2023

The California Way: An Analysis of California's Immigrant-Friendly Changes to its Criminal Laws

Evangeline G. Abriel
Santa Clara University School of Law, aevangeline@scu.edu

The California Way: An Analysis of California's Immigrant-Friendly Changes to its Criminal Laws

Evangeline G. Abriel[1]

CONTENTS

1. Clinical Professor of Law, Santa Clara University School of Law.

Introduction

Immigration falls exclusively within the federal government's purview, and states are generally prohibited from legislating in the area of immigration. At the same time, however, a large number of individuals are subject to deportation, denial of admission, and denial of immigration benefits based upon convictions of state crimes, over which states generally have exclusive authority. At a time when both the federal government and some states seem determined to expand the immigration consequences of even relatively minor criminal conduct, is there anything states can do to protect their noncitizen residents? Surprisingly, yes, quite a bit. California, for example, considers the term "Californian" to cover all of its residents, whether they are citizens, lawful permanent residents, or present without lawful status. This approach has led the state to enact a series of changes to its criminal statutes to reduce, in thoughtful and innovative ways, the immigration effect of some criminal conduct. Because the California Legislature is not the final authority in determining whether a criminal history will result in immigration consequences, its changes are only as effective as their implementation by California courts and recognition by the federal immigration authorities.

This article will analyze California's changes to its criminal laws and the treatment of those changes by California courts and the federal immigration authorities. Section 1 of the article briefly reviews the scope of federal authority in the area of immigration and the treatment of state attempts to legislate in areas concerning immigration. Section 2 will summarize the immigration consequences of criminal conduct under United States immigration law. Section 3 explains the California laws enacted to reduce immigration consequences and the intended purpose of those laws: to protect California's noncitizen residents and their families from the severe immigration consequences resulting from relatively minor criminal conduct. These changes include laws designed to lower immigration consequences at an initial

trial level and those designed to support applications for post-conviction relief. Section 4 explores the implementation of the new laws by California courts and the extent that the changes have been recognized by the Board of Immigration Appeals (BIA or Board) and federal courts as affecting immigration consequences. This section also looks at why these laws may withstand preemption challenges where other immigration-resistant state legislation would not.

I. AN OVERVIEW OF STATE LEGISLATION IN THE AREA OF IMMIGRATION LAW

Although the U.S. Constitution does not specify that the immigration power is vested in the U.S. government, the Supreme Court has made clear that the power to regulate immigration belongs to the federal government rather than to the states.[2] The power has been viewed as an aspect of sovereignty[3] and as "necessary and proper" under the Commerce Clause[4] for carrying out the enumerated powers to, inter alia, "regulate commerce with foreign nations" and "establish a uniform rule of naturalization."[5] Allocating immigration authority to the federal government has also been seen as necessary for the "maintenance of a republican form of government."[6]

Since noncitizens residing in this country live in the physical jurisdiction of states, it is not surprising that states frequently have enacted legislation that impacts them. However, states are deeply divided on how they treat their noncitizen residents.[7] Some, like California, feel strongly that all of their residents should be afforded safety and security to the extent of the state's power to provide it.[8] Others have welcomed a close connection to immigration enforcement and have even

2. DeCanas v. Bica, 424 U.S. 351, 354 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359, *as recognized in* Kansas v. Garcia, 140 S. Ct. 791, 797 (2020); Arizona v. United States, 567 U.S. 387, 394–95 (2012).

3. Ping v. United States, 130 U.S. 581, 604 (1889); *DeCanas*, 424 U.S. at 354.

4. U.S. CONST. art. I, § 8.

5. Fong Yue Ting v. United States, 149 U.S. 698, 712 (1893); *DeCanas*, 424 U.S. at 354.

6. Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952). Cases containing similar language include Plyler v. Doe, 457 U.S. 202, 225 (1982), Kleindienst v. Mandel, 408 U.S. 753, 765–67 (1972), and *Fong Yue Ting*, 149 U.S. at 711.

7. *See* Megan McCauley, *Reversing the Ice Age: Immigration Reform in California*, 49 U. PAC. L. REV. 481, 484 (2018) (revealing that state legislation has created a "deep, foundational divide" as some states have introduced restrictive legislation, while others introduce protection legislation); Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 247 (2016) ("Localities have reacted in quite different ways to their role as crucial partners in immigration enforcement.").

8. McCauley, *supra* note 7, at 488.

enacted legislation to support cooperation with the federal immigration authorities.[9]

State legislation has historically fallen into three general categories.[10] The first is state legislation that imposes controls or regulations upon noncitizens, such as a separate registration system.[11] An "immigration regulation" is a determination of who should be allowed in the United States and the conditions under which entrants may remain.[12] The second historical type of state legislation is legislation that discriminates against noncitizens for purposes of employment,[13] public and professional licenses and permits,[14] education,[15] and public benefits and services.[16]

Yet, a third type of state regulation affecting immigration is state policies that affect the federal government's ability to operate, in violation of the Supremacy Clause. This was seen most recently in the

9. Arizona v. United States, 567 U.S. 387 (2012) (striking down, as field- and obstacle-preempted under the Supremacy Clause, Arizona's S.B. 1070, which would have, inter alia, made failure to comply with federal alien-registration requirements a misdemeanor, made seeking or engaging in work by unauthorized noncitizens a misdemeanor, and authorized state and local officers to arrest persons suspected of committing removable offenses).

10. *See* Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 134–45 (1994). For a comprehensive summary of judicial determinations of whether state legislation concerning noncitizens is preempted or not, *see* Eric M. Larson, Annotation, *Preemption of State Statute, Law, Ordinance, Policy with Respect to Law Enforcement of Criminal Prosecution as to Aliens*, 75 A.L.R. 6th 541 (2012).

11. *E.g.*, Hines v. Davidowitz, 312 U.S. 52, 59–60, 74 (1941) (striking down Pennsylvania alien registration statute); *DeCanas*, 424 U.S. 351, 352, 362, 365 (finding the California state law that prohibited employment of noncitizens not authorized to work, where such employment would negatively impact resident worker, was not a regulation of immigration preempted by federal authority); *Arizona*, 567 U.S. at 387, 409, 416 (holding Arizona provisions making failure to comply with federal alien-registration requirements and seeking or engaging in work as an unauthorized alien misdemeanor offenses were preempted by federal authority).

12. DeCanas v. Bica, 424 U.S. 351, 355 (1976).

13. *See* Sugarman v. Dougall, 413 U.S. 634, 635, 646 (1973) (finding that the New York Civil Service provision limiting permanent positions to U.S. citizens violated the Fourteenth Amendment); Truax v. Raich, 239 U.S. 33, 40, 42–43 (1915) (holding that the Arizona statute limiting the percentage of noncitizens an entity might employ was preempted by federal law and violated the Fourteenth Amendment).

14. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 414, 419–20 (1948) (invalidating the California statute "barring issuances of commercial fishing licenses to persons ineligible for citizenship" because the statute was preempted by federal immigration authority and it violated equal protection under the Fourteenth Amendment).

15. *See* Toll v. Moreno, 458 U.S. 1, 3, 9–10 (1982) (denying in-state university tuition to nonimmigrants violated Supremacy Clause); Plyler v. Doe, 457 U.S. 202 (1982) (prohibiting undocumented children from attending public school without payment of tuition violated the Equal Protection Clause).

16. *See* Graham v. Richardson, 403 U.S. 365, 366–67, 376 (1971) (striking down the Arizona residency requirements for noncitizen eligibility for welfare because it violated the Supremacy Clause and Equal Protection Clause).

Ninth Circuit's en banc decision in *GEO Group, Inc. v. Newsom*.[17] There the Ninth Circuit struck down California's Assembly Bill (A.B.) 32, which would have prohibited the operation of private detention facilities in the state.[18] The Ninth Circuit concluded that A.B. 32 violated the Supremacy Clause's prohibition on state interference with or control of the operations of the federal government because the federal government used only private facilities to house noncitizens in California, and A.B. 32 would have made federal immigration detention virtually impossible in California.[19]

While state legislation in immigration raises the issue of conflict with the federal power over immigration, not all state enactments that deal with noncitizens are regulations of immigration automatically preempted by the federal power.[20] A state statute does not regulate immigration merely because noncitizens are subjects of the statute. Instead, state legislation that impacts immigration is invalid if it conflicts with federal law under either the doctrine of intergovernmental immunity or the doctrine of federal preemption.[21] The "doctrine of intergovernmental immunity is derived from the Supremacy Clause" of the U.S. Constitution that provides that "the activities of the Federal Government are free from regulation by any state."[22] Under the doctrine of preemption, state laws are preempted when they conflict with federal law.[23] This includes cases where "compliance with both federal and state regulations is a physical impossibility," known as obstacle preemption, and "those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," known as conflict preemption.[24] State legislation has also been examined for compliance with equal protection under the Fifth and Fourteenth Amendments.[25]

17. GEO Group, Inc. v. Newsom, 50 F.4th 745 (9th Cir. 2022) (en banc).

18. *Id.*

19. *Id.* at 750–51, 763.

20. *See* DeCanas v. Bica, 424 U.S. 351, 355 (1976) (citing as examples of cases that upheld certain discriminatory state treatment of noncitizens Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 415–22 (1948) and Graham v. Richardson, 403 U.S. 365, 372–73 (1971)).

21. *See* United States v. California, 921 F.3d 865, 878–79 (9th Cir. 2019) (explaining both doctrines).

22. *Id.* at 878.

23. Arizona v. United States, 567 U.S. 387, 399 (2012).

24. *Id.* (internal citations omitted).

25. *DeCanas*, 424 U.S. at 355 (noting that some cases addressing state legislation in the area of immigration arose under the Equal Protection Clause); Plyler v. Doe, 457 U.S. 202 (1982) (prohibiting undocumented children from attending public school without payment of tuition violated the Equal Protection Clause).

In *De Canas v. Bica,* the Supreme Court set forth three tests to be used in reviewing the sorts of state legislation mentioned above. State legislation is federally preempted if it fails any one of the tests.[26] Under the first test, the court must determine whether a state statute is a "regulation of immigration."[27] Because the power to regulate immigration is exclusively a federal one, any statute that regulates immigration is proscribed.[28] Under the second test, even if the state law is not an impermissible regulation of immigration, it may still be preempted if Congress has indicated a "clear and manifest" intent to "complete[ly] oust[ ] . . . state power including state power to promulgate laws not in conflict with federal laws."[29] In other words, under the second test, a statute is preempted where Congress intended to "occupy the field" that the statute attempts to regulate.[30] Finally, under the third test, a state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[31] "Stated differently, a statute is preempted under the third test if it conflicts with federal law, making compliance with both state and federal law impossible."[32]

But the California laws that this article examines are of a new breed, different from the sorts of regulations and limitations described above. The new state laws are designed to protect noncitizen residents from the harshest immigration consequences arising from state criminal prosecutions of its own residents, whether they are citizens or noncitizens. The legislation covers specific lowering of sentences under the California Penal Code, extending representation in removal proceedings for those who cannot afford to pay, restricting the federal government's ability to detain noncitizens in California, and more.[33]

These laws are part of a broader immigrant protection policy. In addition to the crime-related laws that are the subject of this article, states have enacted legislation permitting undocumented noncitizens to obtain driver's licenses, healthcare, particularly during the pan-

26. *DeCanas*, 424 U.S. 351, 356, 361 (1976).
27. *Id.* at 354–55.
28. *Id.* at 354–56.
29. *Id.* at 357.
30. *Id.* at 351.
31. *Id.* at 363 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
32. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 768 (C.D. Cal. 1995), *on reconsideration in part*, 997 F. Supp. 1244 (C.D. Cal. 1997).
33. *See* Ann Morse, *Report on State Immigration Laws 2020*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/immigration/report-on-state-immigration-laws-2020 (last updated Mar. 8, 2021).

demic, and admission to the state bar, to name just a few.[34] In fact, California's legislation has been called "The California Package" and described as creating a de facto state citizenship for California's noncitizen residents.[35]

California's changes to its criminal laws, designed to protect its noncitizen residents and their families, have been called "protective policies,"[36] and the states and localities that enact the legislation have been described as "sites of resistance and assistance."[37] The Ninth Circuit, sitting en banc, has described California as having "placed federal immigration policy within its crosshairs."[38] Are these types of statutes on a collision course with the Supremacy Clause, or do they demonstrate an outer limit of a state's authority to legislate on behalf of its noncitizen residents?

II. IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT UNDER THE IMMIGRATION AND NATIONALITY ACT

As the Supreme Court pointed out in *Padilla v. Kentucky*,[39] "[t]he landscape of federal immigration law has changed dramatically over the last [ninety] years."[40] In the early days of the country, there were no laws banning immigration or requiring deportation based on criminal conduct. It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country.[41] In 1891, Congress added to the list of excludable persons those "who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude."[42] Then, in 1917, "Congress made classes of noncitizens deportable based on conduct committed on

34. *Id.*

35. S. Karthick Ramakrishnan & Allan Colbern, *The "California Package" of Immigrant Integration and the Evolving Nature of State Citizenship*, 6 POL'Y MATTERS 18 (2015), https://escholarship.org/content/qt6kt522jr/qt6kt522jr_noSplash_d458e2e68c58247354ca89b830181009.pdf?t=NYd7l5.

36. *See* David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. ONLINE 224, 224 (2019) ("States and localities are asserting themselves as sites of resistance and assistance.").

37. *Id.*

38. GEO Grp., Inc. v. Newsom, 15 F.4th 919, 928 (9th Cir. 2021). *See also* United States v. California, 921 F.3d 865, 872 (9th Cir. 2019) ("[California] has enacted three laws expressly designed to protect its residents from federal immigration enforcement. . . .").

39. Padilla v. Kentucky, 559 U.S. 356 (2010).

40. *Id.* at 360.

41. *Id.* (citing Page Act of 1875, ch. 141, 18 Stat. 477).

42. *Id.* at 360–61 (citing Act of Mar. 3, 1891, ch. 551 § 1, 26 Stat. 1084, 1084).

American soil."[43] However, along with making criminal conduct a basis for deportation, the 1917 Act also introduced the Judicial Recommendation against Deportation or JRAD.[44] Under the JRAD provision, a criminal court judge, whether federal or state, could, at the time of sentencing or within thirty days thereafter, recommend that the noncitizen not be deported.[45] The federal government was bound by this recommendation.[46] Thus, as the Supreme Court noted, from 1917 forward, there was no automatically deportable offense because criminal court judges "retained discretion to ameliorate unjust results on a case-by-case basis."[47]

Congress restricted the JRAD provision in the Immigration and Nationality Act (INA) of 1952[48] and entirely eliminated it in the Immigration Act of 1990.[49] In addition, Congress has added to the list of offenses that will make an individual deportable, in particular by adding the concept of "aggravated felony" in 1988[50] and by steadily increasing the list of offenses designated as aggravated felonies. While the original list of aggravated felonies included only murder, drug trafficking and illicit firearms trafficking, the list has now stretched to some fifty offenses,[51] including offenses such as theft or forgery with a

43. *Id.* at 361 (citing S. Rep. No. 81-1515, at 54–55 (1950)).

44. *Id.* at 361–62.

45. *Id.* at 361.

46. *Id.* at 362; Immigration and Nationality Act of 1952, 8 U.S.C. § 1227 (originally enacted as Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874, 889–90) . The text of the JRAD provisions was:

> That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, . . . make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act.

Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874, 889–90.

47. Padilla v. Kentucky, 559 U.S. 356, 362 (2010).

48. When Congress separated the deportation ground of crimes of moral turpitude and the deportation ground for narcotics offenses in 1952, it limited the JRAD provision to crimes involving moral turpitude. *Id.* at 363 n.5 (citing Immigration and Nationality Act of 1952, (Pub. L. 414, 66 Stat. 163 (creating a new Immigration and Nationality Act) (June 27, 1952).

49. Immigration Act at 1990, Pub. L. No. 101-649 (Nov. 29, 1990), § 505, 104 Stat. 4978, 5050. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342, 7344(a), 102 Stat. 4181, 4469.

50. *Id.* (amending the definition of aggravated felonies to include illicit trafficking in any controlled substance, money laundering, any crime of violence where the term of imprisonment is at least one year, or violations of foreign law for which the term of imprisonment was completed in the last fifteen years).

51. *Id.* §§ 1227(a)(2)(A)(iii), 1101(a)(43)(A)–(U).

conviction of at least one-year[52] and possession of a gun by an "alien . . . illegally or unlawfully in the United States."[53]

Criminal antecedents have several sorts of immigration consequences under current law. First, intending nonimmigrants and immigrants,[54] as well as a number of other categories of persons seeking U.S. immigration benefits,[55] must establish that they are admissible under the inadmissibility grounds found in Section 212 of the INA.[56] There are a number of crime-related inadmissibility grounds, including having been convicted of or admitting to essential elements of a crime involving moral turpitude,[57] or an offense relating to a controlled substance.[58] There are waivers for some of these crime-based inadmissibility grounds, but those waivers are granted in the exercise of discretion.[59]

Second, an individual who has been admitted to the U.S. as an immigrant, nonimmigrant, or refugee or who has obtained some other immigration status, such as asylum, may be subject to criminal deportation grounds. These include conviction of a crime involving moral turpitude committed within five years of admission for which a sentence of one year or longer could be imposed,[60] the conviction of multiples crimes of moral turpitude at any time,[61] the conviction of a controlled substance offense,[62] a conviction of specified firearms offenses,[63] and conviction of crimes of domestic violence or stalking.[64]

52. *Id.* § 1101(a)(43)(G), (R).

53. 18 U.S.C. § 922(g)(5)(A) (constituting an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii)).

54. Immigrant status refers to someone who lives permanently in the U.S., whereas nonimmigrant status is for someone entering the United States on a temporary basis. *See* Geoffrey Heeren, *The Status of Nonstatus,* 65 Am. U. L. Rev. 1115, 1122–32 (2015).

55. For example, refugees must establish that they are admissible. 8 U.S.C. § 1157(c)(1). Persons seeking temporary protected status. *Id.* § 1254a(c)(1)(A)(iii).

56. Immigration and Nationality Act, Pub. L. No. 414, § 212(a), 66 Stat. 163, 182 (1952); 8 U.S.C. § 1182(a).

57. 8 U.S.C. § 1182(a)(2)(A)(i)(I). There are exceptions to the inadmissibility ground of one crime involving moral turpitude for one petty offense and one juvenile offense. *Id.* § 1182(a)(2)(A)(ii).

58. *Id.* § 1182(a)(2)(A)(i)(II). The crime-based inadmissibility grounds also include, inter alia, conviction of multiple criminal offenses and an immigration agent's reason to believe that the individual is or has been a trafficker in controlled substances. *Id.* § 1182(a)(2)(B)–(C).

59. Non-immigrants may be eligible for a waiver of the crime-based inadmissibility grounds under *Id.* § 1182(d)(3)(A). Immigrants may be eligible for a waiver under *Id.* § 1182(h), if they meet the statutory requirements for that waiver. Refugees may benefit from the waiver found at *Id.* § 1157(c)(3).

60. *Id.* § 1227(a)(2)(A)(i)(I), (II).

61. *Id.* § 1227(a)(2)(A)(ii).

62. *Id.* § 1227(a)(2)(B)(i).

63. *Id.* § 1227(a)(2)(C).

One is also deportable for conviction of an aggravated felony.[65] The list of offenses designated as aggravated felonies includes murder, rape, and sexual abuse of a child,[66] as well as forgery with a sentence of one year,[67] theft with a sentence of one year,[68] and fraud with at least a $10,000 loss to the victim.[69]

A criminal record may also have serious negative effects on an individual's eligibility for certain forms of relief from removal during removal proceedings. For example, a conviction of an aggravated felony makes one ineligible for asylum[70] and voluntary departure,[71] and a conviction of an aggravated felony with a sentence of five years makes one ineligible for withholding of removal.[72] Conviction of a criminal inadmissibility or deportation ground, including an aggravated felony, results in statutory ineligibility for cancellation of removal.[73]

Moreover, a criminal record may affect an individual's ability to show good moral character, a statutory requirement for naturalization, and for some forms of relief from removal. "Good moral character" is defined principally by what it is not. The "what it is not" includes falling under certain criminal inadmissibility grounds,[74] having been convicted of an aggravated felony,[75] or having been confined, as a result of conviction, to an institution for an aggregate period of one hundred and eight days.[76] A criminal record may also result in mandatory immigration detention.[77]

The INA not only defines the substance of offenses that have immigration consequences but also prescribes the type of resolution that will have immigration consequences. Most of the inadmissibility grounds, deportation grounds, and statutory bars to relief mentioned above require a conviction. "Conviction" includes not only a finding of guilt by a judge or jury and a plea of guilty or nolo contendere, but

64. *Id.* § 1227(a)(2)(E)(i).
65. *Id.* § 1227(a)(2)(A)(iii).
66. *Id.* § 1101(a)(43)(A).
67. *Id.* § 1101(a)(43)(R).
68. *Id.* § 1101(a)(43)(G).
69. *Id.* § 1101(a)(43)(M)(i).
70. *Id.* § 1158(b)(2)(B)(i).
71. *Id.* § 1240.56.
72. *Id.* § 1231(b)(3).
73. *Id.* § 1229b(a)(3), (b)(1)(C).
74. *Id.* § 1101(f)(3).
75. *Id.* § 1101(f)(8).
76. *Id.* § 1101(f)(7).
77. *Id.* § 1226(c).

also a resolution under which the individual has admitted sufficient facts to warrant a finding of guilt and the judge has ordered some form of punishment, penalty, or restraint on the individual's liberty.[78] Thus, many of the first-offender pleas utilized by states to ameliorate the effect of a single conviction on an individual's life would still be a conviction for immigration purposes.[79] However, a vacatur of a judgment of guilt based on some legal error in the underlying criminal case will remove a conviction for immigration purposes.[80]

These immigration consequences of a criminal record are exacerbated by the low percentage of legal representation in removal proceedings. As of July 2022, about 53 % of respondents in removal proceedings had representation.[81] Asylum applicants had a higher rate of representation, at 84 %.[82] Representation is critical because statistics show that persons with representation are much more likely to prevail in their removal proceedings. For example, Immigration Judges granted asylum applications in about 44 % of represented

78. *Id.* § 1101(a)(48)(A)(i). "Conviction" is defined under the INA as:

> 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.

Id. This definition was added to the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 322(a)(1), 110 Stat. 3009-546, 628 (1996). Prior to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), the Board had defined "conviction" to include the above definition and a third provision, "a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding his guilt or innocence of the original charge." Matter of Ozkok, 19 I&N Dec. 546, 551–52 (BIA 1988). The Board interpreted Congress's deleting of Ozkok's third prong as Congress' intent to include deferred criminal adjudications within the definition of conviction. Matter Cardenas Abreu, 24 I&N Dec. 795, 799–800 (BIA 2009); Matter of Roldan-Santoyo, 22 I&N Dec. 512, 518 (BIA 1999); Matter of D-L-S-, 28 I&N Dec. 568, 572–73 (BIA 2022). "In so doing, Congress reflected its concern about the problems presented by the indeterminate nature of such proceedings and clearly expressed its disfavor with aliens' pursuit of avenues available under State laws to allow them to delay indefinitely the conclusion of immigration proceedings." Matter of D-L-S-, 28 I&N Dec. at 572–73.

79. There is one exception for convictions of simple possession of a controlled substance. An expungement following a plea under the Federal First Offender Act will remove a conviction for simple possession of a controlled substance. 18 U.S.C. § 3607(b)–(c). In addition, in the Ninth Circuit only, state rehabilitative relief that is an analog to the Federal First Offender Act will cure convictions for simple possession of a controlled substance that occurred on or before July 14, 2011. Nunez-Reyes v. Holder, 646 F.3d 684, 689–90 (9th Cir. 2011) (en banc).

80. Matter of Dingus, 28 I&N Dec. 529, 532–33 (BIA 2022); Matter of Pickering, 23 I&N Dec. 621, 624 (BIA 2003), *rev'd on other grounds*, Pickering v. Gonzales, 465 F.3d 263, 266 (6th Cir. 2006); Matter of Thomas, 27 I&N Dec. 674, 676 (A.G. 2019).

81. Congressional Research Service, U.S. Immigration Courts: Access to Counsel in Removal Proceedings and Legal Access Programs (July 2022), https://crsreports.congress.gov/product/pdf/IF/IF12158/3. (Last visited May 27, 2023.)

82. *Id.*

cases, but in only about 15 % of unrepresented cases.[83] Similarly, as of the end of April 2023, over three out of four persons ordered removed by Immigration Judges during FY 23 had no representation.[84] Lack of representation reduces a respondent's ability to support applications for post-conviction relief and, for individuals with criminal records, to explain, under the complicated immigration laws, why their criminal record does not make them removable.

The Supreme Court's decision in *Padilla v. Kentucky* has indelibly linked immigration law and criminal law by recognizing that "changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction" and "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[85]

III. CALIFORNIA'S IMMIGRATION-RELATED CHANGES TO ITS CRIMINAL LAWS

It bears mentioning that California has come a long way in its thinking about its relationship with its undocumented citizens. In 1994, California passed Proposition 187, which would have prevented "illegal aliens" from receiving benefits or public services in California.[86] Under the proposition, California would have restricted services such as publicly-funded health care benefits (except for emergency medical care), public elementary and secondary education, and public postsecondary education to U.S. citizens, lawful permanent residents, and noncitizens lawfully admitted for a temporary period of time.[87] The proposition would have also required state agencies to notify the Immigration and Naturalization Service (INS) of individuals who appeared to be in illegal status[88] and would have required social service agencies, schools, and medical care providers to verify

83. *Id. See also* Syracuse University, New Proceedings File din Immigration Court by State, Court, Hearing Location, Year, Charge, Nationality, Language, Age, and More, TRAC, https://trac.syr.edu/phptools/immigration/ntanew/ (last visited May 27, 2023).

84. Syracuse University, Despite Efforts to Provide Pro Bono Representation, Growth is Failing to Meet Exploding Demand, TRAC, https://trac.syr.edu/reports/716/ (last visited May 27, 2023).

85. Padilla v. Kentucky, 559 U.S. 356, 362 (2010).

86. Illegal Aliens. Ineligibility for Public Services. Verification and Reporting., 1994 Cal. Legis. Serv., § 5, (Proposition 187).

87. *Id.* §§ 5–8.

88. *Id.* § 4.

immigration status and report findings to the INS.[89] The U.S. District Court for the Central District of California found that the statute's classification, notification, and cooperation/reporting provisions created an impermissible state scheme to regulate immigration and deter "illegal aliens" from entering or remaining in the United States and were therefore preempted by federal law.[90]

What has changed to encourage California to take up the banner of protecting its noncitizen residents in an area of law normally considered reserved to the federal government? Some of the motivation behind the legislation is explained by California demographics. California is home to almost eleven million immigrants.[91] As of 2021, 10,451,810 people living in California were foreign-born, while 28,786,026 were U.S.-born.[92] About twenty-two percent of the immigrants in California in 2019, were undocumented.[93] As of 2022, California has a total of 10.31 million foreign-born residents, accounting for 26.49% of its total population, making it the U.S. state with the largest immigrant population.[94]

Moreover, California is a state of blended immigrant families. "In 2019, [twenty] percent of all individuals under [eighteen years old] in California were living in mixed-status families, meaning they were [either] undocumented themselves or living with someone who was."[95]

89. *Id.* §§ 5–8. The Immigration and Naturalization Service, or INS, was replaced by three departments within the Department of Homeland Security: U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP). U.S. Citizenship and Immigration Services, *Overview of INS History*, USCIS Hist. Off. & Libr. 11 (2012) https://www.uscis.gov/sites/default/files/document/fact-sheets/INS History.pdf. The Department of Homeland Security was created by the Homeland Security Act of 2002. 6 U.S.C. § 111.

90. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786–87 (C.D. Cal. 1995) (striking down the "classification, notification, and cooperation/reporting provisions in sections 4 through 9" of Proposition 187). Although California appealed the district court's decision, that appeal was eventually ended through agreement between the parties. *See* Huyen Pham, *Proposition 187 and the Legacy of its Law Enforcement Provisions*, 53 U.C. Davis L. Rev. 1957, 1981 (2020).

91. State Immigration Data Profiles: California, Migration Pol'y Inst., https://www.migrationpolicy.org/data/state-profiles/state/demographics/CA (last visited Jan. 13, 2023).

92. *Id.*

93. Cesar Alesi Perez, Marisol Cuellar Mejia & Hans Johnson, *Immigrants in California*, Pub. Pol'y Inst. Cal. (Jan. 2023), https://www.ppic.org/wp-content/uploads/jtf-immigrants-in-california.pdf.

94. *States with the Most Immigrants 2023*, World Population Rev., https://worldpopulationreview.com/state-rankings/states-with-the-most-immigrants (last visited Jan. 13, 2023); *see also* Perez et al., *supra* note 94.

95. *Mixed-Status Families: Many Californians Live in Households with Family Members Who Have Different Citizenship or Immigration Statuses*, Cal. Immigr. Data Portal, https://immigrantdataca.org/indicators/mixed-status-families#/ (last visited Jan. 13, 2023).

Across California, in 2019, some 2,385,700 U.S. citizens and 711,285 lawful residents were living with an undocumented family member.[96] Fifty percent of California's children, or about 4.5 million children, have at least one immigrant parent.[97] "In congressional districts [seventeen], [thirty-four], and[forty-six] [that] represent parts of greater Los Angeles and the San Francisco Bay Area, more than [seventy-five] percent of children have at least one immigrant parent."[98] "For mixed-immigration-status families, family separation poses serious risks for children, including emotional trauma, housing insecurity, and food insecurity."[99]

Other factors affecting California's new legislation include a sense that Congress was not accomplishing comprehensive immigration reform.[100] California also has a substantial number of immigrant advocacy groups that "have worked tirelessly to educate the public and legislature about issues affecting the state's immigrant community."[101] And Proposition 187 itself may have added to the impetus, since the reaction[102] against it encouraged collective action and "awakened the political power of Latinos in the Golden [S]tate."[103]

---

96. *Id.*

97. *Half of CA Children Have Immigrant Parents,* KIDSDATA (Feb. 10, 2017), https://www.kidsdata.org/blog/?p=7804.

98. *Id.*

99. *Id.*

100. *See* Andrea Castillo, *Immigration Reformers' Hopes Dashed as Senate Fails to Act*, L.A.TIMES (last updated Dec. 22, 2022); Robert Suro, *Congress Has Killed Immigration Reform. It'll Regret That.*, WASH. POST (Dec. 19, 2022).

101. Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12, 26 (2017), citing Sameer M. Ashar et al, *Navigating Liminal Legalities Along Pathways to Citizenship: Immigrant Vulnerability and the Role of Mediating Institutions*, U.C. IRVINE 3 (2015), https://scholarship.law.uci.edu/faculty_scholarship/581/. For example, the organizations supporting S.B. 1310 that resulted in reduction of the possible sentence for California misdemeanors to 364 days, include, inter alia, the American Civil Liberties Union, Asian Americans Advancing Justice, Children's Defense Fund – California, the California Immigrant Policy Center, Friends Committee on Legislation of California, the Latino Coalition for a Healthy California, and the Mexican American Legal Defense Fund (MALDEF). *See* S.B. 1310, S. Comm. on Pub. Safety, Bill Analysis, S. 113, Reg. Sess., at 1 (Cal. 2014).

102. Among the protests organized against Proposition 187, there was one on October 16, 1994, in which 70,000 protesters marched to Los Angeles City Hall to demonstrate their opposition. *Looking Back at Proposition 187 Twenty-Five Years Later*, CAL. STATE ARCHIVE, https://artsandculture.google.com/story/looking-back-at-proposition-187-twenty-five-years-later-california-state-archives/BwWRJ8CAUvmiLg?hl=EN (last visited Jan. 7, 2023).

103. *See* Libby Denkmann, *After Prop 187 Came the Fall of California's Once-Mighty GOP, and the Rise of Latino Political Power*, LAIST (Nov. 11, 2019), https://laist.com/news/prop-187-political-impact-california-latino-participation-power-surges-republican-party-fading; Suzanne Gamboa, *How an Anti-Immigrant Ballot Initiative Mobilized Latinos- and Turned California Blue*, NBC NEWS (Nov. 8, 2019), https://www.nbcnews.com/news/latino/how-anti-immigrant-ballot-initiative-mobilized-latinos-turned-california-blue-n1078361.

Padilla's clarification of the effect of deportation also resonated with the California Legislature:

> The immigration consequences of criminal convictions have a particularly strong impact in California. One out of every four persons living in the state is foreign-born. One out of every two children lives in a household headed by at least one foreign-born person. The majority of these children are United States citizens. It is estimated that 50,000 parents of California United States citizen children were deported in a little over two years. Once a person is deported, especially after a criminal conviction, it is extremely unlikely that he or she ever is permitted to return.[104]

The Senate Committee on Public Safety in California, considering legislation to ameliorate the effect of criminal history on noncitizens, also emphasized the social and human costs of deportation:

> Those deported often leave behind families and children who depend on them for support. From 2010 through 2012, the U.S. Immigration and Customs Enforcement deported 204,000 immigrant parents from the U.S., which accounts for [twenty-three] percent of the total number of deportations during that time period. Many of those deported for minor offenses are longtime legal permanent residents of California, with deep connections to their families and communities.[105]

This understanding of the effect of deportation is echoed by the California Supreme Court "deported alien who cannot return loses his job, his friends, his home, and maybe even his children, who must choose between their parent and their native country."[106]

The California Legislature's intent to shield its noncitizen residents is clear from much of the legislative history. For example, the bill analysis for Senate Bill (S.B.) 1310, reducing the maximum sentence for a California misdemeanor to 364 days, lists the federal immigration consequences of a sentence of a year or more and explains that "SB 1310 aligns state and federal law by reducing all California misdemeanors by one day for a maximum sentence of 364 days, not 365 days. This small change will ensure, consistent with federal law and intent, legal residents are not deported from the state and torn away from their families for minor crime."[107] The bill's authors pointed out that:

104. CAL. PENAL CODE § 1016.2(g).
105. S.B. 1310, Cal. S. Comm. on Pub. Safety, Bill Analysis, at 6.
106. People v. Martinez, 304 P.3d 529, 535 (Cal. 2013).
107. S.B. 1310, Bill Analysis, S. 113, Reg. Sess., at 2 (Cal. 2014) (Senate 3d Reading).

> This bill will not affect immigration enforcement and people who are in California unlawfully or have committed serious crimes will still face deportation. This bill will preserve judicial discretion and ensure legal residents who have committed minor crimes are not automatically subject to deportation and separated from their families.[108]

California's concern for its noncitizen residents is echoed again in the California Values Act.[109] There, the Legislature stated in its findings that "[i]mmigrants are valuable and essential members of the California community. Almost one in three Californians is foreign-born, and one in two children in California has at least one immigrant parent."[110]

The legislative history of section 1473.7 of the California Penal Code, allowing for post-conviction relief, shows a similar intent, particularly addressing concern over immigration consequences arising from lack of advisals during criminal proceedings.[111]

> AB 813 will give hope to those who have been wronged by an unlawful conviction by establishing a way to challenge it after their criminal custody has ended. Even though current law requires defense counsel to inform noncitizen defendants of the immigration consequences of convictions, some defense attorneys still fail to do so. Failure to understand the true consequences of pleading guilty to certain felonies, for example, has led to the unnecessary separation of families across California. AB 813 does not guarantee an automatic reversal of the conviction, but an opportunity to present their case in front of a judge, a procedure that already exists in most of the country.[112]

> This deficiency [the lack of a means for post-conviction relief for persons no longer in state custody] in current law has a particularly devastating impact on California's immigrant communities. While the criminal penalty for a conviction is obvious and immediate, the immigration penalty can remain 'invisible' until an encounter with the immigration system raises the issue. Since 1987, California law

108. S.B. 1310, Cal. S. Comm. on Pub. Safety, Bill Analysis, at 7.

109. CAL. GOV'T CODE § 7284.2(a).

110. *Id.*

111. *See* People v. Alatorre, 286 Cal. Rptr. 3d 1, 765 (Cal. Ct. App. 2021) ("In section 1473.7, the Legislature has expressed its particular concern for immigrants who suffer convictions without understanding that it will in the future result in their deportation or other adverse immigration consequences.").

112. A.B. 813, Bill Analysis, 2015-16 Legis., Reg. Sess., at 4 (Cal. 2016) (Assembly 3d Reading).

> has required defense counsel to inform noncitizen defendants about the immigration consequences of convictions. But, despite this requirement, some defense attorneys still fail to do so. Immigrants may find out that their conviction makes them deportable only when, years later, Immigration and Customs Enforcement initiates removal proceedings. By then, however, it is too late. Without any vehicle to challenge their convictions in state court, immigrants are routinely deported on the basis of convictions that should never have existed in the first place.[113]

The changes in California law addressed in this article are part of a larger package of protections for the immigrant community. These include allowing individuals to obtain driver's licenses, in-state college tuition, state professional licenses, and protections against immigration enforcement actions in California courthouses regardless of immigration status.[114] Other California laws protect against state, county, and local law enforcement cooperation with federal immigration officials, with the goal of increasing community safety by making all residents feel safe to report crime.[115]

These circumstances in California provided the setting for a systematic addition of laws aimed at reducing the worst immigration consequences that might result from state prosecution. California has responded with a thoughtful, wide-ranging set of new laws that address the immigration consequences of criminal conduct, from the seriousness of current charges, to devising resolutions that do not trigger the consequences of a conviction and to redressing the harm caused by old convictions. The new legislation also addresses surrounding issues, such as the consequences of collaboration with ICE, immigration detention following a California conviction, and the lack of representation in removal proceedings.[116] And California did this by using the

113. A.B. 813, S. Comm. on Pub. Safety, Bill Analysis, 2015-16 Legis., Reg. Sess., at 10 (Cal. 2016) (Hearing on May 10, 2016).

114. *See* Safe and Responsible Drivers Act, 2013 Cal. Stat. ch. 524; California Development, Relief, and Education for Alien Minors (DREAM) Act, 2011 Cal. Stat. ch. 93; 2001 Cal. Stat. ch. 814; California Values Act, S.B. 54, 2017 Leg., Reg. Sess. (Cal. 2017).

115. CAL. GOV'T CODE §§ 7284–7284.12; *see* Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 280–82 (2016) (describing three central justifications conventionally advanced in support of immigrant protection in criminal justice policy: (1) fostering community trust in law enforcement, (2) integrating undocumented immigrants into society, and (3) saving scarce law enforcement resource for local, as opposed to federal, initiatives). *See also* Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 542–43 (2017) (describing the motivation behind the City of Santa Ana's sanctuary policies).

116. CAL. GOV'T CODE §§ 7284–7284.12

simple, targeted, strategic vehicles described in the following subsections.

A. Reducing Maximum Misdemeanor Sentence Under Statute to 364 Days

California's first measure addressing the immigration consequences of crimes was to reduce the possible sentence of a California misdemeanor from one year, or 365 days, to 364 days.[117] This change affected the risk of deportation in two ways. First, it prevented an offense from being a "crime[ ] of moral turpitude" "for which a sentence of one year or more may be imposed."[118] Second, the reduction in the maximum sentence prevents the offense from being one of the aggravated felonies that requires a sentence of one year.[119] The legislative history of the bill makes clear that the "one year sentence deportation policy" is unfair because it results in deportation "due to minor crimes, such as writing a bad check."[120]

B. Alternatives to Conviction - Pre-Plea Diversions

In 2017 and 2018, California enacted two new pretrial diversion programs.[121] In each of these diversion programs, the defendant pleads not guilty, and after successful completion of diversion requirements, the charges are dropped without a conviction.[122] If the person does not complete the diversion program, they return to the criminal court process under the original charges.[123] These alternatives to a conviction allow the noncitizen defendant to avoid the criminal removal grounds that require a conviction, including deportation for crimes involving moral turpitude,[124] aggravated felonies,[125] and con-

117. CAL. PENAL CODE § 18.5(a).

118. 8 U.S.C. § 1227(a)(2)(A)(i)(II).

119. Offenses that require a sentence of one year to be an aggravated felony include crimes of violence, theft, commercial bribery, counterfeiting, forgery, crimes of violence, obstruction of justice, and perjury, among others. *Id.* § 1101(a)(43)(F), (G), (R), (S).

120. S.B. 1310, S. Comm. on Pub. Safety, Bill Analysis, S. 113, Reg. Sess., at 6 (Cal. 2014). http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_1301-1350/sb_1310_cfa_20140401_130813_sen_comm.html.

121. CAL. PENAL CODE §§ 1000–1000.1, 1001.95.

122. *Id.*

123. Cal. Penal Code § 1001.95(d).

124. INA § 237(a)(2)(A)(i) and (ii), 8 U.S.C. § 1227(a)(2)(A)(i), (ii).

125. *Id.* § 1227(a)(2)(A)(iii).

trolled substance offenses,[126] and inadmissibility for multiple convictions.[127]

Amelioration of harsh immigration consequences was clearly one of the goals of the bill's authors:

> This bill seeks to limit harsh consequences to immigrants by changing the current process for nonviolent, misdemeanor drug offenses from deferred entry of judgment (DEJ) to pretrial diversion. While the current DEJ process eliminates a conviction if the defendant successfully completes DEJ, the defendant may still face federal consequences, including deportation if the defendant is undocumented, or the prohibition from becoming a United States citizen if the defendant is a legal permanent resident. This is a systemic injustice to immigrants to this country, but even U.S. citizens may face federal consequences, including loss of federal housing and educational benefits. This bill will keep families together, help people retain eligibility for U.S. citizenship, and also preserve access to other benefits for those who qualify.[128]

In 2021, California expanded the pretrial diversion options to allow judges to offer diversion to persons charged with misdemeanors offenses, even over the prosecutor's objection.[129] There are exceptions for more serious offenses. For example, diversion is not available to persons charged with a misdemeanor offense for which sex registration may be required (California Penal Code 290) or some commonly charged domestic violence or stalking offenses (California Penal Code 243(e), 273.5, and 646.9).[130] Further, Governor Newsom of California has said that he wants to exclude misdemeanor DUI from diversion eligibility as well.[131]

C. Post-Conviction Relief for Noncitizen Defendants

California's work to protect its noncitizen residents looks not only to prospective prosecutions but also to old ones that present immigration risks. The state first addressed this concern in 2015, when the Legislature enacted a provision allowing individuals to withdraw

126. *Id.* § 1227(a)(2)(B).
127. *Id.* § 1182(a)(2)(B).
128. A.B. 208, Assembly Floor Analysis, 2017–18 Legis., Reg. Sess., at 4 (Cal. 2017) (Sept. 12, 2017).
129. CAL. PENAL CODE § 1001.95(a).
130. *Id.* § 1001.95(e).
131. *See* Letter from Gov. Gavin Newsom, to Members of the Cal. State Assemb., Signing Statement for A.B. 3234 (Sept. 30, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/09/AB-3234.pdf.

guilty pleas entered under former section 1000 of the California Penal Code.[132] Prior to 2015, the Penal Code provided that if a defendant who pled under section 1000's deferred entry of judgment complied with probation requirements, the person would not have a conviction or arrest record and would suffer no loss of any legal benefits.[133] However, this turned out not to be accurate, since a plea under a post-plea deferred entry of judgment still met the federal definition of conviction for immigration purposes. The California Legislature stated:

> The Legislature finds and declares that the statement in Section 1000.4, that "successful completion of a deferred entry of judgment program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate" constitutes misinformation about the actual consequences of making pleas in the case of some defendants, including all noncitizen defendants, because the disposition of the case may cause adverse consequences, including adverse immigration consequences.[134]

Under section 1203.43 of the California Penal Code, for defendants who were granted deferred entry of judgment on or after January 1, 1997, who perform satisfactorily during the period of deferred judgment, and whose criminal charges were dismissed under section 1000.3 of the Penal Code, the courts must grant a request to withdraw the plea and shall dismiss the complaint or information against the defendant.[135]

California has continued to refine its post-conviction relief measures. In 2016, the Legislature approved S.B. 1242, which allowed persons previously sentenced to 365 days for a misdemeanor to ask the judge to reduce the sentence retroactively by one day.[136] In 2017, the Legislature approved A.B. 813, which allows noncitizens who are no longer in criminal custody to apply to vacate convictions "due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or poten-

132. A.B. 1352, 2015–16 Leg., Reg. Sess. (Cal. 2015) (enacted and codified as CAL. PENAL CODE § 1203.43).

133. CAL. PENAL CODE § 1000.4 (as enacted in 2017 Cal. Stat. ch. 680, § 5).

134. A.B. 1352, 2015–16 Leg., Reg. Sess. (Cal. 2015) (codified as CAL. PENAL CODE § 1203.43(a)(1)).

135. CAL. PENAL CODE § 1203.43(b). *See also* Equal Employment Opportunity Employer Fresno County, *Penal Code Section 1203.43*, https://www.co.fresno.ca.us/home/showdocument?id=1299 (form used by Fresno Public Defender's Office for clients seeking relief under section 1203.43).

136. S.B. 1242, 2016 Leg., Reg. Sess. (Cal. 2016) (codified as CAL. PENAL CODE § 18.5).

tial adverse immigration consequences of a plea of guilty or nolo contendere."[137] And again in 2018, the Legislature approved A.B. 208, a new pre-plea diversion program.[138]

D. Implementing *Padilla v. Kentucky* into the California Penal Code

The Supreme Court's decision in *Padilla v. Kentucky*[139] was a watershed decision for noncitizen defendants. It stressed the disproportionate consequence of a conviction upon noncitizens and the importance of providing noncitizen defendants with adequate advice about the possible immigration consequences.[140] California had required counsel to advise noncitizen defendants of immigration consequences prior to *Padilla v. Kentucky*.[141] However, in 2015, the California Legislature imposed new obligations concerning immigration consequences on judges, prosecutors, and defense counsel.[142] The Legislature explicitly stated its intent "to codify *Padilla v. Kentucky* and related California case law and to encourage the growth of such case law in furtherance of justice and the findings and declarations of this section."[143]

Under these provisions, prosecutors must consider the avoidance of adverse immigration consequences when negotiating pleas as one factor in an effort to reach a just resolution.[144] Thus, the California

137. A.B. 813, 2017 Leg., Reg. Sess. (Cal. 2017) (codified as CAL. PENAL CODE § 1473.7).

138. A.B. 208, 2018 Leg., Reg. Sess. (Cal. 2018) (codified as CAL. PENAL CODE § 1000). One other form of post-conviction relief that may be used to ameliorate a conviction is § 1018 of the California Penal Code, which provides that on application by the defendant, at any time before judgment or within "six months after an order granting probation is made [ ], the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . [The provision is to] be liberally construed to . . . promote justice." *See* CAL. PENAL CODE § 1018. "Good cause" includes a defendant's being unaware that the plea would result in deportation, People v. Superior Court of San Francisco, 523 P.2d 636, 638 (Cal. 1974), even where the defendant has received the required advisals under § 1016.5 of the Penal Code; *see* People v. Patterson, 391 P.3d 1169, 1172 (Cal. 2017). This is because the language of section 1016.5's standard advisal that requires the court to advise a defendant that a criminal conviction "may" have adverse immigration consequences is not sufficient to place the defendant on notice that under his particular circumstances, he faces an actual risk of deportation. People v. Superior Court (Zamudio), 999 P.2d 686, 699–700 (Cal. 2000); *Patterson*, 391 P.3d at 1176–77.

139. Padilla v. Kentucky, 559 U.S. 356, 362 (2010).

140. *Id.* at 364.

141. People v. Soriano, 240 Cal. Rpt. 328, 336 (Cal. Ct. App. 1987); People v . Barocio, 264 Cal. Rptr. 573, 579 (Cal. Ct. App. 2016).

142. CAL. PENAL CODE §§ 1016.2, 1016.3.

143. *Id.* § 1016.2(h).

144. *Id.* § 1016.3(b).

Legislature included in its overall plan a figure who wields considerable power in a criminal case – the district attorney or prosecutor.[145]

In addition, defense counsel has strict requirements under current California law. They must provide accurate and affirmative advice about immigration consequences of a proposed disposition and "when consistent with the goals of and with the informed consent of the defendant, and consistent with professional standards, defend against those consequences."[146]

The obligations imposed by *Padilla* and the California Penal Code have resulted in the phenomenon of public defender offices increasingly employing immigration experts or establishing direct contact with immigration experts for consultation.[147] For example, sixteen of California's fifty-eight public defender county offices now have in-house immigration experts.[148] Some of those offices also provide representation in removal proceedings following the criminal prosecution.[149]

Finally, judges are required to give certain immigration advisals.[150] Before accepting a guilty or nolo contendere plea (except for one to an infraction), the judge must provide the defendant with the following advisement: "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."[151] If the defendant requests, the court must allow him or her additional time to consider the plea in light of the advisement[152] and to negotiate with the prosecuting agency.[153]

145. *See* Eagley, *supra* note 7, at 265 (describing the "modern reality that criminal prosecutors are what Stephen Lee calls 'gatekeepers' in the immigration removal system") (*citing* Stephen Lee, *De Facto Immigration Courts*, 101 CAL. L. REV. 553, 608 (2013)). *See also* Talia Peleg, *The Call for the Progressive Prosecutor to End the Deportation Pipeline*, 36 GEORGETOWN IMM. L.J. 141, 207–09 (2021) (suggesting specific measures prosecutors can take to limit the immigration consequences of prosecutions, including supporting legislative efforts such as sections 1203.43 and 1473.7 of the California Penal Code).

146. CAL. PENAL CODE § 1016.3(a).

147. *See, e.g.*, the Alameda County Public Defenders Immigration Unit, https://publicdefender.acgov.org/Immigration.page?; the Los Angeles County Public Defender Immigration Unit, https://pubdef.lacounty.gov/immigration/.

148. Ingrid Eagly, Tali Gires, Rebecca Kutlow & Eliana Navarro Gracian, *Restructuring Public Defense after Padilla*, 74 STAN. L. REV. 30 (2022).

149. *See* Alameda County Public Defender, *Services: Immigration*, ACGOV, https://permits.acgov.org/defender/services/immigration.htm (last visited Jan. 26, 2023).

150. CAL. PENAL CODE § 1016.5(a).

151. *Id.*

152. *Id.* § 1016.5(b).

In addition, section 1016.5[154] of the California Penal Code provides for post-conviction relief. If, after January 1, 1978, the court fails to provide the advisement and the defendant shows that the plea may result in deportation, exclusion, or denial of naturalization, the court, on the defendant's motion, must vacate the judgment and allow the defendant to withdraw the guilty plea and enter a plea of not guilty.[155] If the record does not reflect that the court provided the advisement, there is a presumption that the defendant did not receive it.[156] In older cases, records may have been purged,[157] making the presumption especially important. Moreover, in moving to vacate, the defendant cannot be required to disclose his or her immigration status to the court.[158]

E. Funding for Representation in Removal Proceedings

One of the most critical factors in removal proceedings is whether the noncitizen has representation. Respondents in removal proceedings are entitled to representation but at no expense to the government.[159] Thus, they must either pay counsel or obtain representation pro bono or through a free or low-cost legal services provider. While the percentage of represented versus non-represented individuals varies over time by location, nationality, and, in particular, by whether the individual is detained, the result is that only about thirty-seven percent of the people in removal proceedings are able to obtain representation.[160]

Studies report striking differences in the likelihood of success in removal proceedings depending on whether or not the respondent had representation.[161] A report by the Transactional Records Access

153. *Id.* § 1016.5(d).
154. *Id.*
155. *Id.* § 1016.5(b).
156. *Id.*
157. *See* Kathy Brady & Carla Gomez, *Overview of California Post-Conviction Relief for Immigrants,* IMMIGR. LEGAL RES. CTR. 13 (2022), https://www.ilrc.org/sites/default/files/resources/ca_pcr_july_2022.pdf.
158. CAL. PENAL CODE § 1016.5(d).
159. Hearing, 8 C.F.R. § 1240.1(a)(1).
160. Syracuse University, *Who is Represented in Immigration Court?*, TRAC, https://trac.syr.edu/immigration/reports/485/ (last visited Apr. 13, 2023). *See also* Ingrid Eagly & Stephen Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL 2, 5, 11–14 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.
161. Syracuse University, *Representation is Key in Immigration Proceedings Involving Women with Children*, TRAC, https://trac.syr.edu/immigration/reports/377/ (last visited Jan. 13, 2023).

Clearinghouse (TRAC) found that, without representation, women with children almost never prevailed in removal proceedings.[162] The American Immigration Council found, studying data from 2007 to 2012, that, of detained individuals, two percent of unrepresented persons were successful in their removal proceedings, while twenty-one percent of represented persons were successful.[163] For persons who had been detained but released, the figures were seven percent and thirty-nine percent, while for individuals who had never been detained, the figures were seventeen percent and sixty percent.[164]

Recognizing the need for legal representation in removal proceedings, California enacted S.B. 6, codified as sections 13302 to 13306 of the California Welfare and Institutions Code, in 2014.[165] The act authorizes the California Department of Social Services (CDSS) to award Immigration Services Funding (ISF) to qualified nonprofit organizations to provide services in one or more of six categories: (1) Services to Assist Applicants seeking Deferred Action for Childhood Arrivals (DACA); (2) Services to Assist Applicants seeking Naturalization; (3) Services to Assist Applicants seeking Affirmative Immigration Remedies; (4) Legal Training and Technical Assistance Services; (5) Education and Outreach Activities; and (6) Services to Assist Individuals with Removal Defense.[166] For Fiscal Year 2021-2022, California awarded $35,678,030.00 to ninety-three organizations in California to provide pro bono legal representation.[167]

As can be seen, California's ISF covers the critical area of removal defense.[168] Funding for Fiscal Year 2022-2024 includes $22.5 million for the Removal Defense Program.[169] This allocation is significant because of the extensive resources required to provide removal defense services. With this funding, non-profit organizations and agencies that did not previously have the resources to offer removal defense will be able to expand their services to provide this critical legal service.

---

162. *Id.*

163. Eagly & Shafer, *supra* note 160, at 19.

164. *Id.*

165. S.B. 6, 2017 Leg., Reg. Sess. (Cal. 2018) (codified as Cal. W.&I. Code §§ 13302-13306).

166. *Id.*

167. *Immigration Services Funding Award Announcement Fiscal Year 2021-2022*, CAL. DEP'T SOC. SERVS. (2022).

168. *Social Services: Immigration Services Funding*, CAL. DEP'T SOC. SERVS., https://www.cdss.ca.gov/inforesources/immigration/immigration-services-funding (last visited Jan. 5, 2023).

169. *Id.*

F. Limitations on State Cooperation with ICE

For a number of years, the Department of Homeland Security (DHS) has had a process of requesting state law enforcement agencies to advise DHS prior to release of individuals the DHS believes may be removable and to continue to detain those persons until DHS is able to take physical custody of the person.[170] One program, DHS's Secure Communities Program,[171] led to the deportation of over 90,000 individuals in California.[172] In the 2013 TRUST Act (Transparency and Responsibility in Using State Tools), the California Legislature voiced its concern over the effect of this practice on state resources and on individuals.[173] The Legislature noted that the requests, called

170. *Id.*

171. The Secure Communities Program "is a federal program under which fingerprints taken by local law enforcement are checked against federal immigration databases. The results of that check are sent to ICE, which may issue a hold against the person in custody." *Trust Act Toolkit: Trust Act Implementation and Local Immigration Enforcement,* IMIGR. LEGAL RES. CTR., HTTPS://WWW.ILRC.ORG/SITES/DEFAULT/FILES/RESOURCES/TRUST_INTERACTION_WITH_ICE_PROGRAMS_FINAL_0.PDF (last visited Apr. 14, 2023) [hereinafter *Trust Act Toolkit*]. *See also Secured Communities*, U.S. IMMIGR. & CUSTOMS ENF'T, *https://www.ice.gov/secure-communities (last visited Apr. 14, 2023); see* Secure Communities: Fiscal Year 2021, First Quarter, U.S. Immigr. & Custovs Enf't 2 (2022) https://www.dhs.gov/sites/default/files/2022-04/ICE%20-%20Secure%20Communities%20-%20Fiscal%20Year%202021%20Q1.pdf; *see* Syracuse University, *Secure Communities, Sanctuary Cities and the Role of ICE Detainers*, TRAC, https://trac.syr.edu/immigration/reports/489/ (providing statistical information on the Secure Communities Program). A related DHS program, the Criminal Alien Program ("CAP") is the umbrella term for ICE's work in local jails, state prisons, and federal prisons. ICE searches those locations for individuals who may be subject to removal. Its primary purpose is to collect information on persons who come into state or federal criminal custody and, if ICE believes those persons to be removable, to take those persons into immigration custody upon their release from criminal detention and, if needed, to request that state or local law enforcement detain the individual beyond the release date until ICE can take physical custody of them. *See Trust Act Toolkit*, *supra*, note 173 at 2–3. The Secure Communities and related ICE information-sharing and detainer programs were widely condemned. *See, e.g.*, *Over 60 Members of Congress Push President Biden and DHS to End Programs that Conscript Local Police to Work as Federal Immigration Enforcement*, Immigr. Just. Ctr., (Feb. 12, 2021) https://immigrantjustice.org/press-releases/over-60-members-congress-push-president-biden-and-dhs-end-programs-conscript-local; *see* Dara Lind , *Why Cities are Rebelling Against the Obama Administration's Deportation Policies*, VOX, (Jun. 6, 2014, 11:00 AM), https://www.vox.com/2014/6/6/5782610/secure-communities-cities-counties-ice-dhs-obama-detainer-reform. In 2021, DHS replaced the program with the Priorities Enforcement Program (PEP). *See Priority Enforcement Program*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/pep (last visited Apr. 14, 2023) (describing the Priorities Enforcement Program and comparing it to Secure Communities). President Obama retired the program in 2015 replacing it with the Priorities Enforcement Program (PEP). However, President Donald Trump, by Executive Order 13768 (Jan. 25, 2017), ended the PEP program and revived Secure Communities. President Biden revoked Executive Order 13768 on January 20, 2021. *See* Exec. Order No. 13993, 86 Fed. Reg. 7051 (Jan. 20, 2021). .

172. ACLU of Northern California, *TRUST Act (AB 4)*, https://www.aclunc.org/our-work/legislation/trust-act-ab-4 *(last visited Apr. 14, 2023)*; *see* ACLU of Northern California, *ACLU Applauds Gov. Brown for Signing the TRUST Act* (Oct. 5, 2013), https://www.aclunc.org/news/aclu-applauds-gov-brown-signing-trust-act.

173. TRUST Act, A.B. 4, 2013 Leg., Reg. Sess. (Cal. 2013).

"detainers," were agency requests rather than judicial warrants, and that [174] local and state law enforcement were not reimbursed for continuing to hold individuals for the DHS.[175] It also found that cooperation on the detainers affected community policing negatively by causing victims of crime and domestic abuse to refrain from reporting crime for fear that their report would place them under a DHS detainer.[176]

The TRUST Act was the first of three pieces of legislation designed to limit the use of state resources to comply with DHS detainer requests.[177] The law restricts the U.S. Immigration and Customs Enforcement (ICE) access to individuals detained by California law enforcement agencies by prohibiting those agencies from detaining an individual after that person becomes eligible for release from custody unless certain conditions are met, including the individual having been convicted of a serious or violent felony or certain misdemeanors, as identified by the act.[178]

Three years later, the California Legislature expanded the TRUST Act in the TRUTH (Transparent Review of Unjust Transfer and Holds) Act.[179] The Legislature, in its findings, noted that the ICE's Secure Community Program and its successor, the Priority Enforcement Program, had similar troubling aspects, including a lack of transparency.[180] The Legislature stated the purposes of the bill as addressing "the lack of transparency and accountability by ensuring that all ICE deportation programs that depend on entanglement with local law enforcement agencies in California are subject to meaningful public oversight."[181] A further purpose was "to promote public safety and preserve limited local resources because entanglement between local law enforcement and ICE undermines community policing strategies and drains local resources."[182]

174. *Id.* § 1(c).
175. *Id.* § 1(b).
176. *Id.* § 1(d).
177. *Id.*
178. CAL. GOV'T. CODE §§ 7282, 7282.5(a)(1), (3). The ILRC provides a helpful practice advisory on the TRUST Act. *See also The California TRUST Act: A Guide for Criminal Defenders*, Immigr. Legal Res. Ctr., (Jan. 2014) https://www.ilrc.org/sites/default/files/resources/ilrc_trust_act_memo_final_jan_6.pdf.
179. Transparent Review of Unjust Transfers and Holds (TRUTH) Act, A.B. 2792, 2016 Leg., Reg. Sess. (Cal. 2016) (codified as CAL. GOV'T. CODE §§ 7283, 7283.1, 7283.2).
180. A.B. 2792 § 2(g).
181. *Id.* § 2(h).
182. *Id.* § 2(i).

To achieve these goals, the TRUTH Act requires local law enforcement agencies to notify detained individuals of the agency's intent to comply with an ICE request for information.[183] In addition, under the act, local law enforcement agencies, prior to an interview between ICE and an individual in custody regarding civil immigration violations, must provide the individual a written consent form explaining, among other things, the purpose of the interview, that it is voluntary, and that the individual may decline to be interviewed.[184] The consent form must be available in specified languages.[185] In addition, records related to ICE access must be public records for purposes of the California Public Records Act.[186]

The California Legislature again addressed interaction between ICE and California law enforcement in the California Values Act.[187] In this bill, the Legislature specified that "[a] relationship of trust between California's immigrant community and state and local law enforcement agencies is central to the public safety of the people of California,"[188] and entanglements of state and local agencies with federal immigration enforcement threaten that trust, resulting in "immigrant community members fear [of] approaching police when they are victims of, and witnesses to, crimes, seeking basic health services, or attending school, to the detriment of public safety and the well-being of all Californians."[189] The Legislature noted that entangling state and local agencies with federal immigration enforcement programs "diverts already limited resources and blurs the lines of accountability between local, state, and federal governments."[190] The Legislature also noted that state and local participation in federal immigration enforcement "raises constitutional concerns, including the prospect that California residents could be detained in violation of the Fourth Amendment to the United States Constitution, targeted on the basis of race or ethnicity in violation of the Equal Protection Clause, or denied access to education based on immigration status."[191]

183. *Id.* § 3 (codified as CAL. GOV'T CODE § 7293.1(b)).
184. *Id.* (codified as CAL. GOV'T CODE § 7293.1(a)).
185. *Id.*
186. *Id.* (codified as CAL. GOV'T CODE § 7283.1(c)).
187. S.B. 54, 2016 Leg., Reg. Sess. (Cal. 2016) (codified as CAL. GOV'T. CODE §§ 7284–7284.12).
188. CAL. GOV'T. CODE § 7284.2(b).
189. *Id.* § 7284.2(c).
190. *Id.* § 7284.2(d).
191. *Id.* § 7284.2(e). The law specifically cites the following decisions in support of the Legislature's concern about possible violation of constitutional rights: Ochoa v. Campbell, 266 F.

In pursuit of these concerns, the California Values Act specifies what California law enforcement agencies may and may not do in relation to federal immigration agencies.[192] Inter alia, California law enforcement agencies shall not: (1) use their funds or resources to investigate, detain, or arrest persons for immigration enforcement purposes; (2) place peace officers under the supervision of federal agencies; (3) "[t]ransfer an individual to immigration authorities unless authorized by a judicial warrant or judicial probable cause determination, or in accordance with section 7282.5;" (4) "[p]rovide office space exclusively dedicated for immigration authorities;" or (5) "[c]ontract with the federal government for use of California law enforcement agency facilities to house individuals as federal detainees for civil immigration custody," with some exceptions.[193]

G. Oversight of Detention Facilities and Restriction of Private Prison Facilities

ICE and Customs and Border Patrol detain a large number of individuals. For Fiscal Year 2023, DHS statistics show that immigration authorities were detaining 23,022 persons in adult facilities at the end of March 2023 and 19,991 at the end of April 2023.[194] In Fiscal Year 2021, DHS detained nearly 250,000 people.[195] California is one of the states in which DHS detains individuals. In 2021, the California Attorney General reported that through additional contracts with private prison operators, bed capacity for immigration detention within California had increased from approximately 4,160 to 7,408 between

Supp. 3d 1237, 1243, 1259 (E.D. Wash. 2017); Santoya v. United States, No. 5:16-CV-855-OLG, 2017 WL 2896021, at *1, *5, *8 (W.D. Tex. June 5, 2017); Moreno v. Napolitano 213 F. Supp. 3d 999, 1000 (N.D. Ill. 2016); Morales v. Chadbourne 793 F.3d 208, 211, 213, 222 (1st Cir. 2015); Miranda-Olivares v. Clackamas County, No. 3:12–cv–02317–ST, 2014 WL 1414305, at *1, **8–11 (D. Or. Apr. 11, 2014); Galarza v. Szalczyk, 745 F.3d 634, 638–40 (3d Cir. 2014).

192. *See generally* CAL. GOV'T CODE § 7284.6(a).

193. CAL. GOV'T CODE § 7284.6(a). *See generally* Memorandum from Kevin Gardner on Responsibilities of Law Enforcement Agencies Under the California Values Act, California TRUST Act, and the California TRUTH Act to the Executive of State & Local Law Enforcement Agencies 2–9 (Mar. 28, 2018), *DLE-2018-01 - Information Bulletin - Responsibilities of Law Enforcement Agencies Under the California Values Act, California TRUST Act, and the California TRUTH Act*. A.B. 54 was upheld against a preemption challenge in United States v. California, 921 F.3d 865, 890 (9th Cir. 2019).

194. *ICE Detention Data, FY2023: ICE Average Daily Population by Facility Type and Month*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detention-management (last viewed Dec. 26, 2022).

195. *Immigration Detention 101*, DET. WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/detention-101 (last viewed Dec. 26, 2022).

February 2019 and January 2021.[196] During Fiscal Year 2023, 1,779 individuals have been detained in civil immigration custody in California, placing California among the five states having the largest number of immigration detainees.[197]

California has enacted several laws relating to immigration detention facilities. The first of these, A.B. 103, impacted immigration detention in two ways. First, effective June 15, 2017, it prohibited California cities, counties, and local law enforcement from, "entering into contracts with the federal government or any federal agency to house or detain an adult noncitizen in a locked detention facility for purposes of civil immigration custody."[198] Moreover, the bill prohibited entities that had entered into a contract of that nature on or before June 15, 2017, from modifying or renewing the contract so as to expand the maximum number of spaces that could be used to house or detain adult noncitizens for purposes of civil immigration custody.[199] The bill contained similar provisions prohibiting contracts to house unaccompanied minors in the custody of federal agencies in a locked detention facility.[200]

A separate provision of A.B. 103 required the California Attorney General to conduct "reviews of county, local, or private locked detention facilities in which noncitizens are being housed or detained for purposes of civil immigration proceedings in California."[201] The review was to include "the conditions of confinement," "the standard of care and due process provided," and "the circumstances around [the] apprehension" of civil immigration detainees, and then prepare "a comprehensive report outlining the findings of the review."[202]

The second provision, known as A.B. 32, went further, prohibiting any person or entity from operating a private detention facility in California pursuant to a contract with a governmental entity.[203] This provision had a large impact on DHS, which houses immigration de-

196. Xavier Becerra, The California Department of Justice's Review of Immigration Detention in California 5 (2021), https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2021.pdf.

197. Syracuse University, *Immigration Detention Quick Facts*, TRAC, https://trac.syr.edu/immigration/quickfacts/ (last visited Dec. 26, 2022) (reporting that the other three states that DHS houses the highest number of detainees are Texas (10,008), Louisiana (4,454), Georgia (2,007), and Arizona (1,652)).

198. A.B. 103, 2017 Leg., Reg. Sess. (Cal. 2017) (codified as Cal. Gov't Code § 7310(a)).

199. Cal. Gov't Code § 7310(b).

200. *Id.* § 7311(a).

201. *Id.* § 12532(a).

202. *Id.* § 12532(b).

203. Cal. Penal Code §§ 9500-9501.

tainees in California almost exclusively through contracts with privately-operated, for-profit entities.[204]

The federal government challenged A.B. 103's inspection provisions and A.B. 32's prohibition on private detention facilities in federal court.[205] In both cases, the Ninth Circuit struck down the provision, A.B. 103 in part[206] and A.B. 32 in its entirety.[207] The Court concluded that one of A.B. 103's inspection requirements, the requirement that inspectors examine the circumstances surrounding detainees' apprehension and transfer to the facility, violated the doctrine of intergovernmental immunity because it differed from inspections required of other detention facilities.[208] However, the Court upheld the remaining inspection requirements as within the state's historic power to ensure the health and welfare of inmates and detainees in facilities within its borders and because there was no indication that Congress intended to supersede that authority.[209] The Court found A.B. 32 invalid on the basis of both intergovernmental immunity and obstacle preempted because the prohibition on private detention facilities in California made it impossible for the federal government to carry out its detention obligations.[210]

IV. THE RESPONSES OF CALIFORNIA COURTS AND THE FEDERAL IMMIGRATION AUTHORITIES TO CALIFORNIA'S NEW IMMIGRATION-RELATED CRIMINAL LAWS

The changes to California's criminal laws addressed in the preceding section, enacted to ameliorate the most serious immigration consequences of criminal conduct, fall into two basic categories. The first of these categories covers changes to criminal sentencing statutes and alternatives to convictions, applied prospectively to current and future cases. These sorts of statutes are ones to which the Board has historically given full faith and credit as within a state's exclusive authority to define offenses and sentences.[211] In the second category,

204. GEO Grp., Inc. v. Newsom, 50 F.4th 745, 751–52 (9th Cir. 2022).
205. *Id.*
206. United States v. California, 921 F.3d 885, 895 (9th Cir. 2019).
207. *GEO Grp., Inc.*, 50 F.4th at 763.
208. United States v. California, 921 F.3d at 885.
209. *Id.* at 886.
210. *GEO Grp., Inc.*, 50 F.4th at 758 (intergovernmental immunity), 762-63 (obstacle preemption).
211. Matter of Rodriguez-Ruiz, 22 I&N Dec. 1378, 1380 (BIA 2000).

fall provisions that allow for post-conviction relief. Post-conviction relief under these provisions will be honored by the Board and federal courts if the relief does not conflict with established federal rules defining "conviction" for immigration purposes.[212]

The benefits of California's new legislation to its residents are only as strong as its application by state courts and its recognition by the immigration authorities, particularly the Board. Thus, Californians seeking the benefit of the legislation have a number of hurdles to overcome. First, they must negotiate with the prosecution to attempt to arrive at an appropriate plea and proposed sentence. They must then convince the state court hearing the case that they are eligible for the particular type of resolution in question. If they are applying for post-conviction relief, they must again negotiate with the prosecution and then convince the presiding court that they are eligible for the relief. As demonstrated below, California courts have shown that they apply the statutes in a conscientious manner, holding applicants to the statutory requirements.[213] Second, noncitizens must convince the immigration authorities that the resolution in the California criminal court precludes immigration consequences or would incur only some lesser immigration consequences.[214] Third, if the person has already been found removable or ineligible for some immigration relief or benefit, he or she must find a way to get the case back before the immigration authorities for a new decision.[215]

A. Application of California's Immigrant-Shield Post-Conviction Relief Statutes by California Courts

California's three principal post-conviction measures providing means for noncitizens to withdraw guilty pleas are sections 1016.5, 1203.43, and 1473.7 of the California Penal Code.[216] As described above, section 1016.5 allows withdrawal of a plea if the criminal court judge fails to provide the required advisal of immigration consequences.[217] Section 1203.43 was enacted to correct an error in the language of a previous deferred entry of judgment statute, section 1203.4 of the California Penal Code, that erroneously stated that a plea en-

212. *See infra*, text accompanying notes 292-297.
213. *See infra*, text accompany notes 229-282.
214. *See infra*, text accompanying notes 287-353.
215. *See infra*, text accompanying notes 355-367.
216. CAL. PENAL CODE § 1016.5, 1203.43, 1473.7.
217. CAL. PENAL CODE § 1016.5.

tered under it would have no immigration consequences.[218] As it turned out, that information was incorrect because a plea under section 1203.4 remained a conviction for immigration purposes.[219]

Section 1203.43 was designed as a simple procedure where judges may grant relief on the pleadings without a hearing since the only required showing is that the court, in fact dismissed the defendant's charges under section 1000.3 of the Penal Code.[220] "If court records showing the case resolution are no longer available, the applicant's declaration under penalty of perjury that the charges were dismissed after [they] completed the requirements for deferred entry of judgment" together with the state summary criminal history information maintained by the Department of Justice, are sufficient to support the application.[221]

The second major main post-conviction relief provision for noncitizens is section 1473.7 of the California Penal Code which became effective on January 1, 2017.[222] This section allows a person who is no longer in criminal custody to file a motion to vacate a conviction or sentence for either of the following 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. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.
>
> (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.[223]

The immigration-specific provision of section 1473.7 thus has two principal requirements. First, movants "must show that [they] did not meaningfully understand the immigration consequences of [their] plea."[224] Next, movants "must show that [their] misunderstanding constituted prejudicial error."[225]

218. See text accompanying note 134, *supra*.
219. *See id.*
220. CAL. PENAL CODE § 1203.43(b).
221. *Id.*
222. CAL. PENAL CODE § 1473.7.
223. CAL. PENAL CODE § 1473.7(a)(1)–(2).
224. People v. Espinoza, 522 P.3d 1074, 1079 (Cal. 2023).
225. *Id.*

As originally written, section 1473.7 applied only to convictions resulting from a plea.[226] However, the California Legislature amended the statute to make clear that it applies to convictions deriving from either a plea or a trial.[227]

Both the California Supreme Court[228] and the California Court of Appeal have spoken on section 1473.7. These decisions show that the courts have not granted section 1473.7 relief lightly, but have instead queried closely into the terms "prejudicial error," "the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences" of the plea, and "adverse immigration consequences."[229]

In determining whether a defendant meaningfully understood the immigration consequences of a guilty plea or trial, California courts look to factors such as explanations given by counsel or the court during criminal proceedings and the defendant's conduct thereafter.[230] In most section 1473.7 vacatur cases, California defendants whose convictions arose from a plea would have signed a plea form, known as a *Tahl* form, notifying them of the advisals required by California Penal Code section 1016.5.[231] California courts have rejected arguments that such an advisal satisfies defense counsel's duty to advise their clients of immigration consequences, even where the advisal used the word "will" rather than "may" in advising of potential deportation.[232]

On the other hand, a defendant was unable to show that he did not understand the immigration consequences so as to demonstrate the required error, when the trial court orally told him that a conviction would make him deportable, his attorney reviewed the immigra-

226. *See* CAL. PENAL CODE § 1473.7(a)(1), (e)(4), *amended by* Stat. 2021, ch. 420, § 1.

227. *Id. See also* People v. Singh, 296 Cal. Rptr. 3d 163, 166–63 (Cal. Ct. App. 2022) (explaining the history of and applying the amendment). The legislative history of the amendment confirms that the purpose of the amendment was to expand the statute to include convictions as well as pleas. A.B. 1259, Bill Analysis, 2021-22 Legis., Reg. Sess., at 3 (Cal. 2021) (Assembly 3d Reading) ("This bill expand the category of persons able to seek to vacate a conviction or sentence as legally invalid, whatever way that person was convicted or sentence[d], including a person who was found guilty after a trial.").

228. People v. Vivar, 485 P.3d 425, 436–37 (Cal. 2021).

229. CAL. PENAL CODE § 1473.7(e)(4).

230. *See generally* In re Tahl, 460 P.2d 449 (Cal. 1969); *see* People v. Manzanilla, 295 Cal. Rptr. 3d 836, 847 (Cal. Ct. App. 2022), (referring to the plea advisal form as a *Tahl* form).

231. *See generally* In re Tahl, 460 P.2d 449 (Cal. 1969); *see Manzanilla*, 295 Cal. Rptr. 3d 836, 847 (Cal. Ct. App. 2022, (referring to the plea advisal form as a *Tahl* form).

232. People v. Espinoza, 522 P.3d 1074, 1078–80 (Cal. 2023) (finding a lack of meaningful understanding despite the trial court's having provided general advisement under section 1016.5); *Manzanilla*, 295 Cal. Rptr. 3d at 847; People v. Soto, 294 Cal. Rptr. 3d 451, 456–57 (Cal. Ct. App. 2022).

tion consequences of the plea with him, and he "orally acknowledged that he understood the immigration consequences of his plea" and that he would "wait for immigration."[233] Similarly, a defendant's testimony, directly after his plea, that he could not "see his life in Mexico" was persuasive evidence that he understood the deportation consequences of his plea.[234] Hence, where the record demonstrates that the defendant was well aware of the immigration consequences and made a clear choice of what to do in the case, the defendant has not established error for purposes of Section 1473.7.[235]

Post-trial conduct may also demonstrate a lack of understanding of immigration consequences. When a defendant, following a criminal proceeding, started a new business, joined community organizations, became well-known in his local community, and took an international commercial flight out of the United States, the defendant's conduct was not consistent with the behavior of one who understood that his conviction had immigration consequences.[236] Similarly, an application for naturalization after a conviction constituted evidence that the noncitizen did not appreciate the consequences of his plea because "someone who understood his criminal conviction made him automatically deportable would not voluntarily contact immigration authorities and advise them of his presence in the country."[237] Swift action in bringing concerns to the trial court can also demonstrate a lack of original understanding of immigration consequences.[238]

An absence of understanding can also be shown through counsel's corroboration. For example, the "defendant's claims of error were supported by his former attorney's undisputed testimony . . . that he misunderstood the potential immigration consequences . . . and he did not explore possible alternatives to pleading to an aggravated felony."[239] Similar, error was established when the defendant presented counsel's e-mail correspondence and handwritten notes to establish that counsel did not "advise him as to the actual immigration consequences of a plea to the drug charge or any other plea."[240]

233. People v. Abdelsalam, 288 Cal. Rptr. 3d 658, 661 (Cal. Ct. App. 2022).
234. People v. Garcia, 295 Cal. Rptr. 3d 259, 264 (Cal. Ct. App. 2022).
235. People v. Odero, E077298, 2022 WL 2128841, at * 6 (Cal. Ct. App. 4th June 14, 2022).
236. *Espinoza*, 522 P.3d at 1079–80.
237. People v. Alatorre, 286 Cal. Rptr. 3d 1, 18–19 (Cal. Ct. App. 2021).
238. People v. Manzanilla, 295 Cal. Rptr. 3d 836, 851 (Cal. Ct. App. 2022).
239. People v. Camacho, 244 Cal. Rptr. 3d 398, 407 (Cal. Ct. App. 2019).
240. People v. Vivar, 485 P.3d 425, 430 (Cal. 2021).

The California Legislature and courts have defined two unique features of the sorts of error that could satisfy section 1473.7's requirements. The first of these is that where the claimed error was erroneous or defective advice by counsel, the error need not meet the *Strickland v. Washington* standard of ineffectiveness.[241] Prior to 2019, California courts interpreted section 1473.7, specifically or impliedly, to require a showing of ineffectiveness under *Strickland*.[242] In 2018, however, the Legislature amended section 1473.7 to add that "[a] finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel."[243] The Legislature thus decoupled section 1473.7 from the *Strickland* standard.[244]

Instead California courts have looked to *Padilla v. Kentucky*[245] for guidance on defense counsel's obligations towards a noncitizen defendant. After *Padilla*, "defense counsel has had a duty to properly explain the adverse immigration consequences of a plea to a defendant. . . . Where immigration law is 'succinct, clear, and explicit' that the conviction renders removal virtually certain, counsel must advise his client that removal is a virtual certainty."[246] A defense counsel's contemporaneous notes reflecting that counsel told the defendant that a proposed plea "would [change] his status [and] he [would] have [an] immigration hearing" were insufficient to meet this burden where deportation was virtually certain.[247]

Another example of attorney conduct that might qualify as an error for purposes of section 1473.7 is counsel's failure to counter a prosecution offer of a one-year sentence with a proposal of a 364-day sentence.[248] The lower sentence of 364 days would prevent the defendant's conviction for a crime of violence from being an aggravated felony and would thus maintain the defendant's eligibility for some

241. Strickland v. Washington, 466 U.S. 668, 686 (1984).

242. *Camacho*, 244 Cal. Rptr. 3d at 404 (citing as examples People v. Espinoza, 238 Cal. Rptr. 3d 619, 623 (Cal. Ct. App. 2018); People v. Tapia, 237 Cal. Rptr. 3d 572, 577 (Cal. Ct. App. 2018); People v. Olvera, 235 Cal. Rptr. 3d 200, 201–02 (Cal. Ct. App. 2018); People v. Ogunmowo, 232 Cal. Rptr. 3d 529, 535 (Cal. Ct. App. 2018); People v. Perez, 228 Cal. Rptr. 3d 95, 102–03 (Cal. Ct. App. 2018)).

243. *See also id.* at 405 (explaining legislative history of amendment).

244. *Alatorre*, 286 Cal. Rptr. 3d 1, 17 (Cal. Ct. App. 2023).

245. People v. Manzanilla, 295 Cal. Rptr. 3d 836, 846 (Cal. Ct. App. 2022).

246. *Manzanilla*, 295 Cal. Rptr. 3d 836, 846 (Cal. Ct. App. 2022) (quoting United States v. Rodriguez-Vega, 797 F.3d 781, 786 (9th Cir. 2015), citing Padilla v. Kentucky, 559 U.S. 356, 369 (2010)).

247. *Id.* at 847–48.

248. *Manzanilla*, 295 Cal. Rptr. 3d at 840.

form of relief from removal.[249] In failing to offer a plea to the lower sentence, counsel failed to follow *Padilla*'s instructions that defense counsel have a duty to "plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce[s] the likelihood of deportation."[250]

A second unique feature of Section 1473.7 is that the required error need not be an error of counsel at all, but can be the movant's own mistake of law or inability to understand the potential adverse immigration consequences.[251] "The key to the statute is the mindset of the defendant and what he or she understood – or didn't understand – at the time the plea was taken."[252] Thus, to establish error sufficient to trigger a section 1473.7 petition, "a person need only show by a preponderance of the evidence [that] [they] did not 'meaningfully understand' or 'knowingly accept' the actual or potential adverse immigration consequences of the plea."[253] Under this principle, the "error" is that the petitioner subjectively misunderstood the immigration consequences of the plea, and there is no additional need to establish this mistake was caused by some third party.

"Because the errors need not amount to a claim of ineffective assistance of counsel, it follows that courts are not limited to the *Strickland* test of prejudice, [that is,] whether there was reasonable probability of a different outcome in the original proceedings absent the error."[254] Instead, showing prejudice for purposes of section 1473.7 means "demonstrating a reasonable probability that the defendant would have rejected the plea if the defendant had correctly understood its actual or potential immigration consequences."[255] "A 'reasonable probability' does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.' "[256] It

249. *Id.*; *see also* People v. Vivar, 485 P.3d 425, 431 (Cal. 2021) (finding error where counsel warned that plea might have immigration consequences in circumstances where those consequences were certain).

250. *Manzanilla*, 295 Cal. Rptr. 3d at 848 (quoting *Padilla*, 559 U.S. at 373 (2010)) (providing examples of the "many ways" in which defense counsel can creatively bargain).

251. *Id.* at 850; *accord* People v. Camacho, 244 Cal. Rptr. 3d 398, 407 (Cal. Ct. App. 2019); People v. Soto, 294 Cal. Rptr. 3d 451, 456–57 (Cal. Ct. App. 2022); People v. Alatorre, 286 Cal. Rptr. 3d 1, 18–19 (Cal. Ct. App. 2021) (citing additional cases agreeing that the moving party's own mistake of law or inability to understand the potential adverse immigration consequences may be error sufficient for purposes of section 1473.7).

252. People v. Mejia, 248 Cal. Rptr. 3d 819, 824 (Cal. Ct. App. 2019).

253. *Id.* at 821.

254. *Camacho*, 244 Cal. Rptr. 3d at 407.

255. People v. Vivar, 485 P.3d 425, 437–38 (Cal. 2021).

256. *Soto*, 294 Cal. Rptr. 3d 451, 457–58 (Cal. Ct. App. 2022).

is not necessary to show that the defendant could have obtained a more favorable outcome at trial.[257] For example, prejudice is established if the defendant would have risked going to trial "even if only to figuratively throw a 'Hail Mary.'"[258] Where the conviction for which vacatur is sought resulted from a trial, prejudice might be shown by evidence that the defendant might have accepted a plea that did not have immigration consequences absent an error that affected the defendant's ability to understand the immigration consequences of going to trial.[259]

In assessing the reasonable probability that a defendant would have chosen a different resolution had the defendant been adequately informed of the immigration consequences, courts consider the totality of the circumstances.[260] "Factors particularly relevant to this inquiry include 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."[261] "Also relevant are the defendant's probability of obtaining a more favorable outcome if [they] had rejected the plea, as well as the difference between the bargained-for term and the likely term if [they] were convicted at trial."[262]

The California Supreme Court has recognized that removal from the United States and one's ties to this country may constitute "the most devastating consequence" of a conviction.[263] Such ties may be established by length of residence, immigration status, lack of connection to one's country of origin, connection to family, friends, or the community in the U.S., work history or financial ties, or other forms of attachment.[264] The existence of strong community ties supports an assertion that a defendant would have chosen to go to trial rather than take a plea that would make the defendant removable, breaking those ties.

257. People v. Rodriguez, 283 Cal. Rptr. 3d 413, 420 (Cal. Ct. App. 2021).
258. *Id.*
259. People v. Singh, 296 Cal. Rptr. 3d 163, 167–68 (Cal. Ct. App. 2022).
260. *Vivar*, 485 P.3d at 438.
261. *Id.*
262. People v. Espinoza, 522 P.3d 1074, 1080 (Cal. 2023).
263. *Id.*
264. *Id.*

California courts emphasize the importance the defendant placed on immigration consequences at the time of the plea.[265] Evidence of this may appear in the transcript of the criminal proceedings themselves. For example, in *People v. Manzanilla*, the trial court transcript includes Mr. Manzanilla's statement that "'[i]f I'm going to be deported, no,' he did not want the deal" in response to a proposed plea bargain.[266]

Of equal importance in determining prejudice, that is, that a defendant would have chosen a different resolution, is whether alternative immigration-safe dispositions were available at the time of the defendant's plea.[267]

> Factors relevant to this inquiry include the defendant's criminal record, the strength of the prosecution's case, the seriousness of the charges or whether the crimes involved sophistication, the district attorney's charging policies with respect to immigration consequences, and the existence of comparable offenses without immigration consequences.[268]

The defendant must provide objective corroborating evidence of prejudice.[269] The sort of objective evidence that would meet this requirement "includes facts provided by declarations, contemporaneous documentation of the defendant's immigration concern or interaction with counsel, and evidence of the charges the defendant faced."[270] Examples include declarations and biographical evidence of long residence in the United States, ties to the community, family residing in the United States, lack of criminal record, and declarations from immigration law experts on immigration consequences and possible alternative immigration-safe dispositions.[271]

A recent decision shows that California courts are also scrutinizing the requirement of an "adverse immigration consequence."[272] In *People v. Gregor*, the Court of Appeal of California found that the applicant's inability to sponsor his father for a family-based immigrant visa was not an adverse immigration consequence for purposes of sec-

265. People v. Soto, 294 Cal. Rptr. 3d 451, 456–57 (Cal. Ct. App. 2022).
266. People v. Manzanilla, 295 Cal. Rptr. 3d 836, 850 (Cal. Ct. App. 2022).
267. *Espinoza*, 522 P.3d 1074, 1082 (Cal. 2023).
268. *Id.* at 1082 (Cal. 2023).
269. *Id.* at 1077; People v. Abdelsalam, 288 Cal. Rptr. 3d 658, 666 (Cal. Ct. App. 2022); *Soto*, 294 Cal. Rptr. 3d at 458.
270. *Espinoza*, 522 P.3d at 1080.
271. *Id.* at 1080–82.
272. People v. Gregor, 298 Cal. Rptr. 3d 238, 241 (Cal. Ct. App. 2022).

tion 1473.7.[273] The Court considered the statute's legislative history, in which legislators voiced their concern about convictions that would render a noncitizen removable or inadmissible.[274] The Court also noted that section 1473.7 was part of a larger statutory framework, including sections 1016.2, 1016.3, and 1016.5 of the California Penal Code, and that section 1016.2(c) referred to irreparable damage to a noncitizen's "current or potential lawful immigration status, resulting in penalties such as mandatory detention, deportation, and permanent separation from close family."[275] In addition, the Court looked to the language of *Padilla v. Kentucky,* where section 1016.2 was enacted to codify into California's law, and noted the U.S. Supreme Court's citing of cases involving deportation and exclusion.[276] The Court concluded that the "language of the statute, the existing statutory scheme, and the purpose of the statute demonstrate[d] [that] the Legislature[ ] inten[ded] 'adverse immigration consequences' to refer to removal or deportation, exclusion, or the denial of naturalization or lawful status."[277]

Section 1473.7 also contains a timeliness provision. While the motion to vacate is considered timely filed at any time that the applicant is no longer in criminal custody, it may be deemed "untimely if it was not filed with reasonable diligence after the later of:"

> (a) The [applicant's] receiv[ing] a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization [or]
>
> (b) Notice that a final removal order has been issued . . . based on the . . . conviction . . . that the [applicant] seeks to vacate.[278]

Thus, "for most immigration-related section 1473.7 petitions, diligence in bringing a motion is evaluated from the point in time that a petitioner faces a clear adverse immigration consequence as a result of the underlying conviction."[279] At least one California court has found "reasonable diligence [for section 1473.7 purposes] where the peti-

273. *Id.*
274. *Id.* at 251.
275. *Id.*
276. *Id.*
277. *Id.* at 252.
278. CAL. PENAL CODE § 1473.7(b)(2)(A)–(B).
279. People v. Alatorre, 286 Cal. Rptr. 3d 1, 5 (Cal. Ct. App. 2021).

tioner's triggering events predated [the enactment of] the law by determining whether or when the petitioner had a reason to inquire about new legal grounds for relief and assessing the reasonableness of the petitioner's diligence from that point forward."[280]

As these decisions illustrate, California courts are granting vacatur motions under section 1473.7, but they are not doing so lightly. Instead, California courts demand proof of the lack of meaningful understanding, prejudicial error, requirements.

B. Effects Given to Resolutions Under California's New Statutes by the Board of Immigration Appeals and Federal Courts

Because determinations on immigration status are ultimately made by the federal immigration authorities, a state's changes to its criminal laws are only as effective in reducing the immigration consequences of a criminal proceeding as their recognition by DHS and the Executive Office for Immigration Review (EOIR). The former houses Immigration and Customs Enforcement, which charges individuals with removability and actually adjudicates some special forms of removal.[281] The latter houses the Board of Immigration Appeals (BIA or Board) and the Immigration Courts.[282] If a state resolution of a criminal case does not satisfy the DHS and EOIR requirements, then the state's efforts to protect its noncitizen residents fail.

Dispositions under California's criminal laws may come before the Immigration Courts and the Board in any of several contexts. The case may present an initial criminal resolution, for example, a pre-plea diversionary program obtained prior to the removal proceeding. Alternatively, the resolution in question may be the result of post-conviction relief in the state court obtained prior to removal proceedings. The case may also present a resolution subject to California's universal retroactive reduction of misdemeanor sentences to 364 days.[283] In each of these contexts, the principal question is whether the criminal resolution involved meets the definition of conviction, since most

280. *Id.* at 15.

281. *See generally*, Migration Policy Institute, *Who Does What in U.S. Immigration* (Dec. 1, 2005), https://www.migrationpolicy.org/article/who-does-what-us-immigration (last visited May 27, 2023); *see also* U.S. Department of Homeland Security Public Organization Chart, at https://www.dhs.gov/sites/default/files/2023-02/23_0221_dhs_public-organization-chart.pdf.

282. *See generally*, Migration Policy Institute, *supra* n. 283.

283. See text accompanying notes 117-120, *supra*.

crime-based removal grounds and most statutory bars to relief from removal require a conviction.[284]

The Board has noted an obligation under the Full Faith and Credit Clause to recognize the acts of state legislatures, records, and judicial proceedings.[285] In addition, the Board's definition of state criminal laws, unlike its interpretation of federal immigration provisions, is not entitled to *Chevron* deference.[286] However, these restrictions do not preclude the Board from considering the language of the vacatur itself or the language of the state statute under which the vacatur is granted.[287] It may, and does, reject vacaturs based on the reason given in the implementing statute or in the record of the case before it.[288]

The Board's acceptance of criminal court resolutions depends on both the procedural status of the removal proceedings and the procedural status of the underlying criminal case. In initial removal proceedings, where an individual has a resolution of a pre-plea diversion or other disposition under California law that does not carry immigration consequences, the Board has recognized that there is no conviction.[289] In addition, for convictions that have been ameliorated through post-conviction relief, the Board has recognized that there is no conviction if a court having jurisdiction over criminal proceedings vacates a conviction based on a defect in the underlying criminal proceeding.[290] "If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains 'convicted' for immigration purposes."[291] Thus, if a conviction is vacated "solely for immigration purposes," or for other

284. See generally text accompanying notes 57-73, *supra*.

285. Matter of Rodriguez-Ruiz, 22 I&N. Dec. 1378, 1379–80 (BIA 2000) (declining to go behind the state court judgment and question whether the New York court acted in accordance with its own state law). *See also* Matter of Cota-Vargas, 23 I&N Dec. 849, 850, 852 (BIA 2005) (holding the Board must accept the basis given by a state court for its legal judgments); Matter of Thomas, 27 I&N Dec. 674, 685–86 (A.G. 2019) (explaining that *Matter of Pickering* simply requires immigration judges to "make determinations about the reasons that certain state-court orders were entered" without "wad[ing] into the intricacies of state criminal law" that immigration judges "have little familiarity").

286. *See* Contreras v. Schiltgen, 122 F.3d 30, 32 (9th Cir. 1997); Ocon-Perez v. INS, 550 F.2d 1153, 1154 (9th Cir. 1977); Pinho v. Gonzales, 432 F.3d 193, 213 (3d Cir. 2005) (holding that DHS may not "arrogate to itself the power to find hidden reasons lurking beneath the surface of the ruling of state courts").

287. *See Pinho*, 432 F.3d at 213.

288. *Id.*

289. Matter of Pickering, 23 I&N Dec. 621, __ (BIA 2003).

290. *Id.* at 624.

291. *Id.*

reasons "unrelated to the merits of the underlying criminal proceedings," the conviction remains valid for immigration purposes.[292] Vacaturs that would not be valid for immigration purposes include post-conviction modifications under "rehabilitative" laws. Rehabilitative laws are laws that "reduce the long-term impact of criminal convictions on individuals who subsequently demonstrate a period of good behavior such as by 'serv[ing] a period of probation or imprisonment,' after which the 'conviction is ordered dismissed by the judge.'"[293] They also include state court orders that modify the subject matter of a conviction[294] or the criminal sentence.[295]

The Board has recognized that vacaturs under section 1473.7 of the California Penal Code remove a conviction for immigration purposes.[296] The Board reasoned that because a vacatur under section 1473.7 is "available only in cases of legal invalidity or actual innocence," a conviction vacated under that provision is no longer valid for immigration purposes.[297]

Vacaturs under section 1018 of the California Penal Code have also been successful in removing convictions for immigration purposes. Section 1018 requires "California courts to permit a criminal defendant to withdraw a guilty plea if [the person] [was] unrepresented by counsel at the time of [the] plea, upon a showing of 'good cause.'"[298] The Ninth Circuit reviewed the sorts of good cause that would support a section 1018 plea withdrawal and explained that the grounds that would allow withdrawal of a guilty plea under that section are substantive and procedural defects in the underlying proceeding and thus constitute a valid vacatur for immigration purposes.[299]

---

292. *Id.* at 624–25.

293. Prado v. Barr, 923 F.3d 1203, 1206 (9th Cir. 2019) (quoting Ramirez-Altamirano v. Holder, 563 F.3d 800, 805 n. 3 (9th Cir. 2009)) (citations omitted). California's law retroactively reduces sentences for certain controlled substances, which allowed individuals who had completed their sentences under statutes criminalizing the sale, possession, production, or transportation of marijuana to have their convictions reclassified and reduced resembled statutes that have been deemed rehabilitative. Citation Needed.

294. Matter of Dingus, 28 I&N Dec. 529, 534–35 (BIA 2022). .

295. Matter of Thomas, 27 I&N Dec. 674, 683 (A.G. 2019).

296. *See* Letter from Rose Cahn, Greg Chen, and Sirine Shebaya to Kerry E. Doyle (Mar. 15, 2022), *in* Immigrant Legal Resource Center 5, https://www.ilrc.org/sites/default/files/resources/2022.03_letter-opla-1473.7.pdf (attaching a list of Board of Immigration Appeals cases holding that a vacatur under section 1473.7 meets the requirements of *Matter of Pickering*, and removes a conviction for immigration purposes).

297. Elpidio Mendoza Sotelo, AXXX-XX8-491, *2 (BIA Dec. 23, 2019).

298. Ballinas-Lucero v. Garland, 44 F.4th 1169, 1179 (9th Cir. 2022).

299. *Id.*

Similarly, the Board has recognized, in several unpublished cases, that vacaturs under section 1016.5 of the California Penal Code are based upon a defect in the proceedings and thus remove the underlying conviction for immigration purposes. For example, in an early unpublished decision, the Board found that it was bound by the trial court's decision that the respondent's criminal proceedings were not in compliance with section 1016.5 and that the conviction was, therefore, defective.[300] Indeed, where the Immigration Judge looked beyond the state court's section 1016.5 vacatur to find that the vacatur was invalid because the criminal court docket sheet reflected that the reporter's notes were lost or destroyed, the Board reversed the Immigration Judge's conclusion that the vacatur was invalid.[301]

However, dispositions under California Penal Code section 1203.43 and section 18.5's retroactive reduction in sentences have had a more difficult path towards removing a conviction for immigration purposes. The Board's reasoning concerning the two provisions varies, as explained below.

The Board has declined to recognize California's statutory retroactive reduction of misdemeanor sentences, at least in the context of specific immigration provisions. In *Matter of Velasquez-Rios*, the respondent had been convicted of possession of a forged instrument in violation of California law.[302] The Immigration Judge found that this made Velasquez-Rios statutorily ineligible for the relief of cancellation of removal because he had been convicted of a crime involving moral turpitude for which a sentence of one year or more could be imposed.[303] At the time of Mr. Velasquez-Rios' conviction, the maximum sentence for a misdemeanor was 365 days.[304] Subsequently, the California Legislature enacted section 18.5, reducing the maximum sentence for most California misdemeanors to 364 days and making

300. Gina Lobnotin Meala, AXX XX6 062, *1(BIA Aug. 2, 2004). *Accord*, Ignacio Javier Perez-Hernandez, AXXX XX9 726, *1 (BIA July 18, 2013); Jose Noel Meza-Perez, AXXX XX9 568,*1 (BIA Feb. 28, 2011). The Administrative Appeals Unit of U.S. Citizenship and Immigration Services has also recognized vacaturs under section 1016.5 as removing convictions for immigration purposes. *See* Applicant: (Identifying Information Redacted By Agency), 2009 WL 3066357, *3 (AAO June 26, 2009); *but see* Applicant: (Identifying Information Redacted By Agency), 2008 WL 5651999, *3 (AAO Nov. 6, 2008) (finding that a conviction remained valid despite vacatur under section 1016.5 because the record established no underlying procedural defect, where the applicant was clearly advised of the immigration consequences of entering a guilty plea to the charge of driving with a suspended license).

301. Sergio Gabriel Raya-Dominguez, AXXX XX8 730, *1 (BIA Oct. 22, 2015).

302. Matter of Velasquez-Rios, 27 I&N Dec. 470, 470 (BIA 2018).

303. *Id.* at 471.

304. *Id.*

the provision retroactive.[305] Section 18.5 did not become effective until after Mr. Velasquez-Rios' conviction.[306] This change would have prevented the conviction from being a removable offense because it would no longer be an offense for which a sentence of one year might be imposed.

The Board declined to give retroactive effect to the reduction in sentence in Mr. Velasquez-Rios' case and based its decision principally on the language of the federal statute in question. The federal statute states that the deportation ground for conviction of a crime involving moral turpitude requires that the offense be one "for which a sentence of one year or longer may be imposed."[307] The Board determined that California's change to its laws did not affect the immigration consequences of the conviction under federal law because determining the effect of the conviction required a "backward-looking inquiry into the maximum possible sentence the respondent could have received for his forgery offense at the time of his conviction."[308] The Board relied on two precedent decisions, *McNeill v. United States*[309] and *United States v. Diaz*.[310] In both cases, the courts declined to give retroactive effect to state statutes that retroactively reduced sentences, finding that the language of the statutes involved required a backward-looking inquiry to the initial date of conviction.[311]

On review, the Ninth Circuit upheld the Board's decision and arguably went beyond it.[312] The Court noted several reasons for declining to apply section 18.5 retroactively, including the desirability of national uniformity in application of immigration laws.[313] Allowing retroactive effect, said the Court, could result in variation both between jurisdictions, applying different state statutes, and making immigration results dependent on the timing of the removal proceeding.[314] It is debatable, however, whether giving retroactive effect to section 18.5 would result in the lack of uniformity the Court

305. *Id.*
306. *Id.*
307. 8 U.S.C. § 1227(a)(2)(A)(i)(II); Matter of Velasquez-Rios, 27 I&N Dec. 470, 473 (BIA 2018).
308. Matter of Velasquez-Rios, 27 I&N Dec. at 474.
309. McNeill v. United States, 563 U.S. 816, 820 (2011).
310. United States v. Diaz, 838 F.3d 968, 973 (9th Cir. 2016).
311. Matter of Velasquez-Rios, 27 I&N Dec. at 473–74.
312. Velasquez-Rios v. Wilkinson, 988 F.3d 1081, 1083 (9th Cir. 2021.).
313. *Id.* at 1086.
314. *Id.* at 1086–87.

feared. The result of removal proceedings based upon convictions of the various state offenses already varies depending on the precise language of the state statute involved, and there is already a lack of uniformity in terms of timing of removal proceedings, given the considerable backlogs in the immigration court.[315] Arguably, giving retroactive effect to changes that states intended to be retroactive would increase uniformity rather than lessen it.

The Ninth Circuit also highlighted a point that the Board had relegated to a footnote: California's purpose in enacting the law. The Board had cited to the legislative history of section 18.5, noting that it was enacted to "'align[ ] the definition of misdemeanor between state and federal law' and to ensure that aliens 'who committed low level and non-violent crimes [would not be] subject to deportation.'"[316] The Ninth Circuit pointedly stated, however, that:

> [W]e decline to give retroactive effect to the California statute in the cancellation of removal context where it appears that the purpose of that state-law amendment is to circumvent federal law. The legislative history of the amendment to § 18.5 of the California Penal Code reveals that the amendment's retroactive application was designed to prevent the deportation of aliens who had been convicted of misdemeanors before 2015.

The Court referred to a statement by State Senator Richard Lara:

> While SB 1310 aligned state and federal law on a prospective basis, it did not help those who were convicted of a misdemeanor prior to 2015 . . . SB 1242 will provide, on a retroactive basis that all misdemeanors are punishable for no more than 364 days and ensure that legal residents are not deported due to previous discrepancies between state and federal law.[317]

The Ninth Circuit went further, devoting an entire section of the decision to federalism and the proper roles of the federal government and the states.[318] "Historically," said the Court, "the states' police powers are broad in permitting state decisions that relate to public

315. *See* Syracuse University, *Immigration Court Backlogs Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases*, TRAC, https://trac.syr.edu/immigration/reports/675/ (last visited Apr. 7, 2023).

316. Matter of Velasquez-Rios, 27 I&N Dec. 470, 471 n. 2 (BIA 2018) (citing to legislative history); S.B. 1242, S. Comm. on Pub. Safety, Bill Analysis, 2016 Leg., Reg. Sess., at 2 (Cal. 2016).

317. Velasquez-Rios v. Wilkinson, 988 F.3d 1081, 1087 (9th Cir. 2021).

318. *Id.* at 1088–8-9.

health, safety, and welfare, so long as state laws do not violate the federal Constitution."[319]

> From this it follows that Congress may make laws defining the proper sphere in which a person who is not a citizen and is in the United States without proper authority and documentation may be removed from this country, and that Congress, but not individual states, can give an escape hatch for removal in certain cases where equitable circumstances are thought to warrant cancellation of removal as a matter of federal law.
>
> . . .
>
> We hold that those federal law standards cannot be altered or contradicted retroactively by state law actions[ ] and cannot be manipulated after the fact by state laws modifying sentences that at the time of conviction permitted removal or that precluded cancellation.[320]

Despite this language, the Ninth Circuit stopped short of finding that section 18.5 was preempted by federal law, at least in Mr. Velasquez-Rios' case.[321] Instead, the Court found that preemption was not at issue because the case presented no conflict between state and federal law.[322] This was because the Court's decision had "no bearing on whether California [might], for purposes of its *own* state law, retroactively reduce the maximum sentence for misdemeanors."[323]

In addition, the Court noted that section 237(a)(2)(A)(i)(II) differed from "provisions of the Act that require [consideration of] the actual sentence imposed, a fact-based inquiry into a [s]tate court judge's specific sentence or into subsequent modifications to that sentence."[324] Thus, California's reduction in sentences may have effect in the context of other immigration provisions, such as an aggravated felony offense "for which the term of imprisonment [is] at least one year."[325]

---

319. *Id.* at 1088.

320. *Id.* at 1089. This concern with California's motives echoes language in the Ninth Circuit's initial decision in *GEO Grp., Inc. v. Newsom*: "In short, California's mantra-like invocation of 'state police powers' cannot act as a talisman shielding it from federal preemption, especially given that the text and context of the statute make clear that state has placed federal immigration policy within its crosshairs." GEO Grp., Inc. v. Newsom, 15 F.4th 919, 928 (9th Cir. 2021), *reh'g en banc granted, opinion vacated,* 31 F.4th 1109 (9th Cir. 2022), and *on reh'g en banc,* 50 F.4th 745 (9th Cir. 2022).

321. Velasquez-Rios v. Wilkinson, 988 F.3dId. at 1089.

322. *Id.* at 1088.

323. *Id.*

324. Matter of Velazquez-Rios, 27 I&N Dec. 470, 470 n. 9 (BIA 2018).

325. 8 U.S.C. § 1101(a)(43)(G) (indicating for an aggravated felony of a theft or burglary offense the term of imprisonment is at least one year).

Turning to section 1203.43 of the California Penal Code, the Board's acceptance of the effect of post-conviction relief under this provision depends on the facts of the individual case.[326] On June 27, 2018, the Board issued an invitation for amicus curiae briefs regarding section 1203.43.[327] The issues designated by the Board were:

> (1) 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?
>
> (2) 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 (BIA 2006), Matter of Pickering, 23 I&N Dec. 621 (BIA 2003), Matter of Rodriguez-Ruiz, 22 I&N Dec. 1378 (BIA 2000), Matter of Roldan, 22 I&N Dec. 512 (BIA 1999), and Matter of Punu, 22 I&N Dec. 224 (BIA 1998). Please also discuss to what extent relief under section 1203.43 is dependent on successful completion of a deferred adjudication program.
>
> (3) 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)?
>
> (4) 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?[328]

These questions indicate that the Board was considering whether a vacatur under section 1203.43 would remain a conviction for immi-

326. Amicus Invitation, Validity of a Conviction for Immigration Purposes, No. 18-06-27, JUSTICE.GOV (July 27, 2018), https://www.justice.gov/eoir/page/file/1074676/download.

327. *Id.*

328. *Id.* A number of agencies responded to the invitation and filed amicus briefs. *See, e.g.,* Brief for Immigrant Legal Resource Center et al. as Amicus Curiae Responding to Invitation No. 18-06-27, (BIA Oct. 25, 2018) https://www.ilrc.org/sites/default/files/resources/ilrc_amicus_cal_120343_vacaturs-20181025.pdf.

gration purposes because it might constitute a rehabilitative measure or violate the Supremacy Clause.

Prior to the Board's issuance of the amicus invitation, it had issued at least four unpublished decisions finding that section 1203.43 effectively nullified criminal convictions.[329] In the first of those, *In re Soria-Alcazar*, on remand from the U.S. Court of Appeals for the Ninth Circuit, the Board considered a California court's dismissal of a conviction under section 1203.43.[330] The Board noted the Legislature's reason for enacting section 1203.43 was to correct the misinformation that a plea of guilty under California's old deferred entry of judgment program would not result in a conviction.[331] The Board, citing its obligation to extend full faith and credit to a California court order vacating a guilty plea, found that the erroneous information provided to persons who pled under the deferred entry of judgment program qualified as a substantive defect in the criminal proceedings, "notwithstanding its connection to the consequences of immigration enforcement."[332] The Board used similar language in a 2017 unpublished decision.[333] In two shorter 2018 unpublished decisions, one issued shortly after the Board's amicus invitation, the Board found that withdrawal of a guilty plea and dismissal under section 1203.43 nullified a conviction.[334]

In 2019, however, the Board reached the opposite conclusion, finding that a dismissal under section 1203.43 did not remove the conviction for immigration purposes.[335] The Board referred to the same language it cited in *Soria-Alcazar* that the California Legislature's explanation that vacatur was necessary because the old deferred entry of judgment statute erroneously informed defendants that a plea under it would not count as a conviction.[336] But here, the Board found that, despite the misinformation addressed by the statute, section 1203.43 "was not related to the merits of the underlying criminal proceeding and was for avoiding certain consequences, including immigration

329. Amicus Invitation, Validity of a Conviction for Immigration Purposes, No. 18-06-27, JUSTICE.GOV (July 27, 2018), https://www.justice.gov/eoir/page/file/1074676/download.

330. In re Soria-Alcazar (BIA Sept. 7, 2016) (Copy on file with author).

331. *Id.*

332. *Id.* at 3.

333. Juan Carlos Suazo-Suazo, AXX XX4 203, *1 (BIA Feb. 8, 2017).

334. Felipe Jesus Pacheco, AXXX XX9 225, *1 (BIA Mar. 1, 2018); Jose Pablo Hernandez Valdez, AXXX XX2 353, *1 (BIA July 18, 2018).

335. Elpidio Mendoza Sotelo, AXXX-XX8-491 (BIA Dec. 23, 2019), 2019 WL 8197756.

336. *Id.* at *3.

hardship" and thus, "this conviction remains valid for immigration purposes."[337]

In a more recent decision on section 1203.43, issued on June 27, 2020, following the submission of amicus briefs, the Board came to a middle-ground conclusion in an unpublished decision.[338] In it, the Board clarified that in order for a conviction to remain effective for immigration purposes after vacation, the vacation must be *solely* because of rehabilitation or immigration hardship.[339] The Board noted that the respondent's counsel had conceded the possibility that a defendant may withdraw a guilty plea under section 1203.4 even if the defendant had not been misinformed about the immigration consequences.[340] The Board concluded that a blanket retroactive vacatur under section 1203.43 that is unrelated to the respondent's particular case would not be sufficient to eliminate the immigration consequences of the conviction.[341] Thus, the Board imposed an additional evidentiary requirement under which the respondent must prove that the respondent himself or herself was misinformed of the immigration consequences of the original guilty plea.[342] In short, the decision requires that the question of whether a section 1203.43 vacatur effectively cures a conviction for immigration purposes must be decided on a case-by-case basis.[343] For the Board, the statutory language, clearly expressing that the information in the California Penal Code defendants would have relied upon, was insufficient to establish an underlying error in the proceedings.[344]

From the foregoing decisions, the Board's treatment of California's efforts varies depending on the state provision involved and the

337. *Id.*
338. BIA decision of June 27, 2020 (on file with author).
339. *Id.* at 3.
340. *Id.* at 3–4.
341. *Id.* at 4.
342. *Id.*
343. E-mail from Rose Cahn, Evangeline Abriel, Jan. 9, 2023. (on file with author). In response to the decision, the Immigrant Legal Resource Center advises that respondents take two steps. First, in post-conviction proceedings in criminal court, section 1473.7 is a safer route because of that section's statutory presumption that the prior plea was legally invalid. Second, the ILRC advised that, in immigration proceedings, the respondent should submit a declaration or testimony that 1) the respondent was told prior to the plea of guilty that it would not be a conviction for any purpose if there was successful completion of Deferred Entry of Judgment, and 2) that their attorney did not tell them otherwise, and 3) they did not know that it would still be a conviction for immigration purposes. Kathy Brady and Carla Gomez, Immigrant Legal Resource Center, Overview of California Post-Conviction Relief for Immigrants, at 11 (July 2022), ilrc.org/sites/default/files/resources/ca_pcr_july_2022.pdf.
344. Equal Employment Opportunity Employer Fresno County, *supra*, note 137. https://www.co.fresno.ca.us/home/showdocument?id=1299.

underlying case. The Board and Ninth Circuit have recognized California's pre-plea diversion resolutions and its vacaturs of convictions under section 1473.7 and section 18.5 as not constituting convictions for immigration purposes. The Board has not foreclosed the conclusion that section 1203.43 may be an effective vacatur of a conviction. However, the Ninth Circuit's language in *Velasquez-Rios*, the Board's questions to amici, and the Board's required showing of actual misinformation for a section 1203.43 vacatur raises a Supremacy Clause specter. In particular, the Ninth Circuit, in its 2022 en banc decision in *GEO Group, Inc. v. Newsom,* directly found that California's ban on private detention facilities conflicted with the federal government's ability to carry out its statutory detention responsibilities.[345]

For several reasons, state laws on criminal offenses, sentences for those offenses, and post-conviction relief should not be found to be preempted by or in conflict with federal immigration law.[346] Principally, state decisions on what constitutes an offense, what the appropriate resolution of a criminal case should be, the proper sentence in a particular case, and the appropriate basis for any form of post-conviction relief have historically been considered within a state's historic police power.[347] There is a rebuttable presumption against preemption of laws that fall within that power.[348] That presumption "holds true" even if the state law "'"touches on" an area of significant federal presence,' such as immigration."[349] In addition, the INA is necessarily dependent on states and state courts as the only bodies that can make decisions concerning state criminal proceedings.[350] Because of this historic state authority, determinations concerning state court decisions on criminal matters differ significantly from a decision on a state statute, such as California's prohibition on private detention fa-

345. *GEO Grp.*, 50 F.4th at 761.

346. *See* David G. Blitzer, *Delegated to the States: Immigration Federalism and Post-Conviction Sentencing Adjustments in Matter of Thomas & Thompson*, 97 N.Y.U. L. Rev. 697, 726 (2022) (arguing that Congress has delegated to the states the determination of sentences under 8 U.S.C. § 1101(a)(48)(B)); *see also* Brief of Immigrant Defense Project as Amicus Curiae in Support of Petitioner at 12–13, Peguero Vazquez v. Garland, No. 21-6380 (2d Cir. Mar. 17, 2022) (describing ways in which the Immigration and Nationality Act relies upon state law and state processes in determining immigration consequences).

347. *See* Arizona v. United States, 567 U.S. 387, 398 (2012) ("Federalism . . . adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.").

348. *See* Wyeth v. Levine, 555 U.S. 555, 623–24 (2009).

349. GEO Grp., Inc. v. Newsom, 15 F.4th 919, 943 (9th Cir. 2022) (Murguia, J., dissenting).

350. *See, e.g.*, Mellouli v. Lynch, 575 U.S. 798, 805 (2015) (recognizing that Congress chose to rely on state court adjudications rather than on a noncitizen's conduct in making decisions under the INA).

cilities, which the Ninth Circuit has determined, under the facts, to be in violation of the Supremacy Clause.[351]

C. Reopening Old Removal Proceedings in Order to Submit Evidence of Post-Conviction Relief Under California's New Criminal Statutes

A separate question, with additional requirements, arises when an individual has already had a removal proceeding and then is able to successfully ameliorate a conviction through post-conviction relief. In such a case, the individual must figure out how to get the redone criminal case back before the immigration authorities for a new immigration result.[352] And this is not always, or even usually, a foregone conclusion.[353]

The ordinary procedural vehicle for seeking a new administrative decision based on a change such as a vacatur of a conviction is a motion to reopen before the administrative body that last had jurisdiction over the case.[354] Thus, the motion would be filed before either the Immigration Court or the BIA.[355] The motion must raise facts that were not available or discoverable at the time of the original removal proceedings.[356] With some exceptions, an individual is limited to one motion to reopen, which must be filed within ninety days of entry of a final administrative order.[357]

There are certain exceptions to the timing and number rules, for example, where there have been changed conditions that affect a claim for asylum,[358] where DHS joins in the motion to reopen,[359] or

351. *See GEO Grp.*, 50 F.4th 745.

352. The Board of Immigration Appeals has recently invited amicus briefs on the issue of "what factors [ ] the Board [should] weigh when considering an untimely motion to reopen that is premised on a vacatur of a criminal conviction?," *see* Amicus Invitation: Vacatur of a Criminal Conviction, No. 22-16-03, JUSTICE.GOV (Apr. 6, 2022), https://www.justice.gov/eoir/page/file/1483571/download.

353. *Id.*

354. 8 U.S.C. § 1229a(c)(7); see American Immigration Council, The Basics of a Motion to Reopen EOIR-Issued Removal Orders, at 5 (April 25, 2022), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory_0.pdf.

355. *Id.*; see also 8 C.F.R. § 1003.23 (Immigration Court); 8 C.F.R. § 1003.2 (BIA).

356. 8 U.S.C. § 1229aca)(7)(A); 8 C.F.R. § 1003.2(c)(1).

357. 8 U.S.C. § 1229a(a)(7, 2022), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory_0.pdf. (C)(i); 8 C.F.R. § 1003.2(c)(2).

358. 8 U.S.C. § 1229a(a)(7)(C)(ii).

359. 8 C.F.R. § 1003.2(a)(3)(iii). DHS attorneys are authorized to exercise prosecutorial discretion that could take the form of joining in a motion to reopen. *See Prosecutorial Discretion*

where a three-judge panel of the Board agrees to reopen due to a material change in fact or law underlying a removal ground that occurred after the removal order and vitiates all grounds of removability.[360] Until January 15, 2021, the Board was also able to reopen a removal proceeding sua sponte.[361]

In addition, the ninety-day period may be equitably tolled when a respondent is prevented from filing because of deception, fraud, or error.[362] Ineffective assistance of counsel has been held to support equitable tolling.[363] In an equitable tolling situation, the applicant must demonstrate due diligence in discovering the deception, fraud, or error,[364] and the Board and the Ninth Circuit have emphasized this requirement. For example, the Board found a lack of due diligence and, therefore, no equitable tolling to support an untimely motion to reopen, where the applicant failed to explain why he waited more than twenty-one years after a final removal order to file his motion to reopen.[365]

Conclusion

California is a new frontier in terms of a state's ability and willingness to protect its noncitizen residents from unduly harsh immigration consequences. From its efforts, we learn that states have a more robust ability to affect the risk of immigration consequences than was previously recognized. In effect, the state has created at least a partial cocoon for its noncitizen residents, sheltering them from many of the

and the ICE Office of Principal Legal Advisor, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/about-ice/opla/prosecutorial-discretion (last visited Apr. 7, 2023).

360. 8 C.F.R. § 1003.2(c)(3)(v)(A).

361. *Id.* § 1003.2(a). Under current regulations, the Board and Immigration Judges may reopen sua sponte only to correct a ministerial mistake or typographical error or to reissue the decision to correct a defect in service. *Id.* §§ 1003.2(a), 1003.23(b)(1).

362. *See,* Salazar-Gonzalez v. Lynch, 798 F.3d 917, 920 (9th Cir. 2015); *see, e.g.*, Perez-Camacho v. Garland, 42 F.4th 1103, 1110 (9th Cir. 2022).

363. Iturribarria v. INS, 321 F.3d 889, 896–97 (9th Cir. 2003); *Perez-Camacho*, 42 F.4th at 1110.

364. *Perez-Camacho*, 42 F.4th at 1110.

365. *Id.* at 1111–12. Pereida v. Wilkinson, 141 S. Ct. 754, 773 (2021) (demonstrating that a special difficulty arises where the individual seeks to reopen a case in order to apply for relief from removal. In applications for relief from removal, the applicant rather than the government bears the burden of proof). *See also* Ballinas-Lucero v. Garland, 44 F.4th 1169, 1178–79 (9th Cir. 2022) (demonstrating that in the context of a motion to reopen to demonstrate that a conviction has been vacated, that the movant must show that the conviction was vacated for substantive reasons).

disadvantages of undocumented status and lessening their risk of deportation.[366]

While the Board and the Ninth Circuit have indicated that there are limits to what California is permitted to do in areas related to immigration, California's efforts have for the most part achieved its goals. Courts and prosecutors have the tools to fashion dispositions in criminal cases that satisfy the goals of a criminal proceeding without ripping a noncitizen defendant from his home and family through deportation. In addition, noncitizens faced with convictions resulting from criminal proceedings whose consequences they did not meaningfully understand have several procedural vehicles through which to seek vacatur.

Nonetheless, while California's legislation has the potential of providing significant relief from immigration consequences, the legislation's success depends on a number of actors beyond the legislature and the individuals concerned. The ultimate decision on removability still rests with the federal immigration authorities. For this reason, defense counsel in both criminal and immigration proceedings must be familiar with the statutory provisions that might benefit their clients and urge prosecutors and courts to apply those provisions on their client's behalf. Applicants seeking post-conviction relief must closely follow the requirements of the California provisions and must also be conscious of documenting the reasons for vacaturs so as to prove that they were not obtained solely for rehabilitative purposes. If this is not done, the immigration authorities will not recognize the vacaturs as removing convictions. Finally, the Immigration Courts, BIA, an federal courts should recognize the important role that state criminal cases play in the immigration context and the sovereignty of states in resolving criminal cases concerning their noncitizen residents.

366. *See* S. Karthick Ramakrishnan & Allan Colbern, *The California Package: Immigrant Integration and the Evolving Nature of State Citizenship*, 6 POL'Y MATTERS 2 (Spring 2015), https://policymatters.ucr.edu/vol6-3-immigration/ (asserting that California has created a de facto regime of state citizenship that operates in parallel to national citizenship).