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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

Amicus Invitation 18-6-27 (Validity of Conviction for Immigration Purposes)	A [Redacted]

AMICUS CURIAE BRIEF OF THE FEDERATION FOR AMERICAN IMMIGRATION REFORM

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I. INTEREST OF *AMICUS CURIAE*

On behalf of the Federation for American Immigration Reform (FAIR), the Immigration Reform Law Institute (IRLI) respectfully responds to the invitation by the Board of Immigration Appeals (Board) on June 27, 2018, for supplemental briefing in this matter. FAIR is a nonprofit, public-interest, membership organization of concerned citizens and legal residents who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. The Board of Immigration Appeals has solicited *amicus* briefs from FAIR for more than twenty years. *See, e.g.*, *In-re-Q- --M-T-*, 21 I. & N. Dec. 639 (B.I.A. 1996) ("The Board acknowledges with appreciation the brief submitted by amicus curiae [FAIR].").

II. ISSUES PRESENTED

The Board has invited supplemental briefing on the following issues:

- Is the Board required to give full faith and credit to a judgment issued under Cal. Penal Code § 1203.43 in light of the conviction definition found at section 101(a)(48)(A) of the Immigration and Nationality Act? Is the Board required to give full faith and credit to such a judgment if an alien has actually been informed of the immigration consequences of his or her plea pursuant to Cal. Penal Code § 1016.5 or otherwise?

- To what extent is Cal. Penal Code § 1203.43 rehabilitative in nature? In answering please include a discussion of *Matter of Adamiak*, 23 I&N Dec. 878 (B.I.A. 2006), *Matter of Pickering*, 23 I. & N. Dec. 621 (B.I.A. 2003), *Matter of Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (B.I.A. 2000), *Matter of Roldan*, 22 I. & N. Dec. 512 (B.I.A. 1999), and *Matter of Punu*, 22 I. & N. Dec. 224 (B.I.A. 1998). Please also discuss to what extent relief under § 1203.43 is dependent on successful completion of a deferred adjudication program.

- Does the legislative history of Cal. Penal Code § 1203.43 reflect that this statute was enacted for the purpose of providing courts with a mechanism to eliminate the immigration consequences of convictions? If so, is it preempted on the ground that it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress," *Arizona v. United States*, 567 U.S. 387, 399-400 (2012)?

- Please discuss the prospective application of Cal. Penal Code § 1203.43. Will criminal defendants continue to be "misinformed" about the consequences of accepting a deferred adjudication plea?

III. BACKGROUND

The four topics on which the Board seeks supplemental *amicus* briefing all concern the interplay between a provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 101(a)(48)(A), INA § 101(a)(48) (defining the term "conviction . . . with respect to an alien . . . ."), and California state penal statute Cal. Penal Code § 1203.43 (permitting withdrawal of guilty or nolo contendere pleas and dismissal of complaints for certain defendants granted deferred entry of judgment on or after a specified date).

A. Conviction for immigration purposes.

Under INA § 101(a)(48), a conviction for immigration purposes (that is, "with respect to an alien") exists where "a formal judgment of guilt" has been "entered by a court." INA § 101(a)(48)(A). Significantly, a conviction for immigration purposes also exists even "if adjudication of guilt has been withheld, where: . . . [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," §101(a)(48)(A)(i), and ". . . [t]he judge has ordered some form of punishment, penalty or restraint on the alien's liberty to be imposed." § 101(a)(48)(A)(ii). The definition also provides:

> Reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court, regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

§ 101(a)(48)(B).

Section 101(a)(48) was enacted as § 322 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-828, 110 Stat. 3009-546 (1996) (IIRAIRA),

which displaced a prior administrative definition formulated under *Matter of Ozkok*, 19 I. & N. Dec. 546 (B.I.A. 1988). IIRIRA § 322 "deliberately broadened the scope of the definition of conviction." H.R. Rep. No. 104-828, at 223-24 (1996) (Conf. Rep.). The purpose of the change was to establish that "deferred convictions" of all kinds are still convictions. *Id.* at 224.

The Board has found that IIRIRA § 322 "clearly and unambiguously defined the term 'conviction' for immigration purposes and thus has spoken directly to the issue before the Board." *Matter of Punu*, 22 I. & N. Dec. 224, 227 (B.I.A. 1998). "Congress has expressed its intent that the application of the definition of the term 'conviction' to deferred adjudications not be dependent on the vagaries of State law, as the new definition is specifically intended to 'make it easier to remove criminal aliens, regardless of specific procedures in States for deferred adjudications.'" *Id*. at 229 (citing H.R. Rep. No. 104-879 (1997)). This rationale directly reflects the overarching constitutional interest in uniformity of federal immigration and naturalization laws. U.S. Const. Art. I, § 8, cl. 4.

INA § 101(a)(48)(A) expanded the adverse immigration consequences under several INA provisions for aliens who violated state and local criminal laws. Of particular consequence for charges and pleas made under Cal. Penal Code § 1000 *et seq*., but where judgment was mitigated or dismissed under § 1203.43, is INA § 212(a)(2)(A)(i)(II), which provides that "any alien convicted of, or who admits committing acts which constitute the essential elements of . . . a violation (or conspiracy or attempt to violate) . . . any law or regulation of a State … relating to a controlled substance . . . is inadmissible." 8 U.S.C. § 1182(a)(2)(A)(i)(II).

By its own terms and under current Board interpretation, § 101(a)(48)(A)

> plainly encompasses at least those situations in which an alien has a judgment of guilt entered by a court, and those in which the judgment of guilt was never entered because it was withheld, but where the alien has pleaded or admitted sufficient facts, and some penalty was imposed.

Pinho v. Gonzales, 432 F.3d 193, 205 (3d Cir. 2005). The statute, however, does not expressly address the classification of convictions that are imposed but subsequently vacated. The Board has construed the 1997 statutory definition broadly in this regard, finding that

> state rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes.

Matter of Roldan, 22 I. & N. Dec. 512, 528 (B.I.A. 1999). Subsequent to *Matter of Roldan*, the Board clarified that

> there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships.

Matter of Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003) *rev'd on other grounds, Pickering v. Gonzales*, 465 F.3d 262 (6th Cir. 2006).

B. California Penal Code.

In 1972, the California legislature enacted Cal. Penal Code § 1000 *et seq*. to authorize the courts "to *'divert'* from the normal criminal process persons who are *formally charged* with first-time possession of drugs, have not yet gone to trial, and are found to be suitable for treatment and *rehabilitation* at the local level." *People* v. *Superior Court*, 11 Cal .3d 59, 61 (1974) (emphases added). The legislative objective was two-fold: first, to permit the courts "to identify the experimental or tentative user before he becomes deeply involved with drugs, to show him the error of his ways by prompt exposure to educational and counseling programs in his own community, and to restore him to productive citizenship without the lasting stigma of a criminal conviction," and, second, to reduce the "clogging of the criminal justice system . . . ." *B. W. v. Bd. of Med. Quality Assurance*, 169 Cal. App. 3d 219, 228 (1985).

In 1975, the state legislature, in order to provide more protection to the successful divertee, amended the Penal Code to enact what is now § 1000.4. That section provides:

> Any record filed with the Department of Justice shall indicate the disposition in those cases diverted pursuant to this chapter. Upon successful completion of a diversion program the arrest upon which the diversion was based shall be deemed to have never occurred. The divertee may indicate in response to any question concerning his prior criminal record that he was not arrested or diverted for such offense. A record pertaining to an arrest resulting in successful completion of a diversion program shall not, without the divertee's consent, be used in any way which could result in the denial of any employment, benefit, license, or certificate.

Id. at 228-29.

From January 1, 1997 until December 31, 2017, a defendant charged in California with a minor drug offense could have been offered Deferred Entry of Judgment (DEJ) under the version of Ca. Penal Code § 1000 et seq. in effect during that period. Kathy Brady, *California Pretrial Diversion for Minor Drug Charges*, Immigrant Legal Resource Center (ILRC) 6 (Jan. 2018), https://www.ilrc.org/sites/default/files/resources/pretrial_diversion_ab_208_ jan_2018.pdf. A qualifying defendant would plead guilty and then be diverted to a civil drug education or treatment program. The guilty plea, however, was "not a conviction for any purpose" unless a judgement was entered due to failure to complete the diversion program. Cal. Penal Code § 1000.1(d). If, after 18 to 30 months, the court found that the defendant had performed satisfactorily, it would dismiss the charges. *Id.* at § 1000.3. The statute, moreover, provided that upon dismissal there would be no conviction or arrest record, or loss of legal benefits. *Id.* at § 1000.4.

By contrast, the Department of Homeland Security (DHS) and the Executive Office of Immigration Review (EOIR), since the enactment of IIRIRA §322, have considered even the successful completion of a DEJ program to be a conviction for immigration purposes under INA § 101(a)(48). According to the ILRC, "thousands" of aliens have been removed based on DEJ

guilty pleas, including successful divertees whose records were remediated pursuant to § 1000.4. *Brady,* at 6.

Reacting to this policy of federal immigration agencies, the California legislature enacted California Assembly Bill (AB) 1352, codified as Cal. Penal Code § 1203.43 (2016). The mechanics of § 1203.43 are set out in clause (b) of the statute, which states that its requirements were enacted "for the above-specified reason," referring to the avoidance of "adverse immigration consequences," which clause (a)(1) expressly identifies as the goal of the AB 1352. If the charges were dismissed pursuant to § 1000.3, the defendant is entitled to *withdraw* the guilty plea. § 1203.43(b). The ILRC practitioner's guide notes that "there is no requirement that the DEJ period went perfectly or uninterruptedly," cases may be reopened to allow a defendant to complete DEJ to qualify for relief, and § 1203.43(b) can invalidate multiple offenses if each was the subject of the §1000.3 order. *Brady,* at 6.

IV. ARGUMENT

A. When the Board determines whether a state criminal proceeding resulting in a judgment issued under Cal. Penal Code § 1203.43 is a conviction for immigration purposes under INA § 101(a)(48)(A), the full faith and credit requirement does not apply.

The Full Faith and Credit Act mandates that federal courts accord the same "full faith and credit" to "judicial proceedings" in a state court as would other courts of that state. 28 U.S.C. § 1738.

Persuasively, the U.S. Court of Appeals for the Fifth Circuit has found that act inapplicable to federal immigration law. *See Bustamante-Barrera v. Gonzales,* 447 F.3d 388, 400 (5th Cir. 2006) ("[R]efusal to credit the amended [state] decree for purposes of federal immigration law *does not even implicate* the Full Faith and Credit Act.") (emphasis added).

In *Bustamante-Barrera*, a Mexican national LPR had immigrated with his parents in 1983. *Id.* at 390. In 1991, his parents divorced pursuant to a California divorce decree that awarded his mother "sole *physical* custody" but awarded both parents "joint *legal* custody." The mother then naturalized in 1994 while petitioner was still a minor. *Id.* at 391. In 2002, petitioner was placed in removal proceedings based on crime involving moral turpitude and aggravated felony convictions in Texas. *Id.* Petitioner raised an affirmative defense of derivative citizenship, based on a *nunc pro tunc* amended California divorce decree obtained by the mother, retroactively awarding her *sole* legal custody—the previously missing statutory element for derivative citizenship under 8 U.S.C. § 1432(a)—effective to 1991. The mother's request for the amended state decree included a declaration filed by her lawyer that "the purpose" for seeking the order was "to satisfy requirements of the Department of Immigration and Naturalization." *Id.*

The immigration judge (IJ) accepted the amended decree as establishing that DHS had not carried its burden of proving alienage, and terminated removal proceedings, reasoning that the petitioner now met all the requirements for derivative citizenship *nunc pro tunc*. *Id.* at 392.

DHS appealed to the Board, which refused to credit the retroactive effect of the California court's amended decree for purposes of removal, and sustained the appeal. *Id.* The Board "viewed the amended decree as nothing more than a legal fiction created for the express purpose of manipulating federal immigration and naturalization law," holding that "to allow courts to circumvent the clear language of the naturalization requirements . . . is contrary to public policy and decades of Supreme Court jurisprudence requiring strict compliance with . . . statutory requirements to obtain citizenship." *Id.* (citing *In re: Bustamante-Barrera*, No. A38-097-162, at 3 (B.I.A. Oct. 3 2003)). After a removal order was issued by the IJ on remand and

sustained by the Board, petitioner sought appellate review on multiple grounds, including the claim that the amended decree was entitled to full faith and credit by the Board.

The Fifth Circuit rejected petitioner's claim, holding that "[f]ederal naturalization law exists independently of state family law." *Id.* at 400. "Interpretation of § 1432(a) is a matter of federal law." *Id.* at 399. Because of "the overarching constitutional interest in uniformity of federal immigration and naturalization laws, we have previously rejected [the] contention that the law of any one state should govern the determination under § 1432(a) whether an alien child's parents were legally separated." *Id.* (citations omitted). The court explained:

> Petitioner's custody status prior to his eighteenth birthday is determined by federal law; it is *not* dependent on the law of any particular state. True, his custody status under state law might provide evidence of his such status for federal naturalization purposes; yet, even for these purposes, we are not *bound* by California's determination of his legal relationship with his mother. Stated differently, even assuming *arguendo* that the state's amended decree retroactively altered Petitioner's relationship with his mother for some legitimate state purpose, we would not be bound to follow the amended decree in determining Petitioner's custody status for purposes of the subject section of the INA . . . . Here, we do not question the amended decree's *validity*—a question that, in other circumstances, the Full Faith and Credit Act might prohibit our asking. But the Full Faith and Credit Act certainly does not require us to accord that state decree conclusive effect in U.S. *naturalization* proceedings.

Id. at 400 (emphases in original).

The court's analysis in *Bustamante-Barrera* is directly applicable here. Federal immigration law is every bit as independent of state criminal statutes as it is of state family law. *See, e.g.*, *Saleh v. Gonzales*, 495 F.3d 17, 21 (2d Cir. 2007) ("[W]hether one has been 'convicted' within the language of [federal] statutes is necessarily . . . a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State"). Indeed, the compelling need for a uniform federal approach was a primary reason that Congress enacted its sweeping 1997 definition of conviction for immigration purposes.

Thus, other circuits have found the full faith and credit requirement, with respect to state criminal statutes, inapplicable in immigration courts. The U.S. Court of Appeals for the Second Circuit deferred to the Board's finding in *Matter of Roldan* that Congress sought to accomplish "two primary aims[:] . . . to focus the conviction inquiry on the 'original determination of guilt' and to 'implement a uniform federal approach.'" *Saleh*, 495 F.3d at 23 (citing *Matter of Roldan*, 22 I. & N. Dec. at 521-22). The Board was "simply interpreting how to apply Saleh's vacated State conviction for receiving stolen property to the INA and is not refusing to recognize or relitigating the validity of Saleh's California state conviction. The full faith and credit statute is not thereby violated." *Id.* at 26.

Saleh relied in part on a decision by the U.S. Court of Appeals for the First Circuit that had reached a similar conclusion. *Herrera-Inirio v. INS*, 208 F.3d 299, 307 (1st Cir. 2000) ("[S]ection 1101(a)(48)(A) does not infract applicable principles of full faith and credit."). The First Circuit emphasized the importance of the underlying constitutional clause:

> Neither the Full Faith and Credit Clause nor the statutory overlay purports to prevent federal legislative authorities from writing federal statutes that differ from state statutes or from attaching, to words in a federal statute, a meaning that differs from the meaning attached to the same word when used in a statute enacted by a state. A federal Union in which this were not so—a Union in which states possessed the constitutional power to control federal courts' interpretation of federal statutes—would not resemble our *post*-Civil War United States.

Id. (citing *Molina v. INS*, 981 F.2d 14, 19 (1st Cir. 1992) (Breyer, J.)).

For the foregoing reasons, the full faith and credit requirement is inapplicable to the invalidation of guilty pleas under Cal. Penal Code § 1203.43(a)(2). That section provides that pleas under § 1000.4 will be "invalid" pursuant to § 1203.43(a)(1) (declaring that "successful completion of a deferred entry of judgment program [under § 1000.4] shall not, without the defendant's consent, be used in any way that could result in the denial of any . . . benefit . . . .").

This prohibitory language—"shall not . . . be used in any way . . ."—can never be construed as binding on the federal government, as such a mandate would constitute conflict preemption. *See infra* Part C.

This inapplicability of the full faith and credit requirement is certainly the case if a state court complied with its statutory duty, under Cal. Penal Code § 1016.5, to advise a criminal defendant of the immigration consequences before a plea is accepted, or if the defendant otherwise knew of those consequences. In the former case, there is no "procedural" defect even under California law, and in the latter, a vacatur of a guilty plea would be preempted. *See infra* Part C.

B. Cal. Penal Code § 1203.43 is a rehabilitative statute.

"[T]he BIA has reasonably concluded that an alien remains convicted of a removable offense for federal immigration purposes when a state vacates the predicate conviction pursuant to a rehabilitative statute." *Saleh*, 495 F.3d at 25. *Accord Herrera-Inirio v. INS*, 208 F.3d at 305; *Cruz v. Att'y Gen. of U.S.*, 452 F.3d 240, 245 (3d Cir. 2006); *Dung Phan v. Holder*, 667 F.3d 448, 452-53 (4th Cir. 2012); *Danso v. Gonzales*, 489 F.3d 709, 716 (5th Cir. 2007); *Sanusi v. Gonzales*, 474 F.3d 341, 342-43 (6th Cir. 2007) ("We deny the petitions for review on the ground that the state court's vacation of Sanusi's conviction was ineffective for immigration purposes because it was done solely for the purpose of ameliorating the immigration consequences to petitioner."); *Ramos v. Gonzales*, 414 F.3d 800, 805-06 (7th Cir. 2005); *Vasquez-Velezmoro v. INS*, 281 F.3d 693, 697-98 (8th Cir. 2002); *Elkins v. Comfort*, 392 F.3d 1159, 1163-64 (10th Cir. 2004); *Resendiz-Alcaraz v. Ashcroft*, 383 F.3d 1262, 1268-71 (11th Cir. 2004); *Alim v. Gonzales*, 446 F.3d 1239, 1249-50 (11th Cir. 2006); *see also Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (declining to exempt rehabilitative dispositions from the

INA §101(a)(48) definition of conviction, except, for equitable reasons, rehabilitative dispositions of controlled substance simple possession offenses recognized under the Federal First Offender Act where the aliens' charges were expunged, diverted, or vacated prior to July 14, 2011).

The DHS Administrative Appeals Office (AAO)'s California Service Center has concluded that § 1203.43 is a rehabilitative statute. *See In Re Applicant:[Redacted]*, 2013 Immig. Rptr. LEXIS 11747 (A.A.O. Aug. 14, 2013). It was quite correct to do so.

As the AAO notes, a rehabilitative statute is one that serves to dismiss, cancel, or vacate a prior conviction as a result of the successful completion of a term of probation, restitution, or other condition of sentencing. *Id.* Section 1203.43 meets this definition. First, it apples to "any case in which a defendant (1) was granted deferred entry of judgment on or after January 1, 1997," (2) "has performed satisfactorily during the period in which deferred entry of judgment was granted," and (3) "for whom the criminal charge or charges were dismissed pursuant to Section 1000.3." Cal. Penal Code § 1203.43. Second, it *requires* the state court, (4) "upon request of the defendant," to (5) permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty, and subsequently (6) "dismiss the complaint or information against the defendant." § 1203.43(b).

A defendant's eligibility for Cal. Penal Code § 1203.43 relief is thus expressly dependent upon a "grant of deferred entry of judgment"—that is, a deferred adjudication program—during which the defendant "performed satisfactorily during the period [of DER]…." *Id.*

Significantly, California state courts also treat Cal. Penal Code § 1000.3 as a rehabilitative statute: "A diversion (or deferral) program may be viewed as *a specialized form of probation*, available to a different class of defendants but sharing many similarities with general

probation and commitment for addiction." *People v. Cisneros*, 84 Cal. App. 4th 352, 358 (2000) (emphasis added). In particular:

> The plain objective of section 1000 is to permit the courts to identify the experimental or tentative user before he becomes deeply involved in drugs, to show him the error of his ways by prompt exposure to educational and counseling programs in his own community, and to restore him to productive citizenship [sic] without the lasting stigma of a criminal conviction and thereby reduce the clogging of the criminal justice system.

Id. at 356-357 (citations omitted).

Recognizing that Cal. Penal Code §1203.43 is a rehabilitative statute does not conflict with the reasoning in the five precedential Board decisions listed by the Board in its request for supplemental *amicus* briefing.

Under *Matter of Punu*, the Board held that where probation was imposed, deferred judgments were convictions for immigration purposes, because clear and unambiguous congressional action had displaced prior conflicting non-statutory precedents. 22 I. & N. Dec. at 227. Cal. Penal Code § 1203.43 neither "vacates a conviction on the merits" nor (in a way not preempted) "any ground related to the violation of a statutory or constitutional right in the underlying proceeding" and thus is "of no effect in determining whether an alien is considered convicted for immigration purposes." *Matter of Roldan*, 22 I. & N. Dec. at 528.

To the extent that a function of § 1203.43 is to invalidate a plea under § 1000 *et seq.* "because the disposition of the case may cause adverse consequences, including adverse immigration consequences," dispositions under the California provisions may properly be treated by the Board as functionally equivalent to those under post-conviction rehabilitative statutes. *See Matter of Pickering*, 23 I & N. Dec. at 624 (extending the "significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying

proceedings and those vacated because of post-conviction events such as rehabilitation" under *Roldan,* to include vacaturs due to "immigration hardships.").

The AAO's approach also does not conflict with the holding in *Matter of Adamiak,* 23 I. & N. Dec. 878 (B.I.A. 2006). In *Adamiak,* an Ohio criminal court had failed to advise an alien defendant of the immigration consequences of a plea as required by Ohio statute, making vacatur under that state statute the result of a "defect in the pleadings" and thus not a § 101(a)(48) conviction for immigration purposes. Significantly, in *Adamiak* the Board relied on the fact that the Ohio court had both allowed the alien to withdraw his guilty plea, and then remedied the original error of the state criminal court by ordering a new trial, which was still pending at the time of the Board decision. The Board also noted that it could not engage in fact-finding about new allegations of criminal activity, and remanded the matter to the IJ as essentially unripe for adjudication. *Id.* at 880. *Admiak* is thus inapplicable to vacaturs under (rehabilitative) Cal. Penal Code § 1203.43, for which a prior "grant of deferred entry of judgment" must have been issued by the state court.

In *Matter of Rodriguez-Ruiz,* 22 I. & N. Dec. 1378 (B.I.A. 2000), the Board found that a New York court order vacated a lawful permanent resident's guilty plea to a sex offense *and* the related sentence "in all respects … on the legal merits," and that the New York law was "neither an expungement nor a rehabilitative statute," *Id.* at 1379. That holding does not conflict with the conclusion of the AAO and California state court that § 1203.43 is a rehabilitative statute. Although the Board in *Rodriguez-Ruiz* implied that if the record had contained evidence that the state order was motivated by sympathy for the defendant's resulting immigration hardships, it would have concluded differently, under the meager record it declined to look behind the order. *Id.* That decision is rational given the burden of proof on the government in a deportation case.

Rodriguez-Ruiz is also distinguishable because the vacatur order extended to the sentence as well as the plea. *See Matter of Cota*, 23 I. & N. Dec. 849 (B.I.A. 2005) (holding that sentence vacaturs, even for immigration avoidance, must be given full faith and credit by the Board.).

C. Cal. Penal Code § 1203.43 expressly provides state courts with a mechanism to eliminate the immigration consequences of convictions, and thus conflicts with congressional purposes under IIRIRA § 322.

Seeking to minimize any immigration consequences of a DEJ diversion, California enacted Penal Code § 1203.43. Section 1203.43 enables a defendant to vacate certain pleas based on legal error, so as in theory to exclude the offense from constituting a "conviction" for immigration purposes. *Brady*, at 6 (citing Ca. Penal Code § 1203.43).

Section 1203.43 includes a formal legislative finding that for some defendants—including all noncitizen defendants in particular—the DEJ statute it mitigates provided "misinformation" when it stated that a successful participant would not lose legal benefits, because "disposition of the case may cause adverse consequences, including adverse immigration consequences." §1203.43(a)(1) (emphasis added). The legislature then "finds and declares that based on this misinformation and the potential harm"—that is, "adverse immigration consequences"—"the defendant's prior plea is invalid." § 1203.43(a)(2).

It is difficult to credit this finding, when both California law and *Padilla v. Kentucky*, 559 U.S. 356 (2010), require defendants to be informed (by the judge and the defense attorney, respectively) of immigration consequences from guilty pleas. In any event, this provision, as an express interference with congressional purposes, is preempted.

The state legislature's intent to "eliminate adverse immigration consequences" through retroactive judicial acts of rehabilitation clearly is designed as an obstacle to Congress's objective in enacting IIRIRA § 322, which was to "deliberately broaden[] the scope of the

definition of conviction." H.R. Rep. No. 104-828 at 223-24 (1996) (Conf. Rep.). *See Arizona*, 567 U.S. at 399-400 ("[S]tate laws are pre-empted when they conflict with federal law… This includes . . . those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects").

The Board has already determined that "Congress has expressed its intent that the application of the definition of the term 'conviction' to deferred adjudications not be dependent on the vagaries of State law, as the new definition is specifically intended to 'make it easier to remove criminal aliens, regardless of specific procedures in States for deferred adjudications.'" *Matter of Punu*, 22 I. &. N. Dec. at 229 (B.I.A. 1998) (citing H.R. Rep. No. 104-879 (1997)). This specific purpose and its context within IIRIRA directly reflect the overarching constitutional interest in uniformity of federal immigration and naturalization laws. U.S. Const. Art. I, § 8, cl. 4. *See, e.g.*, *Viveiros v. Holder*, 692 F.3d 1, 3 (1st Cir. 2012) ("It would make little sense for federal law to ignore vacaturs for rehabilitation, which, at least in some cases, reflect a measured judgment that the defendant is rehabilitated, but recognize vacaturs that solely aim to help the defendant avoid adverse immigration consequences."). For the same reasons, any vacatur of a guilty plea because a judge failed to inform the defendant of immigration consequences, in violation of Cal. Penal Code § 1016.5, is preempted, at least where the defendant had been otherwise informed of those consequences; the only function of such vacaturs is to frustrate the congressional purposes of defining "conviction" broadly and of removing aliens who have convictions meeting that definition.

D. Where defendants fail to complete a pretrial diversion program under amended § 1203.43 for charges brought in 2018 or later, they will face possible conviction at a bench trial, as well as other consequences that constitute convictions under the INA.

Prospective application of Cal. Penal Code § 1203.43 will be affected by the enactment of AB 208. AB 208 amended Cal. Penal Code §§ 1000 through 1000.5, and added new § 1000.65. Effective January 1, 2018, these provisions replace the prior DEJ program.

The new program differs from the old in key ways. First, the defendant now enters a plea of *not guilty* before accepting diversion, and waives the right to trial by jury should he or she fail to complete the program. Second, the diversion period is reduced to 12-18 months from the 18-36 month period of the pre-AB 208 DEJ program. Third, eligibility for pretrial diversion has been expanded from simple controlled substance offenses covered under the former DEJ provisions, to now include various offenses that are ineligible for mitigation under FFOA, for example, Cal. Heath & Safety § 11358 (Cultivation of marijuana for personal use, an aggravated felony under the INA), Cal. Health & Safety § 11368 (Forgery of a prescription, also a possible aggravated felony), Cal. Penal Code § 647(f) (public drunkenness or public intoxication under a controlled substance), and Cal. Penal Code § 653(d) (solicitation to commit a drug offense). Commission or attempted commission of these offenses is also very probably a ground of inadmissibility under INA § 212(a)(2)(A)(i)(II). See *Brady*, at 2, 7-8. Additionally, former bars to eligibility for DEJ for defendants with prior covered drug convictions, a prior DEJ with five years, or an outstanding probation violation have been prospectively repealed for the pretrial diversion program. *See* AB 208 §1 (amending Cal. Penal Code § 1000(a)).

Unsuccessful enrollees in the new program face a bench trial where consequences other than a verdict of not guilty, including guilty verdicts, nolo contendere pleas, post-trial diversion, vacatur, or conditional sentencing, including probation, will continue to constitute convictions

for immigration purposes. See *Brady*, at 5 ("The stakes are high. A person who fails pretrial diversion is very likely to receive a drug conviction. This may put the person at immediate risk of detention, deportation, and permanent banishment from their life and family in the United States."). While California may continue to treat these alien defendants as "misinformed" under the new program, that label, for the reasons stated in the previous sections, will still have little significance in IJ findings of a federal conviction for immigration purposes under INA § 101(a)(48)(A).

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CERTIFICATE OF SERVICE

I hereby certify that, on July 27, 2018, I caused to be submitted the foregoing Request to Appear and *amicus curiae* brief, with three copies, to the Board of Immigration Appeals.

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