Nos. 16-71196; 21-631

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE ADALBERTO ARIAS JOVEL,

Petitioner,

v.

MERRICK B. GARLAND, Attorney General,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

Agency No. A092-142-072

AMICUS BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

For years, noncitizen criminal defendants in California routinely entered pleas without understanding the potentially serious immigration consequences of those decisions, including removal from the United States. To remedy this problem, in 2016 the California Legislature adopted California Penal Code Section 1473.7 (Section 1473.7), which allows noncitizen defendants to obtain vacatur of their convictions when they can demonstrate that there was a "prejudicial error damaging [their] ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." Cal. Penal Code § 1473.7(a)(1). Although such errors make convictions "legally invalid" under California law, *id.*, in the decision below the Board of Immigration Appeals (BIA) held that convictions vacated pursuant to this provision still count as "convictions" for purposes of federal immigration law.

This ruling—which runs contrary to prior BIA rulings and the conclusion of other circuits in analogous circumstances—is incorrect, and this Court should grant the petition for review and reverse it. When a judge grants a motion to vacate a conviction pursuant to Section 1473.7(a)(1), she does so to remedy an error in the criminal proceeding that rendered the

conviction "legally invalid." Convictions vacated pursuant to this statute have no effect under California law. The BIA erred in concluding that federal authorities may nonetheless rely on convictions vacated pursuant to Section 1473.7(a)(1) for immigration purposes.

The State of California has a significant interest in the proper interpretation and application of this provision of California law. Accordingly, the State, by and through its Attorney General Rob Bonta, submits this brief as amicus curiae to provide important history and background regarding Section 1473.7, and to explain why the BIA's decision is inconsistent with both the statute's plain language and controlling precedent from the California Supreme Court to which the BIA improperly failed to defer.

ARGUMENT

I. THE LEGISLATURE ENACTED SECTION 1473.7(A)(1) TO ALLOW NONCITIZEN DEFENDANTS WHO ARE NO LONGER IN STATE CUSTODY TO SEEK RELIEF FROM LEGALLY INVALID PLEAS

In California, it has long been the case that a defendant's understanding (or lack of understanding) of a guilty plea's potential immigration consequences is germane to whether that plea, and its resultant conviction, is legally valid. In 2009, however, the California Supreme Court limited the availability of relief to noncitizens seeking a remedy for the consequences of

pleas that they had entered without understanding the immigration consequences that would result. In response to those decisions, the Legislature enacted Section 1473.7, which provides an avenue for defendants who entered invalid guilty pleas due to their lack of understanding of the plea's immigration consequences to, under certain conditions, vacate their convictions.

A. California Law Has Long Recognized that a Noncitizen Defendant's Understanding of a Plea's Immigration Consequences Is Relevant to the Legal Validity of the Plea and Resultant Conviction

For decades, California courts have recognized that a noncitizen defendant's ignorance of a plea's potential immigration consequences calls into question the validity of that plea and the conviction that results from it. Indeed, in 1974 the California Supreme Court held that a trial court properly concluded that "justice required the withdrawal" of a plea that the defendant had entered "without knowledge of or reason to suspect" the potential immigration consequences that would follow. *People v. Superior Ct.* (*Giron*), 11 Cal. 3d 793, 798 (1974). And in 2001 it held that "affirmative misadvice" about a plea's potential immigration consequences may

constitute ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. *In re Resendiz*, 25 Cal. 4th 230, 240 (2001).[1]

The California Legislature has also crafted safeguards aimed at equipping noncitizen defendants with a sufficient understanding of potential immigration consequences to enter legally sound pleas. In 1977, it enacted Penal Code Section 1016.5(a), which requires trial courts to advise all defendants that, if they are not a citizen, conviction of the charged offense may have immigration consequences. If a noncitizen defendant pleads guilty after a trial court fails to provide that advice, and can show a risk of suffering immigration consequences as a result of the plea, the California Supreme Court has held that vacatur of the conviction is required. *People v. Martinez*, 57 Cal. 4th 555, 558 (2013). And it has likewise held that defendants who do receive a proper "standard advisement" under Section 1016.5(a) are not categorically barred from later moving to withdraw their plea on the grounds that they entered it while ignorant of its immigration consequences. *People v. Patterson*, 2 Cal. 5th 885, 889 (2017). In 2015, the Legislature also imposed upon all defense counsel an obligation to "provide

[1] The United States Supreme Court would later extend that rule in *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010), holding that the Sixth Amendment creates an affirmative obligation for defense counsel to "inform her client whether his plea carries a risk of deportation."

accurate and affirmative advice about the immigration consequences of a proposed disposition," and, "consistent with professional standards, [to] defend against those consequences." Cal. Penal Code § 1016.3(a).

B. The Supreme Court of California Limited Avenues for Noncitizen Defendants to Obtain Relief from Pleas Entered into Without Understanding Immigration Consequences

Despite the California Legislature's efforts to ensure that criminal defendants enter into plea agreements with accurate information about the potential immigration consequences of those pleas, and the court rulings discussed above applying those laws, it has not consistently been the case that California defendants could obtain relief from pleas entered into following a violation of these rights. In two companion cases from 2009, the California Supreme Court precluded persons no longer in state custody from seeking to vacate their convictions on grounds that they did not understand the immigration consequences of their pleas, even if those convictions continued to have immigration consequences. These rulings led directly to the Legislature's adoption of Section 1473.7.

In *People v. Villa*, 45 Cal. 4th 1063, 1067–68 (2009), the court considered whether state habeas relief was available to a noncitizen who was taken into federal immigration custody in 2005 on the basis of a 1989 state

conviction—which, he alleged, was the product of his counsel's ineffective immigration advice. The court reasoned that federal immigration authorities' decision to "resurrect" Villa's 1989 conviction "and use it to form the basis of a new and collateral consequence" did "not—without more—convert his detention by federal immigration authorities in Alabama into some late-blossoming form of custody for which the State of California is responsible." *Id.* at 1072. Thus, the court held that Villa could not avail himself of habeas relief, as he was "in neither actual nor constructive state custody." *Id.* at 1077.

In *People v. Kim*, 45 Cal. 4th 1078, 1096 (2009), the Court considered whether noncitizens who were no longer in custody could seek to vacate their convictions through a writ of *coram nobis* based on allegations that counsel rendered ineffective assistance by either failing to investigate the adverse immigration consequences of a plea or by failing to seek a plea agreement that would have avoided such consequences.[2] The court concluded that, under those circumstances, the petitioner could not obtain *coram nobis* relief. *Id.* at 1108–09. This is because, to obtain a writ of *coram*

[2] In *Patterson* and *Giron*, the defendants sought to withdraw their pleas under Penal Code Section 1018. The petitioners in *Villa* and *Kim*, however, could not have done so, because Section 1018 permits defendants to move to withdraw a plea only *before* the entry of judgment.

nobis, a petitioner "must 'show that some fact existed which, without any fault or negligence on his part, was not presented to the court . . . and which if presented would have prevented the rendition of the judgment.'" *Id.* at 1093 (quoting *People v. Shipman*, 62 Cal. 2d 226, 230 (1965)). However, the court held, Kim's "alleged new facts"—that he did not understand the immigration consequences of his conviction—"sp[oke] merely to the *legal effect* of his guilty plea and thus [were] not grounds for relief on *coram nobis*." *Id.* at 1102. The court likewise noted that it has "long been the rule" that "a claim of ineffective assistance of counsel, which relates more to a mistake of law than of fact, is an inappropriate ground for relief on *coram nobis*[.]" *Id.* at 1104 (collecting cases). Claims of that sort, the court explained, fell "outside the traditionally narrow limits of the writ of error *coram nobis* as that remedy has been defined in California." *Id.* But the court also noted that the California Legislature had been "active in providing statutory remedies when existing remedies proved ineffective," and observed that the "the Legislature remains free to enact further statutory remedies for those in defendant's position." *Id.* at 1107.

C. The California Legislature Enacted Section 1473.7(a)(1) to Provide Relief Where Noncitizen Defendants Demonstrate Their Convictions Were Legally Invalid

Several years after these decisions, the Legislature accepted the California Supreme Court's invitation in *Kim* and enacted Penal Code Section 1473.7 in order to "create an explicit right for a person no longer imprisoned or restrained" to seek the vacatur of "a conviction or sentence based on 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[.]" A.B. 813, 2015-16 Reg. Sess. (Cal. 2016) (emphasis added). The committee report highlighted the California Supreme Court's decisions in *Villa* and *Kim*, and stressed that the bill "creates a new mechanism for post-conviction relief for a person who is no longer in actual or constructive custody." Cal. Comm. Rep., A.B. 813, 2015-16 Reg. Sess., at 4-5, 7 (Apr. 20, 2015).

Today, as amended, Section 1473.7 provides that a "person who is no longer in criminal custody may file a motion to vacate a conviction or sentence" for one of three reasons:

> (1) 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 conviction or sentence.

(2) Newly 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.

(3) A conviction or sentence was sought, obtained, or imposed on the basis of race, ethnicity, or national origin in violation of [Penal Code] subdivision (a) of Section 745.

Cal. Penal Code § 1473.7(a).

II. VACATURS UNDER SECTION 1473.7(A)(1) MAY ONLY BE GRANTED DUE TO SUBSTANTIVE OR PROCEDURAL DEFECTS THAT AFFECT THE VALIDITY OF THE CRIMINAL PROCESS

A. Federal Immigration Law Only Recognizes State Convictions as Vacated When Courts Do So Due to "Procedural or Substantive Defects"

When Congress first passed the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* (INA), the statute lacked a definition of the term "conviction," and immigration authorities relied on state law in determining whether an immigrant was "convicted." *See Pinho v. Gonzales*, 432 F.3d 193, 204–05 (3d Cir. 2005). In its 1996 amendments to the INA, Congress established a statutory definition of the term "conviction," which would apply in immigration proceedings regardless of the State in which the conviction occurred:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. § 1101(a)(48)(A).

While the INA defines "conviction" as the term is used within the statute, it does not address how convictions that are later vacated or expunged should be treated for federal immigration purposes. But this Court has held that a vacated conviction cannot give rise to immigration consequences under the INA if the conviction was "vacated because of a 'procedural or substantive defect.'" *Nath v. Gonzales*, 467 F.3d 1185, 1189 (9th Cir. 2006) (quoting *In re Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003)). On the other hand, convictions vacated "for reasons 'unrelated to the merits of the underlying criminal proceedings'"—that is, "for equitable, rehabilitation, or immigration hardship reasons"—continue to constitute "convictions" for federal immigration purposes. *Id.*

Here, the BIA held that Section 1473.7(a)(1) allows California courts to vacate convictions for reasons unrelated to the merits of the underlying criminal proceeding, and that the court did so as to Petitioner's conviction.[3] AR 12. In the BIA's view, under Section 1473.7(a)(1), vacatur "may be

[3] Section 1473.7 has undergone various amendments since 2019, when Petitioner's motion for vacatur was granted. None of those amendments, however, are material to the legal question presented here.

granted solely to allow movants to avoid the immigration consequences of their state convictions or sentences." AR 12. That conclusion is inconsistent with the text of the statute itself, how the statute has been interpreted by the California Supreme Court, the relationship of the statute to other aspects of California law, and case law on analogous provisions allowing vacatur.

B. The Plain Language of Section 1473.7 Demonstrates that the Statute is Intended to Remedy a Procedural or Substantive Defect

The BIA's assertion that vacatur under Section 1473.7(a)(1) "may be granted solely to allow movants to avoid the immigration consequences of their state convictions or sentences," AR 12, is directly contradicted by the plain text of the statute. Such vacaturs are *not* authorized wherever a conviction results in "immigration hardship," *Nath*, 467 F.3d at 1189. Rather, a court may only grant vacatur under the statute if a movant demonstrates that there was 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 conviction or sentence*." Cal. Penal Code § 1473.7(a)(1) (emphasis added).

The BIA conflates and confuses two concepts. Forestalling immigration consequences may be the subjective reason for which many noncitizens seek

vacatur under Section 1473.7(a)(1), but it is not a *basis* for a judge to grant that relief.[4]

Section 1473.7(a)(1) provides relief similar to that available to defendants who can make out a claim of ineffective assistance of counsel because their defense counsel failed to adequately advise them of the immigration consequences of their plea. *See supra* 3. And both the BIA and federal courts have recognized that when a conviction is vacated for that reason, it can no longer serve as a predicate for removal under federal immigration laws. *See infra* 18.

The BIA relied on the fact that Section 1473.7 refers to certain specific immigration consequences. For example, the statute provides that a motion will be untimely if not "filed with reasonable diligence" after the petitioner "receives a notice to appear in immigration court." AR 10 (quoting Cal. Penal Code § 1473.7(b)(2)(A), (B)). But, contrary to the BIA's conclusion, this subsection of Section 1473.7 does not "demonstrate[] that vacaturs under subdivision (a)(l) of Section 1473.7 may be granted solely to allow

[4] Note, however, that this needn't necessarily be a movant's principal motivation. A movant could be primarily interested, for example, in the restoration of her civil rights, or in eliminating a predicate conviction to avoid the Armed Career Criminal Act's mandatory 15-year-minimum sentence, *see* 8 U.S.C. § 924(a)(20), (e)(1).

movants to avoid the immigration consequences of their state convictions or sentences." AR 10. Instead, it *limits* the availability of relief: motions filed under Section 1473.7(a)(1) are "untimely" if they are not filed within a certain period. Cal. Penal Code § 1473.7(b)(2). The BIA's reliance on other statutory references, AR 9-10, suffers from the same fundamental problem: no part of the statute changes the legal requirement that a petitioner must make a showing of prejudicial error.

Moreover, reviewing the other bases for vacatur under Section 1473.7 shows that the statute as a whole is aimed at remedying "procedural or substantive defect[s]," *Nath*, 467 F.3d at 1189, resulting in unsound convictions. Under Section 1473.7(a)(2), a defendant may secure vacatur of a conviction upon the production of "newly discovered evidence of actual innocence." And, under Section 1473.7(a)(3), a defendant may secure vacatur if they can show that a conviction or sentence was "sought, obtained, or imposed on the basis of race, ethnicity, or national origin" in violation of another provision of California law, Penal Code Section 745(a). These types of errors call the validity of the convictions into question: even the BIA in this case recognized that a showing that a person is actually innocent is a "substantive" defect in the proceeding. *See* AR 10 at n.10. And evidence showing that a defendant was convicted on the basis of race, ethnicity, or

national origin—which can be shown by, for example, documenting that a judge, attorney, law enforcement officer, expert witness, or juror "used racially discriminatory language"—similarly calls the validity of the conviction into question. *Cf. Foster v. Chatman*, 578 U.S. 488, 499 (2016) ("The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'") (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). There is no reason to interpret Section 1473.7(a)(1) as inconsistent with (a)(2) and (a)(3) in this respect.

C. The BIA's Interpretation of Section 1473.7(a)(1) Is at Odds with the California Supreme Court's Interpretation

It is fundamental that "[w]hen interpreting state law, federal courts are bound by decisions of the state's highest court." *Ariz. Elec. Power Coop. v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995) (citing *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990)). Here, the BIA directly contradicts *People v. Vivar*, 11 Cal. 5th 510 (2021), a recent decision by the California Supreme Court that not only holds that prejudicial error must be shown in order to obtain relief under Section 1473.7, but discusses precisely how such a showing can be made.[5]

[5] While the BIA is not entitled to deference in its views on the proper interpretation of state law, it is noteworthy that the BIA's decision in this

Relying on California and U.S. Supreme Court rulings explaining what "prejudice" means in similar contexts, the court in *Vivar* held that, to establish prejudice under Section 1437.7(a)(1), a defendant must show that, "in the absence of the error regarding immigration consequences, it's reasonably probable [they] would not have entered the plea." *Id.* at 534.[6] The court made clear that this inquiry is a backward-looking one: it asks "what

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case also conflicts with several other BIA decisions, each of which has held that when a conviction is vacated under Section 1473.7, it is because of substantive or procedural defects in the conviction. *See Elpidio Mendoza Sotelo*, AXXX-XX8-491, 2019 WL 8197756, at *2 (BIA Dec. 23, 2019) ("[W]hile the state court's order does not indicate the specific reason for the state court's action, a vacatur under [Section] 1473.7 is available only in cases of legal invalidity or actual innocence."); *Ernesto Rios Rodriguez*, AXXX-XX4-738, 2019 WL 7859271, at *2 (BIA Dec. 2, 2019); *Arutyun Demirchyan*, AXXX-XX4-622, 2019 WL 7168795, at *2 (BIA Oct. 31, 2019); *Albert Limon Castro*, AXXX-XX0-288, 2018 WL 8333468, at *2 (BIA Dec. 28, 2018); *Jose Pablo Hernandez Valdez*, AXXX XX2 353, 2018 WL 4611530, at *1 (BIA July 18, 2018); *Oscar George Thetford*, AXXX XX9 837, 2017 WL 4418352, at *1 (BIA July 17, 2017); *Jose Jesus Arredondo Gomez*, AXXX XX8 774, 2018 WL 3007175, at *1 (BIA Apr. 19, 2018) (holding that convictions vacated under Section 1473.7 "may not be considered convictions for immigration purposes"); *see also Leni Margarita Saco Cotito*, AXXX-XX9-284, 2020 WL 1169206, at *1 (BIA Jan. 6, 2020) ("[U]nlike [Section] 1473.7, California Penal Code § 1203.4 is a rehabilitative statute, thus an expungement of conviction under that provision has no impact on the existence of 'conviction' for Federal immigration purposes.").

[6] *See also id.* at 528–529 (listing other contexts in which courts conduct a similar analysis, including to make out a claim of ineffective assistance of counsel under both California and federal law).

the defendant would have done" at the time of the conviction had the defendant understood the immigration consequences. *Id.* at 528. And, to secure vacatur under Section 1437.7(a)(1), defendants must introduce "contemporaneous evidence" from *the time of the conviction*. *Id*. at 529–530.

Vivar also identified a (non-exhaustive) list of factors that courts can look to in determining whether there is a reasonable probability that a defendant would have rejected a plea had they meaningfully understood its immigration consequences, including "the defendant's ties to the United States, the importance the defendant placed on avoiding deportation, the defendant's priorities in seeking a plea bargain, and whether the defendant had reason to believe an immigration-neutral negotiated disposition was possible." *Id.* at 530 (citing *Lee v. United States*, 137 S. Ct. 1958, 1967–69 (2017); *People v. Martinez*, 57 Cal. 4th 555, 568 (2013), *as modified on denial of reh'g* (Sept. 11, 2013)).[7] But each of these items of "objective

[7] Although evidence that a defendant has been in the United States for a long time at the time of the plea can weigh in favor of a conclusion that a defendant would have rejected a plea deal had they known of its immigration consequences, that does not mean that the statute is directed at alleviating "immigration hardship[s]." *Nath*, 467 F.3d at 1189. Instead, it reflects the common-sense conclusion that a defendant who has been in this country for a long time is more likely to reject a plea that could result in his removal, even if his chances of prevailing at trial are low. As the U.S. Supreme Court has explained, a defendant with especially "strong

evidence" is only legally relevant to corroborate the defendant's assertion about what they would have done *at the time of the plea*. *Id.* They do not provide independent grounds for vacatur. Like the error analysis that Section 1437.7(a)(1) directs, the prejudice inquiry makes clear that a defendant cannot make out a claim for relief simply because the conviction will result in an "immigration hardship." *Nath*, 467 F.3d at 1189.

D. The BIA's Interpretation Is Undercut by the Broad, Non-Immigration-Related Collateral Effects of Section 1473.7(a)(1) Vacaturs

While the BIA suggests that Section 1473.7 vacaturs are intended only to address immigration consequences, California itself recognizes that, once a conviction has been vacated pursuant to Section 1473.7, it can no longer serve as a predicate for *any* collateral consequences that would otherwise be imposed under state law, including some that significantly impact defendants' rights and obligations. *See, e.g.*, Cal. Pen. Code §§ 29800(a)(1), 290(c).

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connections to the United States" and relatively few to his country of origin is more likely to try to avoid a conviction that will result in his removal. *Lee*, 137 S. Ct. at 1968. For these defendants, avoiding removal may be "*the* determinative factor" when deciding whether to accept a plea; and many may decide to "reject[] any plea leading to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial." *Id.* at 1967.

This Court has found the extent to which California's expungement laws address collateral state-law consequences relevant to the question of whether state convictions are still cognizable for federal immigration law purposes. *Prado v. Barr*, 949 F.3d 438, 442 (9th Cir. 2020) (crimes reclassified from felonies to misdemeanors by a California proposition were still felonies for purposes of the INA in part because the Act "did not completely eliminate the consequences" of the conviction "even as a matter of state law"). Thus, the BIA's assertion that avoiding immigration consequences is the sole purpose of Section 1473.7 vacaturs is incorrect.

E. Federal Courts Treat Similar State-Court Errors as "Substantive or Procedural Defects" for INA Purposes

The fallacy of the BIA's interpretation is further shown by decisions from federal courts that errors similar to those addressed by Section 1473.7(a)(1) are "procedural or substantive defect[s]" for purposes of federal immigration law. *See Nath*, 467 F.3d at 1189. For example, courts have repeatedly held that ineffective assistance of counsel is a substantive or procedural defect, and, accordingly, that convictions vacated on this ground are no longer "convictions" under the INA. *Pinho v. Gonzales*, 432 F.3d 193, 211-13 (3d Cir. 2005); *Sandoval v. INS*, 240 F.3d 577, 583 (7th Cir. 2001); *Ali v. Ashcroft*, 395 F.3d 722, 729 (7th Cir. 2005).

F. The BIA's Interpretation of Section 1473.7(a)(1) Fails to Accord Proper Respect to California State-Court Decisions

The BIA, of course, applies federal law and federal standards when making removal decisions. But here, the federal standard established in *Pickering* and *Nath* requires an evaluation of the *reason* the conviction was vacated. And the permissible reasons for vacatur under Section 1473.7 are a matter of state law. But instead of looking at the plain text of the statute and the California Supreme Court's interpretation of Section 1473.7 in *Vivar*, the BIA conducted its own independent statutory interpretation of the meaning of Section 1473.7. This was error.

The BIA's assertion that California courts may *and do* grant vacatur motions under Section 1473.7(a)(1) solely to thwart immigration consequences amounts to an effort to attribute to state court judges motives that are not only impermissible but at odds with the actual state-court rulings themselves. "[I]t is far from clear that [the BIA] may *rewrite* state-court rulings as to the legal basis for those orders," *Pinho*, 432 F.3d at 213, particularly where, as "an administrative agency, [it] is not competent to inquire into the validity of state criminal convictions." *Contreras v. Schiltgen*, 122 F.3d 30, 32 (9th Cir. 1997), *aff'd on add'l grounds*, 151 F.3d

906 (9th Cir. 1998) (citing *De la Cruz v. INS*, 951 F.2d 226, 228 (9th Cir. 1991); *Ocon-Perez v. INS*, 550 F.2d 1153, 1154 (9th Cir. 1977).

In *Pinho v. Gonzales*, the Third Circuit faced a situation similar to the one now before the Court, in which the BIA used the definition of "conviction" in the INA as a license to "arrogate to itself the power to find hidden reasons lurking beneath the surface of the rulings of state courts." 432 F.3d at 213. The Third Circuit decried the BIA's interpretation as not "in keeping with longstanding principles of federal respect for state decisions as to the meaning of state law." *Id*. at 212. It explained that it would "not accept an interpretation of the Immigration and Nationality Act that permits, let alone requires, speculation by federal agencies about the secret motives of state judges and prosecutors." *Id.* at 214–15. This Court should also not accept such an interpretation, and should instead require that the BIA demonstrate the respect that it "owe[s] the States and the States' procedural rules." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

Here, in concluding that relief under Section 1473.7 is granted for reasons "unrelated to the merits of the underlying criminal proceedings," *Nath*, 467 F.3d at 1189 (quoting *Pickering*, 23 I & N, Dec. at 624), the BIA reviewed the statute's legislative history and provided its own independent interpretation. AR 9. But the subjective motivations of the Legislature,

whatever they may have been, are not cause to disregard the text of Section 1473.7, both on its face and as interpreted by the California Supreme Court. *See First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1278 (9th Cir. 2017) (holding that it would "not be dispositive" to establish that a legislature "had an illicit motive in adopting" legislation, "because '[t]he Supreme Court has held unequivocally that it will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive'" (quoting *Menotti v. City of Seattle*, 409 F.3d 1113, 1130 n.29 (9th Cir. 2005)) (alteration in original).

CONCLUSION

The petition for review should be granted.

Dated: July 5, 2022

Respectfully submitted,

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STATEMENT OF RELATED CASES

Amicus curiae is not aware of any related cases, as defined by Ninth Circuit Rule 28-2.6, that are currently pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 29(a)(5), and 32(a), because it uses a proportionately spaced Times New Roman font, has a typeface of 14 points, and contains 4,943 words, not counting those items excluded by Rule 32(f).

Dated: July 5, 2022

/s/ James E. Richardson
JAMES E. RICHARDSON

CERTIFICATE OF SERVICE

I certify that on July 5, 2022, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 5, 2022

/s/ James E. Richardson
JAMES E. RICHARDSON