to avoid the immigration consequences by pursuing an alternate disposition or taking the matter to trial. Section 1473.7(a)(1) vacatur thus rest on a threshold finding of legal error.

I. Every Error That Meets the Statutory Requirements for a Section 1473.7(a)(1) Vacatur is a Legal Error Under *Pickering*.

By requiring a threshold showing that the noncitizen did not meaningfully understand, defend against, or knowingly accept the immigration consequences of

a conviction, Section 1473.7(a)(1) only permits California courts to vacate convictions in two circumstances. First, a court may determine that the noncitizen did not knowingly accept or defend against the immigration consequences of a plea because of legal defects stemming from defense counsel error. Both the U.S. and California constitutions recognize the right to effective assistance of counsel, which has been implemented in California through statutory protections for noncitizen defendants. Second, a California court may determine that the noncitizen did not meaningfully understand or knowingly accept a plea, in violation of the due process protections of the U.S. and California constitutions or implementing California statutes.

Both of these types of errors are legal errors for the purposes of the *Pickering* standard because they are rooted in violations of federal and state constitutional and statutory law. *See Pickering*, 23 I. & N. Dec. at 624. As such, every conviction vacated under Section 1473.7(a)(1) is vacated for immigration purposes. Indeed, this is what the majority of BIA cases deciding this issue have recognized: that Section 1473.7(a)(1) vacatur—whether they correct for a violation the federal or state constitutional right to effective assistance of counsel or due process, or the implementing California statutes—are correcting for a legal error in the underlying proceedings and so the conviction is no longer a conviction for immigration purposes under *Pickering*. *See, e.g., In re Aruyun Demirchyan*,

2019 WL 7168795, at *1 (B.I.A. Oct. 31, 2019); *In re Ernesto Rios Rodriguez*, 2019 WL 7859271, at *2 (B.I.A. Dec. 2, 2019); *In re Albert Limon Castro*, 2018 WL 8333468, at *1 (B.I.A. Dec. 28, 2018).

A. Section 1473.7(a)(1) Corrects for Legal Defects Stemming from Defense Counsel’s Error, Which Constitute Legal Error Under *Pickering*.

Section 1473.7(a)(1) vacates convictions obtained in violation of the Sixth Amendment right to effective assistance of counsel, its California constitutional counterpart, and state implementing statutes. Such vacatur satisfies the *Pickering* standard because they correct for constitutional or statutory legal error. *See Pickering*, 23 I. & N. at 624; *Adamiak*, 23. I. & N. at 880.

When a noncitizen’s Sixth Amendment right to effective assistance of counsel has been violated, the noncitizen cannot defend against or knowingly accept the immigration consequences of a conviction, and thus qualifies for a vacatur under Section 1473.7(a)(1). In the context of noncitizen defendants, the U.S. Supreme Court has held that effective assistance of counsel requires defense attorneys to investigate and advise noncitizens of the potential immigration consequences that may be triggered by a pending criminal charge. *Padilla v. Kentucky*, 559 U.S. 356, 368-69 (2010). As the Supreme Court has recognized, “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants.” *Id.* at 364. So

“preserving the [noncitizen]’s right to remain in the United States may be more important to the [noncitizen] than any potential jail sentence.” *Lee v. U.S.*, 137 S. Ct. 1958, 1968 (2017). *See also U.S. v. Rodriguez-Vega*, 797 F.3d 781, 787 (9th Cir. 2015) (recognizing that, while a “properly and timely advised” noncitizen can “instruct her counsel to attempt to negotiate a plea that would not result in her removal,” an uninformed noncitizen cannot).

While acknowledging that Section 1473.7(a)(1) vacatur based on ineffective assistance of counsel under the Sixth Amendment suffice to vacate a conviction for immigration purposes, A.R. 14 n.13, the Board failed to recognize other legal errors stemming from deficient counsel. Section 1473.7(a)(1) corrects not only for Sixth Amendment ineffective assistance, but also for defective representation as recognized by California constitutional and statutory protections implementing the right to effective assistance of counsel. California law requires defense counsel to affirmatively advise noncitizen defendants of the specific and actual immigration consequences of a conviction. *People v. Soriano*, 240 Cal. App. 3d 328, 336 (Ct. App. 1987). *See also* Cal. Penal Code § 1016.2 (“[i]t is the intent of the Legislature to codify *Padilla v. Kentucky* and related California case law”). A formulaic warning from defense counsel of the mere possibility of deportation or recitation of a pro forma immigration advisement is insufficient to satisfy defense counsel’s obligation under California law. *See Soriano*, 240 Cal. App. 3d at 336

(“Is such a formulaic warning from his own attorney an adequate effort to advise a [noncitizen] criminal defendant of the possible consequences of his plea? We think not.”).

California law additionally provides that defense counsel have an obligation to defend against the adverse immigration consequences of a potential disposition, when doing so is consistent with the goals and informed consent of a properly advised noncitizen defendant. Cal. Penal Code § 1016.3. *See also People v. Bautista*, 115 Cal. App. 4th 229, 241 (Ct. App. 2004) (recognizing that defending against immigration consequences is a crucial component of effective assistance). This may include pursuing a plea to a “different but related offense” or to a “stiffer offense” that does not carry immigration consequences. *Bautista*, 115 Cal. App. 4th at 238.

In short, under California law, a legal defect occurs in the criminal process when a noncitizen is not provided accurate and specific advice about the immigration consequences of a criminal charge such that the noncitizen can instruct defense counsel to defend against the immigration consequences or accept them as they are. Section 1473.7(a)(1) corrects for this defect by vacating the legally invalid convictions that result from defective representation by counsel. Such vacatur satisfies the requirements of *Pickering* because they remedy violations of California state law. *See Adamiak*, 23 I. & N. Dec. at 879 (finding

that a violation of Ohio state law constituted a legal defect in the underlying proceedings).

Nicky Rodriguez's case offers an example of how a noncitizen's failure to meaningfully understand, defend against, or knowingly accept the immigration consequences of a plea corresponds to a violation of the Sixth Amendment and California constitutional right to effective assistance of counsel. Mr. Rodriguez was a 21-year-old lawful permanent resident at the time of his conviction for felony assault by a plea of *nolo contendere*. Mr. Rodriguez had spent most of his youth in Pasadena, California with his father, grandmother, and brother, whom he helped financially support. This was Mr. Rodriguez's first interaction with the criminal legal system and his first conviction. At the time he entered the plea, Mr. Rodriguez had not received any advice from his attorney about the specific terms and immigration impact of his plea, even though the consequences of the proposed plea were clear—it would render Mr. Rodriguez deportable and ineligible for most forms of relief that would allow him to stay in the United States with his family. Had Mr. Rodriguez been properly advised by counsel, he would have understood the high stakes of the proposed disposition and been able to defend against those consequences by instructing counsel to negotiate a different plea or taking his chances at trial. Defense counsel's failure to meet his constitutional obligations damaged Mr. Rodriguez's ability to do either. Mr. Rodriguez subsequently

obtained a vacatur under Section 1473.7 based on a violation of his right to effective assistance of counsel.²

Mr. Arias's own case illustrates how a violation of the California statutes implementing the Sixth Amendment and California constitutional right to effective assistance of counsel also damage a noncitizen's ability to meaningfully understand, defend against, or knowingly accept the immigration consequences of a plea, qualifying the noncitizen for a vacatur under Section 1473.7(a)(1). Mr. Arias's criminal defense attorney did not inform him that he could negotiate with the District Attorney to drop the name of the substance "cocaine" from the proposed plea. This would have resulted in the same sentence but without any immigration consequences. Defense counsel's failure violated California state law, which requires that defense counsel defend against the immigration consequences of a proposed disposition by pursuing alternate pleas that do not trigger immigration consequences. *See* Cal. Penal Code § 1016.3 (requiring defense counsel to defend against the immigration consequences of a conviction). *See also* *Bautista*, 115 Cal. App. 4th at 241 (describing various techniques defense counsel

² The facts and disposition of Nicky Rodriguez's case are alleged in the motion to vacate and supporting documents filed in the Superior Court of the State of California, County of Los Angeles and the minute order vacating his conviction. *See* Def.'s Mot. to Vacate, *People v. Rodriguez*, No. GA097126 (Cal. Super. Ct. June 10, 2019) (copy on file with counsel). *See also* Min. Order, *People v. Rodriguez*, GA097126 (Cal. Super. Ct. Sept. 4, 2019) (copy on file with counsel).

may use to satisfy their obligation to defend against adverse immigration consequences). Section 1473.7(a)(1) corrected for this legal defect in Mr. Arias's criminal proceedings by vacating his conviction.

As these stories from noncitizens demonstrate, Section 1473.7(a)(1) vacatur correct for violations of a noncitizen defendant's right to effective counsel, as guaranteed by the U.S. and California constitutions and California statutes implementing that right. When those rights have been violated, a noncitizen defendant cannot knowingly accept or defend against the immigration consequences of a plea, and that legal error is the basis of the Section 1473.7 vacatur. Given that the basis for the vacatur was legal error—as it always is under Section 1473.7(a)(1)—the vacatur erases the conviction for immigration purposes under *Pickering*. See *Adamiak*, 23 I. & N. Dec. at 879 (finding that a vacatur should be recognized in immigration proceedings when granted to remedy a violation of a noncitizen's rights in their criminal proceedings).

B. Section 1473.7(a)(1) Vacates Pleas That Are Not Voluntarily or Intelligently Made, As Required by Federal and State Law, Correcting for Legal Error Under *Pickering*.

Section 1473.7(a)(1) corrects for a second type of legal error (beyond ineffective assistance of counsel): a violation of federal or state due process law requiring pleas to be voluntarily and intelligently made. This due process requirement corresponds to Section 1473.7(a)(1)'s language, which grants vacatur

when a defendant does not “meaningfully understand” or “knowingly accept” the immigration consequences of a plea. *See* Cal. Penal Code. § 1473(a)(1). Section 1473.7(a)(1) vacatur thus satisfy *Pickering*’s requirement that a vacatur be granted to correct for legal error in order to vacate the conviction for immigration purposes. *Pickering*, 23 I. & N. Dec. at 624.

The Due Process Clause of the U.S. Constitution requires that every plea be voluntary and intelligent. As the U.S. Supreme Court held in *Boykin v. Alabama*, criminal courts must ensure an accused “has a full understanding of what the plea connotes and of its consequences” before the accused may accept a plea, or else the plea is invalid. 395 U.S. 238, 243-44 (1969). California similarly protects noncitizens’ due process rights to a “knowing, intelligent, and voluntary” plea. *See People v. Giron*, 523 P.2d 636, 639 (Cal. 1974) (finding that a plea may be withdrawn for “mistake, ignorance or inadvertence or any other factor overreaching defendant’s free and clear judgment.”). *See also* Cal. Penal Code § 1016.8(2) (codifying the right enunciated by the Supreme Court in *Boykin v. Alabama*).

For noncitizen defendants, awareness of the actual consequences of a plea requires awareness of the immigration consequences. *See Padilla*, 559 U.S. at 364 (recognizing that immigration consequences are often the most significant penalty imposed on noncitizen defendants); *Lee*, 137 S. Ct. at 1986 (finding that preserving

the right to remain in the United States is of primary concern). *See also Rodriguez-Vega*, 797 F.3d at 788 (finding a plea invalid when the noncitizen defendant was unaware of the actual immigration consequences of the proposed plea at the time it was entered); *Giron*, 523 P.2d at 639-40 (“When, as here, the accused entered his plea of guilty without knowledge of or reason to suspect several collateral consequences [including deportation], the court could properly conclude that justice required the withdrawal of the plea on motion therefor.”). Whether because of mental incapacity, incompetent counsel, or some other reason, a noncitizen who does not understand the immigration consequences of a plea does not understand the “actual consequences of her plea” and is stripped of the opportunity to intelligently decide whether to accept the plea as is or “negotiate a plea not requiring her removal.” *Rodriguez-Vega*, 797 F.3d at 790-91.

Section 1473.7(a)(1) corrects for these and other due process violations resulting in a noncitizen not meaningfully understanding or knowingly accepting the immigration consequences of a plea. *See* Cal. Penal Code § 1473.7(a)(1). Due process violations of federal and state law are legal errors, and Section 1473.7 vacatur based on these errors satisfy the requirements of *Pickering*. *See Pickering*, 23 I. & N. at 624.

The stories below highlight the experiences of noncitizens defendants who, because of cognitive disabilities, translation errors, or because they were

unrepresented when pleading, were unable to meaningfully understand the immigration consequences of their pleas. Cognitive disabilities, translation errors, and lack of counsel produce legally invalid convictions because they prevent the defendant from understanding the actual consequences of their plea.

1. A Community Member with a Cognitive Disability Cannot Meaningfully Understand, Defend Against, or Knowingly Accept the Consequences of a Plea, Rendering the Plea Legally Invalid.

When a noncitizen has a cognitive disability impairing their ability to meaningfully understand or knowingly accept the terms of a plea, that due process violation qualifies for a vacatur under Section 1473.7(a)(1). The stories below illustrate the experiences of California noncitizens who obtained Section 1473.7 vacatur based on such due process violations.

Juanita Diaz is a longtime lawful permanent resident with a cognitive disability. An expert assessed that Ms. Diaz's reading and listening comprehension skills in her native language of Spanish are at the level of a child in their fourth month of kindergarten. She cannot read or write, even with a Spanish translator. Two decades ago, Ms. Diaz was charged with two offenses related to food stamp violations after she applied for food stamps to feed her seven children. Despite her cognitive disability, Ms. Diaz pled guilty to both charges without the assistance of counsel. Because of her disability, Ms. Diaz's plea was not knowing or voluntary as required by federal and California state due process standards. She did not

understand the documents that were read to her describing the nature of the charges against her, her rights, and the consequences of her plea, including that the proposed disposition would make her deportable and ineligible for discretionary immigration relief. Because she could not meaningfully understand the charges against her and the consequences of pleading guilty, Ms. Diaz could not knowingly accept, the actual consequences of her plea, including the immigration consequences. Ms. Diaz qualified for a Section 1473.7(a)(1) vacatur to correct for the violation of her due process rights.³

Tien Van Duong's mental health disorders similarly prevented him from entering a knowing and voluntary plea as required under federal and California law. Mr. Duong is a Vietnamese refugee and survivor of child abuse who has long suffered from post-traumatic stress disorder (PTSD). Mr. Duong's PTSD interferes with his cognition, memory, and concentration, and impedes his ability to complete tasks requiring longitudinal planning and complex execution. At the time of his plea, Mr. Duong's top priority was remaining in the United States with his long-time partner and their infant child. But because of his mental health issues, Mr. Duong entered a plea without "sufficient awareness of the relevant circumstances

³ The facts and disposition of Juanita Diaz's case are described in a practice advisory on vacating convictions under Section 1473.7. See Andrew Wachtenheim & Rose Cahn, *Using and Defending California Penal Code Vacatures in Immigration Proceeding* (ILRC 2020).

and likely consequences,” *Brady v U.S.*, 397 U.S. 742, 748 (1970), including the immigration consequences of his potential plea: loss of his green card and a bar to virtually every defense to deportation. His plea was therefore not voluntary or knowing, and was entered in violation of Mr. Duong’s federal and state due process rights. A California court vacated Mr. Duong’s conviction under Section 1473.7(a)(1) to correct this legal error on a showing that Mr. Duong did not meaningfully understand, defend against, or knowingly accept the consequences of his plea.⁴

As these stories demonstrate, when a noncitizen defendant has a cognitive disability, that disability prevents a plea consistent with the requirements of due process. Section 1473.7(a)(1) corrects for this error by vacating convictions obtained through pleas that are not knowing or voluntary because the noncitizen did not “meaningfully understand” or “knowingly accept” the immigration consequences of the plea. *See* Cal. Penal Code 1473.7(a)(1).

⁴ The facts and disposition of Tien Van Duong’s case are alleged in the motion to vacate and supporting documents filed in the Superior Court of the State of California, County of Santa Clara and the court order vacating his conviction. *See* Def.’s Mot. to Vacate, *People v. Duong*, Nos. CC1224841, CC626074 (Cal. Super. Ct. March 3, 2020) (copy on file with counsel). *See also* Stipulation and Order, *People v. Duong*, Nos. CC1224841, CC626074 (Cal. Super Ct. Oct. 21, 2020) (copy on file with counsel).

2. A Community Member Who Cannot Understand a Plea Because of Inadequate Translation Cannot Meaningfully Understand, Defend Against, or Knowingly Accept the Immigration Consequences of the Plea.

Section 1473.7(a)(1) also vacates convictions when a limited-English-proficient noncitizen lacked necessary translation during a plea. When a noncitizen is denied necessary translation or interpretation, he cannot meaningfully understand or knowingly accept the immigration consequences of the plea, in violation of state and federal due process protections. Section 1473.7 corrects for this due process violation.

Noe Lopez's story illustrates how translation barriers can become legal errors in a criminal proceeding. Mr. Lopez cannot read or write in English, has limited English speaking abilities, and does not understand English legal terms. At the time of his conviction, Mr. Lopez had been living in the United States with his mother and two sisters for almost twenty years; remaining in the United States with his family was of paramount importance to Mr. Lopez. Despite these circumstances, Mr. Lopez's attorney spoke to him in English without an interpreter, and did not advise him of the immigration consequences of his plea: that he would be deported because of his plea and that his conviction would be a lifetime bar to obtaining lawful permanent status. Because his counsel failed to communicate with Mr. Lopez in a language he understood, Mr. Lopez could not comprehend and therefore, could not knowingly accept the immigration

consequences of his plea—a violation of state and federal due process requirements that he understand and knowingly accept the actual consequences of his plea. Section 1473.7(a)(1) corrected for this legal error by permitting the vacatur of Mr. Lopez’s conviction.⁵

3. A Community Member Who Is Unrepresented or Who Pleads Without Counsel Cannot Meaningfully Understand, Defend Against, or Knowingly Accept the Consequences of a Plea, Rendering the Plea Legally Invalid.

Section 1473.7(a)(1) also vacates convictions when the conviction is the result of a plea that is not voluntarily or intelligently made because the defendant was unrepresented by counsel. In many California counties, including Sacramento and Napa counties, indigent criminal defendants do not receive representation at the arraignment stage, even though they may plead guilty at that stage.⁶ When a noncitizen pleads guilty at arraignment without counsel, the only advisal the defendant receives related to immigration consequences is from the court under

⁵ The facts and disposition of Noe Lopez’s case are alleged in the motion to vacate and supporting documents filed in the Superior Court of the State of California, County of Sonoma and the court order vacating his conviction. *See* Def.’s Mot. to Vacate, *People v. Lopez*, No. SCR-638275 (Cal. Super. Ct. Feb. 14, 2018) (copy on file with counsel). *See also* Order Vacating J., *People v. Lopez*, No. SCR-638275 (Cal. Super. Ct. Feb. 22, 2018) (copy on file with counsel).

⁶ While it may be constitutionally permissible to plead guilty at the misdemeanor stage, California state law allows those pleas to be withdrawn within six months of entry of the judgement on a showing of good cause. *See* Cal. Penal Code § 1018. This strict time limit is often too short for noncitizen defendants to realize the immigration consequences of their conviction.

California Penal Code section 1016.5: “[i]f you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged *may* have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” Cal. Penal Code § 1016.5 (emphasis added). As this Court has recognized, such a standard and unspecific advisal is not sufficient to ensure a knowing and voluntary plea because it does not give the noncitizen defendant adequate notice regarding the “actual consequences of her plea.” *Rodriguez-Vega*, 797 F.3d at 790. The plea occurs in violation of due process because it is neither voluntary nor knowing. Section 1473.7 corrects for this error by granting vacatur upon a showing that a noncitizen did not “meaningfully understand” nor “knowingly accept” the immigration consequences of a plea. Cal. Penal Code § 1473.7(a)(1).

Felipe Sanchez did not have counsel at his proceeding. Twenty years ago, when he was a young adult, Mr. Sanchez was charged with indecent exposure under California Penal Code section 314.1 for urinating in public. Indecent exposure is a serious offense that requires *lifetime* sex offender registration and triggers severe immigration consequences. Still, Mr. Sanchez’s proceedings continued without counsel and without the required court advisal. Without the assistance of counsel, Mr. Sanchez did not understand the nature of the charge against him or the actual consequences it carried. He did not understand that when

he pled, he was admitting to having lewd intent (an element of the crime), which he did not have, or waiving his right to counsel. He also did not understand that the proposed disposition would result in a lifetime on the sex offender registry or that the conviction would trigger immigration removal and bar him from relief. Years later, assisted by competent counsel, Mr. Sanchez moved a California court to vacate his conviction because of two legal errors: the court's failure to provide the advisal required by California Penal Code section 1016.5 and its failure to ensure that Mr. Sanchez's plea was made voluntarily and intelligently with meaningful awareness of the actual consequences of his conviction, as required by due process and California state law.⁷

* * * * *

As these stories from California community members demonstrate, Section 1473.7(a)(1) vacatur correct for violations of a noncitizen defendant's due process rights. When their due process rights under federal or state law have been violated, noncitizens cannot meaningfully understand or knowingly accept the immigration consequences of their plea. That legal error then forms the basis of a Section

⁷ The facts of Felipe Sanchez's case are alleged in the motion to vacate and supporting documents filed in the Superior Court of the State of California, County of Santa Clara and the court order vacating his conviction. *See* Def.'s Mot. to Vacate, *People v. Sanchez*, No. CC115502, (Cal. Super. Ct. Jan. 23, 2019) (copy on file with counsel). *See also* Min. Order, *People v. Sanchez*, No. CC115502 (Cal. Super Ct. Feb. 14, 2019) (copy on file with counsel).

1473.7(a)(1) vacatur. Because the vacatur corrects for a legal error—as it always does under Section 1473.7—the vacated conviction is no longer a conviction for the purposes of immigration law. *See Adamiak*, 23 I. & N. Dec. at 879 (finding that vacatur to correct for legal error erases the conviction for the purposes of the INA).

II. Section 1473.7’s Structure Demonstrates That California Courts Must Always Find Legal Error Before Granting a Vacatur.

California courts must always find legal error—either corresponding to ineffective assistance or to due process—prior to granting a vacatur under Section 1473.7(a)(1). Every noncitizen moving to vacate a conviction under Section 1473.7(a)(1) must first establish that the underlying proceedings are legally invalid due to legal error, based on a noncitizen’s inability to “meaningfully understand, defend against, or knowingly accept” the immigration consequences of a plea. *See infra* Section I. Only after finding a legal error does a California court examine whether the legal error prejudiced the noncitizen: that is, whether, based on the equities, there is “a reasonable probability that the defendant would have rejected the plea if the defendant had correctly understood its actual or potential immigration consequences.” *Vivar*, 485 P.3d at 437-38 (citing *Lee*, 137 S. Ct. at 1966).

The Court should reject the Board’s attempt to conflate legal error and prejudice, which are two independent requirements of Section 1473.7(a)(1) vacatur. Only after meeting the first requirement—legal error—does a California

court determine whether the error was prejudicial or not. *See id.* at 437. The legal error requirement is a rigorous one, and noncitizens do not always prevail. *See People v. Perez*, 19 Cal. App. 5th 818, 829 (Ct. App. 2018) (upholding denial of a petition under Section 1473.7(a)(1) because “the record belies Perez’s contention that he did not meaningfully understand the immigration consequences of his plea.”). To substantiate legal error, noncitizens present detailed motions, legal arguments, and supporting exhibits; criminal courts may hold contested hearings as to legal error, considering testimony from expert and fact witnesses. Contrary to the BIA’s finding below, a showing of legal error is required for all Section 1473.7 vacatur. *See* A.R. 13 (finding that 1473.7 allows for vacatur solely to alleviate the immigration consequences of a conviction). Neither prejudice nor immigration hardships are alone sufficient for a California court to grant a Section 1473.7(a)(1) vacatur.

Jose Lopez Merino’s case demonstrates that, to obtain a vacatur under Section 1473.7(a)(1), a noncitizen must argue both legal error and prejudice. Mr. Lopez Merino’s motion for a vacatur under Section 1473.7 first recounted the independent ways in which Mr. Lopez Merino’s underlying proceedings were legally invalid, for failure of counsel to: (1) advise of the immigration consequences and (2) defend against those consequences. Second, the motion discussed the equities of Mr. Lopez Merino’s case to establish prejudice. Mr.

Lopez Merino argued that, but for the legal invalidities in his underlying criminal proceedings, he would have been aware of the immigration consequences of his plea, and may have rejected the plea. The court vacated Mr. Lopez Merino's conviction under Section 1473.7(a)(1) after finding that he suffered legal error and was prejudiced by that error.⁸

Jose Mejia's hearing exemplifies the two-step Section 1473.7(a)(1) process as well as the rigorous analysis that California courts' determination of legal error under that provision requires. Mr. Mejia was a lawful permanent resident at the time of his conviction for home invasion robbery. Prior to entering his plea, Mr. Mejia's attorney provided affirmative misadvice in violation of the Sixth Amendment right to effective counsel and California state law. Mr. Mejia alleged that his counsel provided him with categorically wrong advice: that, because of his status as a lawful permanent resident, he would not be deported. Mr. Mejia's Section 1473.7(a)(1) motion resulted in a contested hearing. At the hearing, the district attorney and defense counsel each presented a detailed oral argument, and Mr. Mejia and an expert witness both testified and were subject to cross

⁸ The facts and disposition of Jose Lopez Merino's case are alleged in the motion to vacate and supporting documents filed in the Superior Court of the State of California, County of Alameda and the court order vacating his conviction. *See* Def.'s Mot. to Vacate, *People v. Lopez Merino*, No. 150346 (Cal. Super. Ct. Dec. 23, 2019) (copy on file with counsel). Order, *People v. Lopez Merino*, No 150346 (Cal. Super. Ct. Sept 17, 2020) (copy on file with counsel).

examination. After considering the testimony and arguments from both sides, the state court judge proceeded to make a two-pronged finding on the record. First, the judge found that Mr. Mejia’s counsel’s affirmative misadvice about the immigration consequences of his plea constituted legal error. Only after making this threshold finding did the judge rule that Mr. Mejia had been prejudiced by the legal defect.⁹

Every Section 1473.7(a)(1) motion and hearing is predicated on a determination of legal error. Only after finding legal error does a California court consider the noncitizen’s equities, to decide whether the legal error prejudiced the noncitizen. This two-step process underscores how every vacatur under Section 1473.7 meets the requirements of *Pickering*; every vacatur is based on legal error—namely, a violation of federal or state constitutional or statutory law.

CONCLUSION

For the foregoing reasons, Amici urge the Court to grant Mr. Arias’s petition for review and reverse the decision of the Board of Immigration Appeals. Amici also urge the Court to hold that all vacaturs under Section 1473.7(a)(1) require a

⁹ The facts of Jose Mejia’s case and the California Superior Court’s findings are found in the partial transcript of Mr. Mejia’s motion hearing before the Superior Court of the State of California, County of Santa Cruz. *See* Partial Tr. of Mot. Hr’g, *People v. Mejia*, No. F20201 (Cal. Super. Ct. Jan. 14, 2021) (copy on file with counsel).

finding of legal error, and as such, vacates convictions for the purposes of immigration law.

Respectfully submitted,

Dated: July 1, 2022

/s/ Shanti Tharayil
Shanti Tharayil

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), and Ninth Circuit Rule 32-1, I certify that the attached opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 6515 words.

Dated: July 1, 2022

/s/ Shanti Tharayil
Shanti Tharayil

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System:

I hereby certify that I caused the foregoing, including an appendix, to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate ACMS and CM/ECF system on July 1, 2022.

I certify that all participants in the case are registered ACMS and CM/ECF users and that service will be accomplished by the appellate ACMS and CM/ECF system.

Executed this 1st day of July 2022 at Palo Alto, CA.

/s/ Shanti Tharayil
Shanti Tharayil

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