Case Nos. 16-71196 and 21-631

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE ADALBERTO ARIAS JOVEL,

Petitioner,

vs.

MERRICK GARLAND, ATTORNEY GENERAL,
DEPARTMENT OF JUSTICE,

Respondent.

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

BRIEF OF AMICI CURIAE FORMER IMMIGRATION JUDGES AND BOARD OF IMMIGRATION APPEALS MEMBERS IN SUPPORT OF PETITIONER

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BRIEF FOR FORMER IMMIGRATION JUDGES AND BOARD OF IMMIGRATION APPEALS MEMBERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

This brief is submitted on behalf of the following former immigration judges (IJs) and former Board of Immigration Appeals (BIA) members: Hon. Terry Bain; Hon. Sarah Burr; Hon. Esmeralda Cabrera; Hon. Jeffrey Chase; Hon. Bruce Einhorn; Hon. Cecelia Espenoza; Hon. Noel Ferris; Hon. James Fujimoto; Hon. Jennie Giambastiani; Hon. John Gossart; Hon. Alberto Gonzalez; Hon. Paul Grussendorf; Hon. Miriam Hayward; Hon. Charles Honeyman; Hon. Rebecca Jamil; Hon. William Joyce; Hon. Carol King; Hon. Elizabeth Lamb; Hon. Dana Leigh Marks; Hon. Margaret McManus; Hon. Charles Pazar; Hon. Laura Ramirez; Hon. Lory Rosenberg; Hon. Susan Roy; Hon. Patricia Sheppard; Hon. Ilyce Shugall; Hon. Helen Sichel; Hon. Andrea Sloan; and Hon. Polly Webber.[1]

INTEREST OF AMICI CURIAE

Amici curiae are former IJs and BIA members. Amici have an interest in this case based on their many years devoted to the fair and efficient administration of the immigration laws of the United States. Amici collectively presided over thousands of immigration cases and appeals, allowing them to provide this Court

[1] Both parties have consented to the filing of this brief. No counsel for any party authored this brief, in whole or in part. No one contributed money intended to fund preparation and submission of this brief.

with the unique perspective of those who have sat on the immigration bench. Based on their experience, amici are concerned with the government's interpretation of California Penal Code section 1473.7(a)(1).[2] The interpretation, and the underlying BIA decision adopting it, is contrary to established precedent, and is neither administrable nor in the best interests of litigants or the overburdened immigration courts.

SUMMARY OF ARGUMENT

A criminal conviction vacated due to a substantive or procedural defect does not qualify as a "conviction" establishing a noncitizen's removability under the Immigration and Nationality Act (INA). By the statute's plain language, vacatur under section 1473.7(a)(1) conclusively establishes that the underlying conviction rested on a substantive or procedural defect: It allows people no longer in criminal custody to seek vacatur of convictions that were "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."

Even though a California court vacated the conviction of petitioner Jose Adalberto Arias Jovel under section 1473.7(a)(1), the BIA declined to sua sponte

[2] Further statutory references are to the California Penal Code unless otherwise indicated.

reopen Mr. Arias' removal proceedings because it held that, as a noncitizen, Mr. Arias had the burden to show that his conviction under section 1473.7(a)(1) was vacated on the merits, and Mr. Arias failed to meet that burden. If affirmed, the BIA's holding creates several problems.

First, the holding requires IJs to second-guess a state court's determination under section 1473.7(a)(1), despite the statute allowing vacatur only for prejudicial defects. The plain language of section 1473.7(a)(1) requires "prejudicial error" that renders the conviction "legally invalid," and IJs should accept that the state court *must have* vacated the conviction due to a substantive or procedural error of law. Precedent requires IJs to apply the INA to a section 1473.7(a)(1) vacatur without second-guessing the state court's ruling.

Second, *even if* a section 1473.7(a)(1) vacatur doesn't conclusively establish a substantive or procedural defect, the burden is *not* on noncitizens like Mr. Arias to demonstrate their convictions were vacated on the merits. IJs are bound by Ninth Circuit precedent, which holds that the government bears the burden of proving whether a vacated conviction can still form the basis for removal. To shift the burden of proof to noncitizens (who do not have a constitutional right to counsel, may be detained, and often have limited English proficiency) is contrary to the law and will inevitably increase the likelihood of due process violations.

Third, the government's interpretation of section 1473.7(a)(1) will exacerbate the growing backlog of immigration cases and the enormous pressure that IJs face to eliminate the backlog. Given the severe time and resource constraints applied to the immigration court, deviating from the established law governing vacated convictions will greatly hinder the fair and efficient administration of immigration proceedings.

ARGUMENT

I. AN IJ'S ROLE IS TO APPLY THE INA TO THE VACATUR OF A STATE CRIMINAL CONVICTION UNDER SECTION 1473.7(a)(1), NOT TO REEVALUATE OR QUESTION THE VALIDITY OF THE STATE COURT RULING.

"[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 removability" or denial of immigration relief. *Nath v. Gonzales*, 467 F.3d 1185, 1189 (9th Cir. 2006) (quotations omitted); *accord Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006). Section 1473.7(a)(1) allows people no longer in criminal custody to seek vacatur of convictions that are "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."

Despite this unambiguous statutory language, the government contends that a vacatur under section 1473.7(a)(1) does not conclusively establish a substantive or procedural defect in the underlying criminal proceeding. The government's position is contrary to both Ninth Circuit and BIA precedent because it effectively requires IJs to ignore a state criminal court's finding of "prejudicial error" under section 1473.7(a)(1) and do an independent analysis under state criminal law as to the validity of the vacatur.

A. The plain language of section 1473.7(a)(1) requires a finding of "prejudicial error" to vacate a conviction, and an IJ must accept that a state court made that finding when determining whether a conviction can trigger a noncitizen's removal under the INA.

An IJ's role when analyzing the complex area of the intersection of criminal and immigration law is to assess the impact a criminal conviction has on a noncitizen's removability and eligibility for relief. IJs must read and understand state criminal codes, but are not permitted to second-guess state court decisions. Indeed, it would be unprecedented and unwise to require IJs to look behind a state court conviction vacatur to establish removability.

An IJ determines whether a vacated conviction can form the basis for removal by establishing "whether the conviction was quashed on the basis of a [substantive or procedural] defect in the underlying criminal proceedings." *Pickering,* 23 I&N Dec. at 625. To assess why a state court vacated a noncitizen's conviction, the IJ looks at the plain language of the vacatur statute and order. *See id*. "[T]he inquiry must focus on the state court's rationale for vacating the conviction," *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011), and the IJ may not "reevaluat[e] or otherwise question[] the validity of the state-court judgment." *Matter of Thomas and Thompson*, 27 I&N Dec. 674, 686 (A.G. 2019).

Here, the vacatur statute is clear: For a state court to vacate a conviction under section 1473.7(a)(1), there must be "prejudicial error" that renders the conviction "legally invalid." Any conviction vacated under section 1473.7(a)(1) is necessarily vacated because of a procedural or substantive defect, isn't considered a "conviction" for immigration purposes, and cannot serve as the basis for a noncitizen's removal. *Nath*, 467 F.3d at 1189; *Pickering*, 23 I&N Dec. at 624; *see* Appellant's Br. 15, 23-24.

The inquiry should end here, as an IJ must credit a state court's determination under section 1473.7(a)(1). *See Matter of Thomas and Thompson*, 27 I&N Dec. at 686; *Saleh v. Gonzales*, 495 F.3d 17, 26 (2d Cir. 2007) ("[T]he BIA is simply interpreting how to apply [respondent]'s vacated State

conviction . . . to the INA and is not refusing to recognize or relitigating the validity of [respondent]'s California state conviction. The full faith and credit statute is not thereby violated.").

B. It is not an IJ's role to wade into the intricacies of state criminal law to question the validity of a state court ruling.

The government's position requires IJs to look beyond the vacatur statute in order to independently assess whether noncitizens have demonstrated that their conviction was vacated on the merits. However, because section 1473.7(a)(1) *already requires* state courts to determine whether a substantive or procedural defect in the underlying proceedings rendered the conviction "legally invalid" in order to vacate the conviction, IJs need not make the same determination. In fact, the Attorney General warned that, when applying *Pickering*, IJs should not reevaluate or question "the validity of the state-court judgment." *Matter of Thomas and Thompson*, 27 I&N Dec. at 685-86 (noting that "immigration judges should not need to wade into the intricacies of state criminal law in applying [*Pickering*]'s rule"). The government's position contravenes both *Pickering* and *Matter of Thomas and Thompson*.

Numerous courts have also held that "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) (citing *De la Cruz v. INS*, 951 F.2d 226,

228 (9th Cir. 1991) and *Ocon-Perez v. INS*, 550 F.2d 1153, 1154 (9th Cir. 1977)). That "is the reason behind [the] well-established rule that criminal convictions may not be collaterally attacked in deportation proceedings themselves." *Contreras,* 122 F.3d at 32; *see also Pinho v. Gonzales*, 432 F.3d 193, 213 (3d Cir. 2005) (holding that the government may not "arrogate to itself the power to find hidden reasons lurking beneath the surface of the rulings of state courts").

A similar rationale lies behind the well-known categorical approach. To determine whether a criminal conviction triggers a ground for removal, "a court does not consider the facts of an individual's crime as he actually committed it. Instead, a court asks only whether an individual's crime of conviction necessarily—or categorically—triggers a particular consequence under federal law." *Pereida v. Wilkinson*, 141 S. Ct. 754, 762 (2021). "Because Congress predicated deportation 'on convictions, not conduct,' the [categorical] approach looks to the statutory definition of the offense of conviction, not to the particulars of a [noncitizen]'s behavior." *Mellouli v. Lynch*, 575 U.S. 798, 805 (2015).

When applying the categorical approach, IJs consider the conviction itself, not the facts of the crime, because a state criminal court has already determined that under the facts of the crime, the noncitizen has a conviction. The IJ then applies the INA to the conviction to determine removability. It is unnecessary—indeed, improper—for IJs to go behind the state court judgment or wade into the

intricacies of state criminal law by examining the particular facts of the crime again.

Similarly, when determining whether a vacated conviction can still support removal, IJs must look at the vacatur itself, not the facts of the conviction. IJs need only determine whether a state court vacatur "triggers a particular consequence under federal law." *See Pereida*, 141 S. Ct. at 762. If the vacatur was under section 1473.7(a)(1), a state criminal court has already looked at the facts of the conviction and determined that it is "legally invalid due to prejudicial error." *See* § 1473.7(a)(1). The IJ then applies the INA to the vacatur. It is equally unnecessary and improper for IJs to go behind the state court's vacatur order to determine whether the state court really did find prejudicial error. *See Bueno v. Hallahan*, 988 F.2d 86, 88 (9th Cir. 1993) (per curiam) (federal court "must defer to the state court's interpretation of state law"); *cf. Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1014 (9th Cir. 2006) (federal courts "do not defer to BIA interpretations of state law").[3]

To uphold the validity of state-court judgments, the reading of section 1473.7(a)(1) must function the same way as the categorical approach. In both

[3] A noncitizen's motive in seeking to vacate a conviction is also irrelevant. *Reyes-Torres*, 645 F.3d at 1077.

instances, an IJ should take the state criminal statute, and a state court's findings under the statute, at face value.

II. EVEN IF A SECTION 1473.7(a)(1) VACATUR DOESN'T CONCLUSIVELY ESTABLISH A SUBSTANTIVE OR PROCEDURAL DEFECT, PUTTING THE BURDEN OF PROOF ON NONCITIZENS TO DEMONSTRATE THEIR CONVICTION WAS VACATED ON THE MERITS IS CONTRARY TO NINTH CIRCUIT PRECEDENT AND WILL JEOPARDIZE THEIR DUE PROCESS RIGHTS.

IJs must understand and properly assign the burden of proof in different postures of removal proceedings. Under Ninth Circuit precedent, by which IJs are bound, "the government . . . [carries the] burden in establishing that a conviction remains valid for immigration purposes, [and] the government must prove '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 v. Gonzales*, 460 F.3d 1102, 1107 n.3 (9th Cir. 2006); *Reyes-Torres*, 645 F.3d at 1077 ("[T]he burden is on the government to prove that [the conviction] was vacated *solely* for rehabilitative reasons or reasons related to his immigration status.") (internal quotation marks and citation omitted); *accord Nath*, 467 F.3d at 1189; *see*

also Melkonian v. Ashcroft, 320 F.3d 1061, 1065 (9th Cir. 2003) ("The BIA must . . . follow the decisions of our court, and we will not defer to BIA decisions that conflict with circuit precedent."). In short, when a state criminal court vacates a noncitizen's conviction, the burden of proof is on the government to demonstrate that the conviction was not vacated on the merits. *See* Appellant's Br. 50-54.

It makes sense to put the burden of proof on trained government attorneys. Immigration law is a complex "legal specialty of its own," and the intersection between criminal and immigration law is all the more complicated. *See Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).[4] IJs rely solely on parties to introduce evidence, but noncitizens are often unfamiliar with U.S. laws and the immigration system. Unlike the government, they are unequipped to acquire and dig through old state court records to demonstrate a substantive or procedural defect in their criminal proceedings. As a result, not only is shifting the burden of proof from the government to noncitizens contrary to the law, but it would also compromise noncitizens' due process rights—especially when a noncitizen is appearing pro se, is detained, and/or has limited English proficiency.

[4] *See also Crimmigration: The Impact Of Criminal Convictions On Immigration Status*, Ozment L. (2022), <https://www.ozmentlaw.com/special-immigration-law-services/crimmigration/> (last visited July 5, 2022) ("The intersection of immigration and criminal law is often extremely complex and counterintuitive.")

No constitutional right to counsel. "[T]he complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important," *Ardestani v. INS*, 502 U.S. 129, 138 (1991), but unlike criminal defendants, noncitizens faced with removal do not have a constitutional right to counsel. *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004). To protect their due process rights, IJs must "provide [noncitizens] a reasonable time to locate counsel, and permit counsel to prepare for the hearing." *Id*. at 1105. However, representation is a "privilege," not a right, and noncitizens must bear the expense of obtaining counsel.[5] INA §§ 240(b)(4)(A), 292; 8 U.S.C. §§ 1229a(b)(4)(A), 1362. As a result, a large percentage of noncitizens are "forced to proceed pro se"—which often leads "to present[ing] a case with no evidence"—and "to answer [an] IJ's inquiries without any idea of their legal significance." *Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005).

The rate of legal representation in immigration court can greatly vary depending on factors like nationality, detention status, and jurisdiction, but between 2007 and 2012, "only 37 percent of [noncitizens] secured legal

[5] Am. Immigr. Council, *Access to Counsel in Immigration Court*, 1 (Sept. 28, 2016), <https://www.americanimmigrationcouncil.org/sites/default/files/-research/access_to_counsel_in_immigration_court.pdf> (last visited July 5, 2022).

representation in their removal cases."[6] This is troubling because a lack of representation can "have a profound impact on [noncitizens'] ability to receive a fair hearing."[7] In fact, represented noncitizens are *two to five times* more likely than their unrepresented counterparts to obtain the immigration relief they sought.[8] If the burden shifted to noncitizens to prove that their conviction was vacated on the merits, noncitizens appearing pro se would have to gather the proper evidence to demonstrate that their conviction was vacated for a substantive or procedural defect—and that's assuming they understand what qualifies as a "substantive or procedural defect" and how to demonstrate it in the proceedings. This would be an overwhelming burden for pro se noncitizens to overcome alone, especially when this burden is historically placed on trained government attorneys.

Detention status. Detention status also affects the due process rights of noncitizens and will exacerbate the difficulty of presenting the evidence that the

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[6] *See id.* at 1-2 (examining data from over 1.2 million deportation cases decided between 2007 and 2012); TRAC Immigr., *Who Is Represented in Immigration Court?* (Oct. 16, 2017), <https://trac.syr.edu/immigration/reports/485/> (last visited July 5, 2022).

[7] Am. Immigr. Council, *supra* note 5, at 1.

[8] *Id.* at 3; *see also Representation in Removal Proceedings*, 126 Harv. L. Rev. 1658, 1658 (2013); Exec. Office for Immigr. Review, *A Ten-Year Review of the BIA Pro Bono Project: 2002-2011*, 12 (2014) (noting that the likelihood of an immigrant achieving a favorable result increased from 9.5% to 31% when BIA Pro Bono Project volunteers provided legal representation).

government's position demands. Detained noncitizens are far less likely to obtain legal representation than individuals who have never been detained.[9] According to a nationwide study, "nondetained respondents were almost five times more likely to obtain counsel than detained respondents."[10] *See also Biwot*, 403 F.3d at 1099 (noting that a noncitizen's "attempts to secure a lawyer [can be] hampered by his incarceration, lack of English skills, and unfamiliarity with this country") (citing *Rios-Berrios v. INS*, 776 F.2d 859, 862-63 (9th Cir. 1985)). Detention makes it more difficult for pro se noncitizens to effectively present their cases, since many detention facilities have insufficient or outdated legal resources.[11] Even if the legal resources are adequate and up-to-date, they may not be available in a noncitizen's native language.[12]

When detained noncitizens are fortunate enough to be represented by counsel, they still face roadblocks communicating with their attorneys. After all,

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[9] *See* TRAC Immigr., *supra* note 6; *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 Cardozo L. Rev. 357, 367-73 (2011) ("[C]ustody status (i.e., whether or not [individuals] are detained) strongly correlates with their likelihood of obtaining counsel ….").

[10] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 32 (2015).

[11] *See* U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, 186 (2005) (finding that "in none of the facilities visited by the experts were all the legal materials listed in the DHS detention standards . . . present and up-to-date").

[12] *Id.*

"the nature of detention itself makes it extremely difficult for attorneys to get information needed from their clients to effectively represent them."[13] Detention facilities are often far from urban areas, requiring immigration lawyers to travel long distances to meet their detained clients face to face. *See Hamama v. Adducci*, 261 F. Supp. 3d 820, 827-28 (E.D. Mich. 2017) (noting that it was "nearly impossible" and "impractical" for attorneys to visit clients because they were detained approximately four hours away). Attorneys must also navigate "detention facilities' limitations on visiting hours."[14]

Attorney-client phone conversations can also be "impossible" due to the "'extremely limited access to the phone' at detention facilities."[15] *See Hamama*, 261 F. Supp. 3d at 827. Many detention facilities have "telephone problems" such as "low volume and inoperable phones," limit the duration of phone calls, or charge detainees prohibitively expensive usage fees.[16] *See Hamama*, 261 F. Supp. 3d at 827-28 (noting that "phone calls at the Arizona detention facility can last no

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[13] Ctr. for Immigrants' Rts. Clinic, *Detained Immigrants and Access to Counsel in Pennsylvania*, Penn. State L., 19 (Oct. 2019), <https://pennstatelaw.psu.edu/sites/default/files/PAFIUP%20Report%20Final.pdf> (last visited July 5, 2022).

[14] *Id.*

[15] *Id.*

[16] *See* DHS Office of Inspector General, *Management Alert on Issues Requiring Immediate Action at the Theo Lacy Facility in Orange, California*, 7 (Mar. 6, 2017) ("telephone problems [at one detention facility included] low volume and inoperable phones").

longer than fifteen minutes at twenty-five cents per minute"). Some attorneys have better luck with ordinary mail, but even then, it can be "difficult for [detained noncitizens] to get that mail."[17] Letter correspondence also makes it difficult to "effectively acquir[e] the necessary information about the [noncitizen] to proceed."[18] Whether represented or unrepresented, it would be difficult for detained noncitizens to gather the proper evidence to demonstrate their criminal conviction was vacated on the merits.

Limited English proficiency. A language barrier, which is common in immigration court, also interferes with due process and a noncitizen's ability to adequately present evidence. In 2018, 89 percent of noncitizens conducted hearings in a language other than English.[19] Like detention, limited English proficiency decreases the likelihood that a noncitizen will obtain legal counsel. *See Biwot*, 403 F.3d at 1099 (noting that a noncitizen's "attempts to secure a lawyer [can be] hampered by his incarceration, lack of English skills, and

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[17] Ctr. for Immigrants' Rts. Clinic, *supra* note 13, at 19-20.

[18] *Id.* at 19.

[19] Dep't of Justice, Exec. Office for Immigr. Review, *Statistics Yearbook Fiscal Year 2018*, 18, <https://www.justice.gov/eoir/file/1198896/download> (last visited July 5, 2022); *see* Laura Abel, *Language Access in Immigration Courts*, Brennan Ctr. For Just., 1 (2011), <http://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf> (last visited July 5, 2022) ("More than 85% of the people appearing before the nation's Immigration Courts have limited proficiency in English").

unfamiliarity with this country") (citing *Rios-Berrios*, 776 F.2d at 862-63). It also makes it challenging to navigate an unfamiliar and complex immigration system that requires all documents to be filed in English.[20]

Despite a Department of Justice mandate that all federal agencies provide "meaningful access" to noncitizens with limited English proficiency, it is still difficult for individuals to access immigration court forms and websites in their native language or adequate interpretation services.[21] As a result, many noncitizens with limited English skills will struggle to prepare their cases.

For example, if detained or pro se, these noncitizens would be forced to make phone calls to state courts to try to explain the information they need. They will have difficulty determining whether they have received the right evidence to meet the burden of proof because the documents given to them will likely only be in English. What the government's position asks for is near impossible for these noncitizens to deliver; as a result, "people [will] lose their freedom, families, livelihoods, and homes because of simple misunderstandings."[22]

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[20] Dep't of Justice, *EOIR Policy Manual*, § 3.3(a) (Mar. 22, 2022) ("All documents filed with the Immigration Court must be in the English language or accompanied by a certified English translation.") (citing 8 C.F.R. §§ 1003.33, 1003.23(b)(1)(i)).

[21] Abel, *supra* note 19, at 1, 9.

[22] *Id.* at 1.

Lack of English proficiency can also prevent noncitizens from understanding the legal repercussions of their decisions[23]—something section 1473.7(a)(1) seeks to remedy by providing post-conviction relief to individuals who may not have understood the meaning or consequences of their conviction. *See* § 1473.7(a)(1); *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969) (Fifth Amendment due process requires guilty pleas to be "voluntary and knowing"). As a result, shifting the burden of proof from the government to noncitizens to demonstrate whether their conviction was vacated on the merits undermines the very thing section 1473.7(a)(1) aims to do: protect due process rights.

III. THE GOVERNMENT'S INTERPRETATION OF SECTION 1473.7(a)(1) IS UNWORKABLE AND WILL EXACERBATE THE GROWING BACKLOG OF IMMIGRATION CASES.

The immigration case backlog is at an all-time high, and IJs are under immense pressure to address it. Section 1473.7(a)(1) was designed to lighten the burden on IJs by permitting vacatur only when a conviction is "legally invalid due to prejudicial error." That a conviction was vacated under section 1473.7(a)(1) *necessarily means* that it was vacated due to a substantive or procedural defect. *See supra* Section I.A. On the other hand, the government's interpretation of section 1473.7(a)(1) will only exacerbate the backlog problem.

[23] Ctr. for Immigrants' Rts. Clinic, *supra* note 13, at 27-28.

At the end of December 2021, there were 1,596,193 pending cases in the immigration court system—"the largest [backlog] in history," and "larger than the population of Philadelphia, the sixth largest city in the United States."[24] As of May 2022, there are 1,809,953 pending cases.[25] The growth of this backlog is only accelerating, as a result of "[t]he partial Court shutdown during the COVID-19 pandemic" and an unprecedented number of new cases filed.[26] This "suggest[s] that the Immigration Courts are entering a worrying new era of even more crushing caseloads—all the more concerning since no attempt at a solution has yet been able to reverse the avalanche of cases that [IJs] now face."[27]

A 2019 study found that "the typical (median) judge caseload is just under three thousand cases. Twenty percent of these judges have caseloads of four thousand or more cases. One judge in the Houston Immigration Court is currently assigned 9,048 cases."[28] Another IJ in San Francisco described her "pending caseload [of] about 4,000 cases" as "nightmarish," explaining that she only had

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[24] TRAC Immigr., *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases* (Jan. 18, 2022), <https://trac.syr.edu/immigration/reports/675/> (last visited July 5, 2022).

[25] TRAC Immigr., *Immigration Court Backlog Tool*, <https://trac.syr.edu/phptools/immigration/court_backlog/> (last visited July 5, 2022).

[26] TRAC Immigr., *supra* note 24.

[27] *Id*.

[28] TRAC Immigr., *Burgeoning Immigration Judge Workloads* (May 23, 2019), <https://trac.syr.edu/immigration/reports/558/> (last visited July 5, 2022).

"about half a judicial law clerk and less than one full-time legal assistant to help [her]."[29] In an effort to reduce the backlog, the Department of Justice issued performance metrics for IJs in 2018 that threatened disciplinary action if IJs did not meet the strict quotas.[30] The guidelines defined "[s]atisfactory performance" as completing 700 cases per year, "which translates to about four cases a day."[31] Management officers also told IJs "how many cases to docket and how many cases to hear," and "put production quotas on [IJs] in terms of the time frame that [they] had to decide an individual case."[32]

However, "quotas value[] expediency over due process and [are] not an appropriate metric to evaluate judges."[33] Fast-tracking "policies designed to speed cases through the system have [also] proven to be ineffective in reducing the case

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[29] *Amid "nightmarish" case backlog, experts call for independent immigration courts*, ABA News (Aug. 9, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/amid-_nightmarish-case-backlog--experts-call-for-independent-imm/> (last visited July 5, 2022).

[30] Dep't of Justice, *Immigration Judge Performance Metrics Memo* (Mar. 30, 2018), <https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics> (last visited July 5, 2022); Priscilla Alvarez, *Justice Department Eliminates Trump-era Case Quotas for Immigration Judges*, CNN (Oct. 20, 2021), <https://www.cnn.com/2021/10/20/politics/immigration-judges-quotas/index.html> (last visited July 5, 2022) (citing EOIR, *Performance Plan* (Oct. 1, 2018), <https://www.justice.gov/eoir/page/file/1358951/download> (last visited July 5, 2022)).

[31] EOIR, *supra* note 30; *see* ABA News, *supra* note 29.

[32] ABA News, *supra* note 29; *see* EOIR, *supra* note 30.

[33] Alvarez, *supra* note 30.

backlog . . . while seriously compromising due process."[34] The Department of Justice ended the use of case quotas for IJs in 2021, but with the backlog at an all-time high, the immense pressure to reduce the backlog remains.[35] "[T]ypical judge caseloads are skyrocketing" higher than ever.[36]

When thousands of cases are placed on a single IJ's docket, noncitizens "assigned to that judge are inevitably required to wait longer and longer before an available time slot opens up for their hearing."[37] At the end of December 2020, the average wait for a hearing date was 1,642 days, or about 4.5 years.[38] Many cases take more than one hearing, so the wait time is even longer before a decision is rendered and the case is closed.[39] With the enormous pressure they face to address the existing and growing backlog, IJs cannot spend extra time and resources

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[34] Congressmember Pramila Jayapal, *Letter to Attorney General Garland* (Mar. 29, 2022), <https://jayapal.house.gov/wp-content/uploads/2022/03/LETTER_DOJ_Immigration_Court_Follow_up_03_29_2022.pdf> (last visited July 5, 2022); *see* TRAC Immigr., *Crushing Immigration Judge Caseloads and Lengthening Hearing Wait Times* (Oct. 25, 2019), <https://trac.syr.edu/immigration/reports/579/> (last visited July 5, 2022) (noting that policies like the imposed 700 case quota "have been unsuccessful in stemming the rise in the Immigration Court's backlog")

[35] Alvarez, *supra* note 30.

[36] TRAC Immigr., *supra* note 24.

[37] TRAC Immigr., *supra* note 28.

[38] TRAC Immigr., *Immigration Court Cases Jump in June 2021; Delays Double This Year* (Jul. 28, 2021), <https://trac.syr.edu/immigration/reports/654/> (last visited July 5, 2022).

[39] *Id.*

relitigating whether a conviction vacated under section 1473.7(a)(1) was vacated on the merits.

This is particularly true if the burden of proving whether the conviction was vacated on the merits were to be placed on noncitizens, as the government requests. If all noncitizens were represented, then opposing counsel would provide legal arguments, and IJs would have a significantly heightened starting point upon which to decide the issue. However, because so many noncitizens are unrepresented, IJs must often develop noncitizens' legal arguments for them before deciding the issue—especially when the burden of proof is placed on noncitizens rather than the government. When a noncitizen is unrepresented or particularly vulnerable, *see supra* Section II., IJs need to ensure that the noncitizen is afforded due process, which means repeatedly and fully explaining what the burden of proof is and that the noncitizen has the responsibility of presenting evidence to meet the burden. This can be a time-consuming process that will be compounded by the fact that more than 85 percent of noncitizens in immigration court have limited English proficiency and require interpreters.[40]

Efficiency is important because additional time spent on each case will only extend the years-long process of receiving an immigration decision, leaving noncitizens unsure of their futures and possibly "held in unsafe detention centers

[40] Abel, *supra* note 19, at 1.

and prisons for even longer as they wait for their hearings."[41] The government's interpretation of section 1473.7(a)(1) fails to consider the real impact on noncitizens, IJs, and the overburdened immigration court.

CONCLUSION

For the reasons stated above and in Petitioner's opening brief, the Court should reverse the BIA's decision.

Dated: July 5, 2022

Respectfully submitted,

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[41] *See Supreme Court Wrestles With Indefinite Detention for Immigrants Awaiting Deportation*, Boundless (Jan. 18, 2022), <https://www.boundless.com/blog/supreme-court-indefinite-detention-immigrants/> (last visited July 5, 2022).

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(5) and Ninth Circuit Rules 29-2(c)(2) and Cir. R. 29-2(c)(3), I certify that this **BRIEF OF AMICI CURIAE FORMER IMMIGRATION JUDGES AND BOARD OF IMMIGRATION APPEALS MEMBERS IN SUPPORT OF PETITIONER** is proportionately spaced, has a typeface of 14 points or more, and contains **4,998** words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(f).

Dated: July 5, 2022

s/ *Pauletta L. Herndon*
Pauletta L. Herndon

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 5, 2022.

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