UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 21-6323 Caption [use short title] Siriboe v. Garland

Motion for: Leave to File Brief on Behalf of Proposed Amici Curiae

Set forth below precise, complete statement of relief sought:

The Kathryn O. Greenberg Immigration Justice Clinic at Cardozo School of Law, Appellate Advocates, the Office of the Appellate Defender, and the Center for Appellate Litigation seek to file an amicus brief in support of Petitioner's petition for review of the denial of his motion to reopen.

MOVING PARTY: Proposed Amici **OPPOSING PARTY:** Merrick B. Garland, United States Attorney General

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Lindsay Nash **OPPOSING ATTORNEY:** Craig Alan Newell

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Court- Judge/ Agency appealed from: Board of Immigration Appeals

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): ☑ Yes ☐ No (explain):

Opposing counsel's position on motion: ☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response: ☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

Lindsay Nash **Date:** 01/04/22 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

No. 21-6323

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Kwame SIRIBOE,
A 072-432-310
Petitioner,

v.

Merrick B. GARLAND,
United States Attorney General,
Respondent.

ON PETITION FOR REVIEW FROM THE DECISION OF THE BOARD OF IMMIGRATION APPEALS

MOTION OF PROPOSED AMICI CURIAE NEW YORK APPELLATE DEFENDER ORGANIZATIONS AND KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC FOR LEAVE TO FILE AMICUS BRIEF

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29(a)(3), proposed amici curiae Appellate Advocates, the Center for Appellate Litigation, the Kathryn O. Greenberg Immigration Justice Clinic, and the Office of the Appellate Defender request leave to file the accompanying brief in support of Kwame Siriboe's petition for review of a final order of the Board of Immigration Appeals. *See* Ex. A (Proposed Brief of Amici Curiae). Petitioner consents to the filing of the brief; counsel for Respondent does not oppose.

IDENTITY AND INTEREST OF PROPOSED AMICI CURIAE

Proposed Amici Curiae ("Amici") are nonprofit organizations that, inter alia, represent noncitizens who have incurred unlawful convictions in post-conviction proceedings in New York State courts. Appellate Advocates is one of the largest appellate public defender offices in New York City. Founded nearly 25 years ago, Appellate Advocates serves by appointment of the Appellate Division, Second Department, as the principal institutional appellate defender for appeals arising in Queens, Kings, and Richmond Counties pursuant to its contract with the City of New York. In addition to handling over 600 direct appeals annually, it also litigates numerous post-conviction relief motions each year under N.Y. C.P.L. § 440.10 for noncitizens whose New York convictions have resulted in immigration consequences.

The Center for Appellate Litigation ("CAL") is a nonprofit, public-defense firm. The Center represents indigent persons convicted of crimes in New York City, in their

appeals and other post-conviction proceedings. Many of CAL's clients are noncitizens. CAL's Immigrant Justice Project, in particular, analyzes the convictions of all of its noncitizen clients to determine the immigration consequences of their criminal conviction and pursues the full range of post-conviction legal remedies available to protect these clients from such immigration consequences. The legal significance of a N.Y. C.P.L. § 440 motion vacatur within the context of federal immigration law is critically important to CAL's noncitizen clients.

The Kathryn O. Greenberg Immigration Justice Clinic is a nonprofit law school clinic dedicated to providing quality representation for indigent immigrants facing deportation and supporting advocacy work by and on behalf of immigrant communities. As part of this work, the Clinic both represents noncitizens in post-conviction proceedings in New York State courts and represents individuals—including those who had convictions that were subsequently found to be unlawful—in removal proceedings and motions to reopen prior removal orders. The Clinic also regularly conducts research and advocacy on issues affecting noncitizens who are unable to afford counsel to represent them in their removal proceedings.

The Office of the Appellate Defender ("OAD") is one of New York City's oldest providers of appellate representation to people experiencing poverty convicted of felonies before New York's appellate courts. OAD represents New Yorkers on direct appeals and in post-conviction proceedings—in both cases challenging the legality and constitutionality of their convictions.

ARGUMENT

Because Amici collectively regularly represent noncitizens in post-conviction proceedings in New York State courts and before the Executive Office for Immigration Review, they have significant experience and expertise in post-conviction litigation in New York State courts and a direct interest in ensuring that the Board of Immigration Appeals does not erroneously treat convictions that have been vacated for constitutional defects as valid for immigration purposes.

Amici respectfully seek leave to submit the accompanying brief to shed further light on the substantial errors in the Board decision under review and the broad consequences for noncitizens who have incurred unconstitutional convictions if the decision is affirmed. As is described below, the Board's decision departs from well-established precedent and practice, which violates both fundamental tenets of administrative law and the reliance interests of litigants who have reasonably relied on these agency rules. It also seriously impairs attorneys' ability to competently counsel clients about the consequences of post-conviction relief and re-pleas by denying them any assurance that longstanding rules will be applied consistently across individual cases.

The proposed brief outlines three significant problems associated with the Board's refusal, in Petitioner's case, to recognize that a conviction vacated under New York Criminal Procedural Law § 440.10(1)(h) does not constitute a "conviction" within the meaning of the Immigration and Nationality Act ("INA"). First, it explains why the Board's decision represents an arbitrary and capricious departure from the agency's

established precedent and practice of recognizing that a vacatur issued pursuant to N.Y. C.P.L. § 440.10(1)(h) eliminates the underlying conviction for immigration purposes. Second, Amici argue that the Board's decision was erroneous because, when a vacatur order cites to a statute that clearly sets out the basis for the vacatur, that statute is sufficient to determine whether the vacated conviction remains valid for immigration purposes. This position has been adopted by several courts of appeals—including this one—and often the Board itself when addressing the question of whether a vacatur eliminates a conviction for immigration purposes. Third, Amici present the compelling public policy reasons for requiring the Board to adhere to past precedent and practice when determining whether a vacated conviction remains valid for immigration purposes. Specifically, Amici argue that consistency is crucial to ensure that litigants in immigration proceedings, many of whom appear *pro se*, have fair notice of the laws and procedural rules under which their cases will be judged.

Amici respectfully submit that their practical experience in the fields of post-conviction and immigration-related litigation may inform the Court's resolution of the instant petition for review, and they urge this Court to find that the Board erred in failing to adhere to its policy and practice of recognizing that a conviction vacated under N.Y. C.P.L. § 440.10(1)(h) is eliminated for immigration purposes.

CONCLUSION

For the foregoing reasons, Amici respectfully request the Court's permission to file the accompanying brief.

Respectfully submitted,

Dated: January 4, 2022

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CERTIFICATE OF COMPLIANCE

I, Lindsay Nash, hereby certify that this motion complies with the type-volume limitations of Fed. R. App. P. 27(d) because, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), this document contains 933 words, as determined by the word-count function of Microsoft Word Version 16.56.

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared using Microsoft Word Version 16.56, is proportionately spaced, and has a typeface of 14-point.

Dated: January 4, 2022

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EXHIBIT A

No. 21-6323

IN THE UNITED STATES COURT OF APPEALS
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Kwame SIRIBOE,
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Merrick B. GARLAND,
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Respondent.

ON PETITION FOR REVIEW FROM THE DECISION OF THE BOARD OF IMMIGRATION APPEALS

BRIEF OF NEW YORK APPELLATE DEFENDER ORGANIZATIONS AND KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC AS AMICI CURIAE IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT
PURSUANT TO FED. R. APP. P. 26.1

I, Lindsay Nash, counsel for Amici, hereby certify that Appellate Advocates, Center for Appellate Litigation, the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law, and the Office of the Appellate Defender are nonprofit organizations that do not have any parent corporations or issue stock and, consequently, there exists no publicly held corporation which owns 10% or more of stock.

Dated: January 4, 2022

/s/ Lindsay Nash

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TABLE OF CONTENTS

ADDENDUM

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

ADMINISTRATIVE DECISIONS

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

Amici Curiae Appellate Advocates, Center for Appellate Litigation, the Kathryn O. Greenberg Immigration Justice Clinic, and the Office of the Appellate Defender ("Amici") are nonprofit organizations that represent noncitizens who were unlawfully convicted of criminal offenses in pursuing vacatur through post-conviction proceedings in New York State courts. Amicus Kathryn O. Greenberg Immigration Justice Clinic also represents noncitizens—including those who have had prior convictions vacated by New York State courts—in removal proceedings and in efforts to reopen removal proceedings before immigration courts and the Board of Immigration Appeals ("BIA" or "Board"). Given their work, Amici have experience and expertise in issues at the intersection of immigration and criminal law and in post-conviction litigation in New York State courts. They also have a direct interest in ensuring that the Board does not erroneously treat prior unconstitutional convictions that have been subsequently vacated by New York State courts as valid convictions for immigration purposes.

Amici respectfully submit this brief to shed further light on the substantial errors in the Board's decision under review and the broad consequences for noncitizens who

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), Amici state that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than Amici and their counsel contributed money that was intended to fund preparing or submitting the brief.

have incurred unconstitutional convictions if the decision is affirmed. As is described below, the Board's decision departs from well-established precedent and practice, which violates both fundamental tenets of administrative law and the reliance interests of litigants who have reasonably relied on these agency rules. It also seriously impairs attorneys' ability to competently counsel clients about the consequences of post-conviction relief and re-pleas by denying them any assurance that longstanding rules will be applied consistently across individual cases. Accordingly, Amici respectfully urge this Court to require the Board to adhere to its policy and practice of recognizing that a conviction vacated under N.Y. C.P.L. § 440.10(1)(h) does not constitute a "conviction" within the meaning of the Immigration and Nationality Act ("INA").

SUMMARY OF ARGUMENT

The Board's decision in Mr. Siriboe's case represents an unexplained and unauthorized departure from its longstanding precedent and practice of recognizing that a conviction vacated under N.Y. C.P.L. § 440.10(1)(h) is no longer a "conviction" as defined by the INA. It is also a decision that, if affirmed by this Court, will sow uncertainty in post-conviction proceedings and the immigration system; create significant comity concerns by inviting immigration adjudicators to second-guess state courts' compliance with state law; and compound the injustices faced by individuals who the criminal legal system has already failed.

Amici submit the instant brief to present three principal reasons that this Court should vacate the agency decision under review. First, the Board's decision in this case impermissibly departs from binding agency precedent—specifically *Matter of Rodriguez-Ruiz*, 22 I. & N. Dec. 1378, 1378 (BIA 2000)—holding that, because Article 440 of the New York Criminal Procedure Law is *not* a rehabilitative or expungement statute, a conviction vacated under it is not a "conviction" for purposes of the INA.[2] Moreover, even if there were no precedent on this issue, the Board's decision would nevertheless reflect arbitrary decisionmaking because it conflicts with longstanding agency practice. Second, the Board's attempt to require Mr. Siriboe to present additional details about the facts underlying the vacatur order—which was undisputedly on constitutional grounds—diverges from the approach adopted by courts of appeals and, in many cases, the agency itself. Indeed, the Board's effort in this case to "go behind" the state court's judgment to re-evaluate whether the state court complied with the strictures of the state vacatur statute would generate precisely the comity concerns and practical challenges that courts have refused to create. Third, the Board's abrupt departure from precedent and practice will result in unjust outcomes, uncertainty, and devastating harms for litigants who reasonably rely on the agency to adhere to its own rules. And while agency fealty to precedent and settled practice is important in any context, it is particularly

[2] The New York legislature has added new subsections to Article 440 since *Rodriguez-Ruiz* was decided, but the Board should be required to adhere to *Rodriguez-Ruiz* at minimum with respect to the subsections that existed at the time it was decided, which includes N.Y. C.P.L. § 440.10(1)(h)—the provision at issue in Petitioner's case.

critical here given the stakes of these proceedings, *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (recognizing the motion to reopen mechanism as "an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings"), and the high proportion of pro se litigants in the immigration arena.

ARGUMENT

I. The Board's Decision Impermissibly Departs from Longstanding Agency Precedent and Settled Practice Recognizing that a Prior Conviction Vacated Under N.Y. C.P.L. § 440.10(1)(h) Is No Longer a "Conviction" for Immigration Purposes.

A. It is Arbitrary and Capricious for an Agency to Depart from Established Precedent and Settled Practice without Explanation.

For decades, it has been clear that consistency is critical to prevent arbitrary agency decisionmaking. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 549 (2009) ("[A]n agency must act consistently."). Accordingly, this Court has long recognized that, when the Board "inexplicably departs from established policies," that constitutes reversible error. *Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 93–95 (2d Cir. 2001) (holding that the "application of agency standards in a plainly inconsistent manner across similar situations evinces such a lack of rationality as to be arbitrary and capricious"); *see also Johnson v. Ashcroft*, 378 F.3d 164, 173 (2d Cir. 2004) (reversing Board decision where the agency "acted contrary to its own precedents"); *Vargas v. I.N.S.*, 938 F.2d 358, 364 (2d Cir. 1991) (vacating Board's denial of a motion to reopen because it applied rule inconsistently and "erratic[ally]" across different cases). This doctrine not only reflects

"a fundamental principle of justice that similarly situated individuals be treated similarly," *Pan v. Holder*, 777 F.3d 540, 544 (2d Cir. 2015) (quotation marks omitted), but also "serves a critical purpose: the provision of fair notice to those subject to the agency's decisions." *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 711–12 (6th Cir. 2004); *see also Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (explaining that adherence to prior precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process").

Binding regulations and Board case law also require the Board to follow its own precedent. *See* 8 C.F.R. § 1003.1(g)(3) (requiring Board to adhere to its own precedential decisions "in all proceedings involving the same issue or issues"); *Matter of E-L-H-*, 23 I. & N. Dec. 814, 814 (BIA 2005) ("A precedent decision of the Board of Immigration Appeals applies to all proceedings involving the same issue unless and until it is modified or overruled by the Attorney General, the Board, Congress, or a Federal court.").

In light of this fundamental precept, the Second Circuit has regularly reversed Board decisions where the agency, without explanation, ignored or departed from its own precedent. For example, in *Johnson v. Ashcroft*, this Court reversed a Board decision in which the agency inexplicably departed from precedent by granting the then-Immigration and Naturalization Service's ("I.N.S.") motion to remand despite the I.N.S. not having presented any previously unavailable evidence, as the Board's

standards required. 378 F.3d at 171. In so doing, this Court made clear that, "[w]hile the Board is free to modify its precedents in a reasoned fashion, it acts arbitrarily and unlawfully when it simply ignores established holdings." *Id.* at 171–72 (collecting cases); *see also Ordonez Azmen v. Barr*, 965 F.3d 128, 136 (2d Cir. 2020) (finding that Board abused its discretion where its holding "appear[ed] to contradict" a prior decision without justification.); *Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008) (finding that Board abused its discretion by failing to "provid[e] a rational explanation for its departure from its own precedent").

This Court has similarly concluded that consistency with settled practice is critical for rational administrative decisionmaking. For example, in *Vargas v. I.N.S.*, the Second Circuit vacated a Board decision because, *inter alia*, the agency's approach to the dispositive issue was "inconsistent" and "erratic" when compared to its other decisions on the same issue. 938 F.2d 358, 362 (2d Cir. 1991). Citing the Board's contrary decisions in two other unpublished decisions, it emphasized that such "[p]atently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary." *Id.* (internal quotation marks omitted). And similarly, in *Twum v. I.N.S.*, this Court vacated the Board's denial of a motion to reopen where the agency had applied a standard "inconsistent with the agency's analysis of . . . similar claims" in two other cases. 411 F.3d 54, 60–61 (2d Cir. 2005) (Sotomayor, C.J.); *see also Andrews v. Barr*, No. 17-3827, 799 F. App'x 26, 28 (2d Cir. Jan. 22, 2020) (similar).

B. The Board's Decision Conflicts with Longstanding Precedent Recognizing that a Prior Conviction Vacated Under N.Y. C.P.L. § 440.10(1)(h) is No Longer a "Conviction" for Immigration Purposes.

Over twenty years ago, in *Matter of Rodriguez-Ruiz*, the Board ruled on the dispositive issue in Mr. Siriboe's case, categorically holding that "a conviction that has been vacated pursuant to Article 440 of the New York Criminal Procedure Law does not constitute a conviction for immigration purposes." 22 I. & N. Dec. at 1378. In so finding, the Board rejected the then-I.N.S.'s argument that the noncitizen's conviction had been "vacated for purposes of avoiding removal and not for reasons relating to a constitutional or legal defect in the criminal proceedings" and therefore "remain[ed] a 'conviction' under the Act." *Id.* at 1379. Instead, because the noncitizen had submitted a state court order which made clear that the conviction was vacated pursuant to New York Criminal Procedure Law Article 440 ("Article 440"), the Board held that the "criminal conviction upon which the charge of removability is based has been vacated" and "did not constitute a conviction" within the meaning of the INA. *Id.* at 1378–80. In so finding, the Board adopted a statute-focused approach, concluding that, because this particular vacatur statute was neither an "expungement statute nor a rehabilitative statute," vacaturs under this particular statute—Article 440—were valid for immigration purposes. *Id.* at 1379.

The Board has repeatedly reaffirmed this conclusion. In *Matter of Pickering*, for instance, the Board reiterated that, in *Rodriguez-Ruiz*, it had "determined that a conviction that had been vacated on the merits pursuant to Article 440 of the New

York Criminal Procedure Law did not constitute a conviction for immigration purposes within the meaning of the statute." 23 I. & N. 621, 622–23 (BIA 2003); *see also id.* (distinguishing *Rodriguez-Ruiz* because it "involved a statute authorizing vacation of a conviction based on the legal merits of the underlying proceedings"). The Board reaffirmed this holding more recently in *Matter of J.M. Acosta*, 27 I. & N. Dec. 420, 432 (BIA 2018), citing *Rodriguez-Ruiz* as an example of the Board's continued approach to evaluating the validity of a vacatur. *Id.* at 428.

The binding nature of *Rodriguez-Ruiz* is not undermined by the footnote in *Matter of Thomas & Thompson* stating that, "*to the extent* that [*Rodriguez-Ruiz*] *suggests* that the Full Faith and Credit Act applies to proceedings before immigration judges and the Board," it is overruled. 27 I. & N. Dec. 674, 688, n.2 (A.G. 2019) (emphases added). That is because the main substantive holding in *Rodriguez-Ruiz*—that vacaturs issued pursuant to Article 440 are categorically valid for immigration purposes—did not depend upon the application of the Full Faith and Credit Clause. *See Rodriguez-Ruiz*, 22 I. & N. Dec. at 1380 (concluding that vacaturs under Article 440 were valid for immigration purposes because that statute did not permit rehabilitative or expungement-focused vacaturs). Moreover, as *Thomas & Thompson* implicitly recognized, the Board in *Rodriguez-Ruiz* never held that it was bound by the Full Faith and Credit Clause. *See Thomas & Thompson*, 27 I. & N. Dec. at 688 n.2 (stating that it overruled this aspect of *Rodriguez-Ruiz* only "to the extent that [it] suggest[s]" that the Act applied to proceedings before the agency); *cf. Rodriguez-Ruiz*, 22 I. & N. Dec. at 1380 (recognizing that the Full Faith

and Credit Act applied to "federal courts"—not the agency—and proving this by citing the Full Faith and Credit Act with only a "see" citation signal). Rather, the Board simply found that it was "not compelled" to "question whether the New York court acted in accordance with its own state law" in issuing the vacatur order and, drawing upon the comity principles underlying the Full Faith and Credit Act, rejected the I.N.S.'s invitation to "go behind" the judgment and engage in that type of second-guessing. *Id.* at 1379–80.

Despite this longstanding precedent and the Board's obligation to either adhere to it or justify its departure, it did neither in Mr. Siriboe's case. It recognized that the court order made clear that Mr. Siriboe's convictions had been vacated under Article 440 of the New York Criminal Procedure Law—the same statute at issue in *Rodriguez Ruiz*. Administrative Record ("AR") 4 (acknowledging that the state court vacated Mr. Siriboe's convictions under N.Y. C.P.L. § 440.10(1)(h)). But the Board—without noting or explaining its departure—came to a conclusion directly at odds with *Rodriguez-Ruiz*: it held that, even though the evidence made clear that Mr. Siriboe's vacaturs occurred under N.Y. C.P.L. § 440.10(1)(h)—which only permits vacaturs where the court finds that the conviction was "obtained in violation of a right of the defendant under the constitution of this state or of the United States"—he had "not established that the[y] . . . were based on a procedural or substantive defect in the underlying criminal proceeding." AR 4. In other words, the Board ignored its prior conclusion that Article 440 was *not* a rehabilitative or expungement statute and thrust new, legally

irrelevant evidentiary requirements upon Mr. Siriboe. *See, e.g.*, AR 4 (indicating that Mr. Siriboe was required to specify whether his conviction had violated a state versus a federal constitutional provision without explaining its reasoning). The Board also ignored the fact that *Rodriguez-Ruiz* pointedly rejected the government's invitation to inquire into the specific basis for the vacatur and found a court order identifying Article 440 as the statutory basis for the vacatur sufficient to show that the prior conviction was eliminated for immigration purposes. *Cf. Rodriguez-Ruiz*, 22 I. & N. Dec. at 1379–80. Because the ruling in Mr. Siriboe's case cannot be reconciled with this precedent and the Board made no attempt to do so, its decision must be reversed. *See Aris*, 517 F.3d at 600; *Johnson*, 378 F.3d at 164.

C. The Board's Decision Also Conflicts with the Agency's Longstanding Practice of Recognizing That a Prior Conviction Vacated Under N.Y. C.P.L. § 440.10(1)(h) is No Longer a "Conviction" for Immigration Purposes.

The Board also commits reversible error when its decisionmaking reflects the "[p]atently inconsistent application of agency standards to similar situations." *Vargas*, 938 F.2d at 362. As a result, the Second Circuit has, on multiple occasions, reversed or vacated Board decisions that conflicted with the agency's other decisions—including in the context of motions to reopen—presenting similar facts. *See, e.g., id.* (citing two unpublished cases in which the agency had taken the opposite approach and rejecting Board's "sometimes-yes, sometimes-no, sometimes-maybe" adjudication approach as arbitrary and capricious); *Twum*, 411 F.3d at 60–61 (vacating Board decision where the agency had applied a standard "inconsistent with the agency's analysis of . . . similar

claims" in two other cases); *Zhao*, 265 F.3d at 95 (finding the "plainly inconsistent" application of agency standards to be arbitrary and capricious); *Andrews*, 799 F. App'x at 27 (similar); *Pan v. Holder*, 777 F.3d 540, 544 (2d Cir. 2015) (finding that Board decision that "made no attempt to explain" why its decision diverged from decisions in similar cases violated the "fundamental principle of justice that similarly situated individuals be treated similarly" (internal citations omitted)); *Zheng v. Gonzales*, 497 F.3d 201, 203 (2d Cir. 2007) (remanding when "it appear[ed] that the BIA has taken contrary positions on this issue").

In deciding Mr. Siriboe's case, the Board refused to recognize that his vacaturs under N.Y. C.P.L. § 440.10(1)(h) were valid for immigration purposes. AR 9. It did so despite the fact that, as the Board itself has long recognized, a vacatur under N.Y. C.P.L. § 440.10(1)(h) is necessarily based on a substantive or procedural defect in the underlying criminal proceedings, *see, e.g.*, *Pickering*, 23 I. & N. at 622–23 (describing Article 440 as "a statute authorizing vacation of a conviction based on the legal merits of the underlying proceedings"), and in direct conflict with Board decisions reaching the opposite conclusion on the same material facts.

For example, *In Re: Junior Rafael Perez*, the Board granted the noncitizen's motion to reopen where he had submitted a vacatur order stating—with no additional detail—that his conviction was vacated under N.Y. C.P.L. § 440.10(1)(h). *See In Re: Junior Rafael*

Perez, A044-877-814 (BIA Nov. 20, 2020) (attached at Add. 1).[3] Mr. Perez's vacatur order was substantively identical to Mr. Siriboe's in that both reflected that the conviction was vacated under N.Y. C.P.L. § 440.10(1)(h) without any further explanation about the nature of the constitutional defect in the underlying proceeding. *Compare* Order Vacating Judgment of Conviction, *People v. Perez*, Ind. No. 2025/2015 (New York Sup. Ct. Dec. 17, 2018) (attached at Add. 4), *with* AR 27–42 (Siriboe vacatur orders).[4] And, again like Mr. Siriboe, Mr. Perez did not submit additional evidence detailing the basis for the vacatur. *See In Re: Junior Rafael Perez*, A044-877-814 (BIA Nov. 20, 2020).[5] Yet, unlike in Mr. Siriboe's case, the Board properly concluded that, in light of the state vacatur statute on which the vacatur order was based, the vacatur order in Mr. Perez's case proved that his conviction was "eliminated for immigration purposes," *id.* ("New York Criminal Procedure Law section 440.10(1)(h) provides for vacating judgments obtained in violation of a right of the defendant under the constitution of

[3] A number of public, but difficult-to-access, Board decisions are attached as part of the addendum. These "public documents, promulgated by . . . a government agency, and not subject to reasonable dispute" are subject to judicial notice at ""any stage in the proceeding."" *Richardson v. NYC Bd. of Educ.*, No. 17- 695, 711 F. App'x 11, 14 (2d Cir. Oct. 2, 2017) (quoting Fed. R. Evid. 201(d)).

[4] An email from Mr. Perez's counsel clarifying that the Board erroneously cited January 26, 2017 as the conviction date (when it is, instead, the date of Mr. Perez's sentence and commitment) is on file with undersigned counsel.

[5] An email from Mr. Perez's counsel confirming that, as the Board decision suggests, he did not submit Mr. Perez's post-conviction motion or any other evidence of the basis for the motion is on file with undersigned counsel.

New York or of the United States, the conviction is eliminated for immigration purposes"), and granted his motion to reopen.

Similarly, when adjudicating a motion to reopen in *In Re: Clinton Daryl Alexander*, the Board found the noncitizen's vacatur to be valid based on a court order issued under Article 440. *In Re: Clinton Daryl Alexander*, A096-649-248 (BIA Aug. 15, 2018) (attached at Add. 5). In explicitly rejecting the Department of Homeland Security's arguments that the vacatur did not eliminate the conviction for immigration purposes, the Board again focused on the statute itself and found that the conviction did not "remain valid for immigration purposes," explaining that "section 440.10(1)(a)-(i) does not include rehabilitation or the prevention of immigration hardships as a basis for vacating convictions." *Id.*; *see also id.* (explaining that "[m]otions to vacate convictions under N.Y. Crim. Proc. Law § 440.10 concern various substantive and procedural grounds").

Again, in adjudicating a motion to remand in *In Re: [Redacted]* (BIA Feb. 27, 2020) (attached at Add. 7), the Board found that the noncitizen's state court order specifying that the conviction was vacated pursuant to N.Y. C.P.L. § 440.10(1)(h) showed that the vacatur was "valid and effective for immigration purposes because it was based on a substantive defect in the underlying proceedings." *Id.* at 1; Vacatur Order, *People v. Redacted*, Ind. No. XXXX/XXXX (New York Sup. Ct. Crim. Term Dec. 18, 2018) (attached at Add. 9). As in the *Perez* and *Alexander* cases, neither the order nor any other evidence elaborated on the constitutional claim at issue in the post-conviction

proceedings,[6] yet the Board correctly concluded that the vacatur was valid for immigration purposes based entirely on the fact that the order was issued pursuant to N.Y. C.P.L. § 440.10(1)(h). *See In Re: [Redacted]* (BIA Feb. 27, 2020) at *1. That is, in this case—as in the cases above—the Board properly recognized that vacatur order, together with statute itself, provided all the legally relevant information necessary to determine if the vacatur eliminated the conviction for immigration purposes.

Given the Board's conclusions in these cases, its decision in Mr. Siriboe's case was "erratic," "plainly inconsistent" with its analysis of similar vacatur orders under N.Y. C.P.L. § 440.10(1)(h) in other cases, and must be vacated as a result. *See Twum*, 411 F.3d at 60–61 (vacating Board's order that was "inconsistent with the agency's analysis of . . . similar claims" in two other cases); *Vargas*, 938 F.2d at 362; *see also Andrews*, 799 F. App'x at 28.

D. The Board Acted Arbitrarily and Capriciously in Failing to Provide Any Explanation, Much Less an Adequate One, for its Departure from Precedent and Past Practice.

The Board's decision in Mr. Siriboe's case is also arbitrary and capricious because it "provides no rational explanation" and "is devoid of any reasoning" that would explain its abrupt departure from precedent and past practice. *Zhao*, 265 F.3d at 93

[6] An email from the attorney representing this noncitizen confirming that he did not submit the post-conviction motion or any other evidence of the basis for the motion is on file with undersigned counsel.

(internal citations omitted); *see also id.* at 83 (remanding where Board did not explain its reasoning for failing to apply a prior precedential ruling to the factually similar case).

In the instant case, the Board did not even recognize—much less explain—its departure from its longstanding precedent or settled practice of recognizing that convictions vacated under N.Y. C.P.L. § 440.10(1)(h) are no longer "convictions" for immigration purposes. *See generally* AR 4–5. And while the Board attempted to frame its denial in terms of an evidentiary requirement, AR 5, it provided no justification for its stated need for additional details when Mr. Siriboe proved that his convictions had been vacated under N.Y. C.P.L. § 440.10(1)(h), a statute that—as the Board has long recognized—necessarily "eliminate[s] a conviction for immigration purposes." *In Re: Aref al Omri Abdulla al Omri*, AXX-XX9-021, 2004 WL 2952358, at *1–2 (BIA Dec. 3, 2004) (stating that, "[i]n *Matter of Rodriguez-Ruiz*" the Board "held . . . that an overturned sentence under Article 440 of New York Criminal Procedure would be considered a reversal on the merits, and thus eliminate a conviction for immigration purposes"); *see supra* Section I(B)–(C) (collecting cases).

Because the Board's decision is "devoid of reasoning" that might explain this abrupt change in approach, *Zhao*, 265 F.3d at 93, and fails to provide any "rational explanation for its ruling," *Sheng Gao Ni v. BIA,* 520 F.3d 125, 129-30 (2d Cir. 2008) (quotation marks omitted), an abuse of discretion must be presumed. *Zhao*, 265 F.3d at 97; *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 337 (2d Cir. 2006) (explaining that, if the agency's "reasoning proves inadequate for denying a petitioner's claim, [the Court]

will not hesitate to reverse" (quoting *Secaida-Rosales v. I.N.S.*, 331 F.3d 297, 305 (2d Cir. 2003) and remanding due to insufficient reasoning).

II. The Board's Requirement that Petitioner Submit More Than the Court Order Issued Pursuant to a Statute that Only Permits Vacatur for Constitutional Defects Conflicts with Court Precedents and the Board's Own Decisions in Other Cases.

Even if the Board had not departed from prior precedent and practice with respect to the validity of vacaturs under N.Y. C.P.L. § 440.10(1)(h), it nevertheless erred because it failed to recognize that a court order vacating a conviction under a statute that *only* permits vacatur for substantive or procedural defects is sufficient to show that the vacatur is valid for immigration purposes.

A. Where the Statute Authorizing the Vacatur Order Makes the Basis for the Vacatur Clear, that Suffices to Show Whether a Vacated Conviction is Valid for Immigration Purposes.

In considering whether vacaturs are valid for immigration purposes, courts of appeals have recognized the inherent challenges of identifying a single reason for precisely why a vacatur ultimately occurs. For example, as the Third Circuit explained, permitting immigration adjudicators to conduct a searching inquiry into the multi-faceted reasons that a vacatur is entered risks inviting allegations about "the secret motives of state judges and prosecutors" or allowing immigration adjudicators to "second-guess the motives of state officials." *Pinho v. Gonzales*, 432 F.3d 193, 215 (3d Cir. 2005); *see also Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1131 (10th Cir. 2005) (describing the challenges of determining the basis for the vacatur given "two very

different stories" about why the vacatur ultimately occurred and the inferences that accepting these accounts would require). Because of this, any inquiry into the basis for a vacatur must be governed by clear, administrable rules. *See Pinho*, 432 F.3d at 215.

In keeping with this, courts of appeals across the nation have adopted a common-sense approach in this respect, widely recognizing that, where (1) a vacatur order makes the statutory basis for the vacatur clear and (2) that statute only permits vacatur on either rehabilitative *or* substantive/procedural grounds, that suffices to show whether the vacatur is valid for immigration purposes. For example, in *Cruz-Garza v. Ashcroft*, the Tenth Circuit considered whether a vacatur that (as the vacatur order made clear) occurred under Utah Code §§ 76-3-402(1), (3) eliminated the prior conviction for immigration purposes. 396 F.3d 1125, 1131. It concluded that the vacatur did, reasoning that the statute on which the order was based only permitted vacatur in consideration of "matters leading up to and encompassed within the judgment of conviction, not on post-conviction events relating to the subsequent success or failure of rehabilitation." *Id.* at 1131. In other words, the Tenth Circuit found the language of the statutory vacatur provision to be dispositive in showing that the vacatur was unrelated to the rehabilitation of the defendant and therefore that the vacatur was valid for immigration purposes. *Id.* at 1127–28, 1131. The Third Circuit has adopted a similar approach, explaining that, "[i]f the order explains the court's reasons for vacating the conviction, the agency's inquiry must end there." *Pinho*, 432 F.3d at 215.

Other courts of appeals—including this Court—have applied this same analysis when coming to the opposite conclusion. Specifically, they have employed this statute-focused approach to find that certain statutes only authorize vacaturs for rehabilitative reasons and, therefore, that vacaturs under those provisions do not eliminate the conviction for immigration purposes. For example, in *Dung Phan v. Holder*, the Fourth Circuit found that the statute—D.C. Code § 24–906(e)—authorizing convictions to be "set aside" was categorically rehabilitative because it focused on "post-offense conduct" rather than "legal error," and, consequently, convictions set aside under that provision statute remained valid for immigration purposes. 667 F.3d 448, 453 (4th Cir. 2012). The Ninth Circuit reached a similar conclusion in *Poblete Mendoza v. Holder*, concluding that a vacatur under Arizona Revised Statutes § 13-907 did not eliminate the underlying conviction for immigration purposes because the statute only permitted vacaturs for rehabilitative reasons. 606 F.3d 1137, 1141–42 (9th Cir. 2010).

The Second Circuit has also adopted this statute-focused approach for determining whether a vacatur is valid for immigration purposes. For example, in *Sutherland v. Holder,* the Second Circuit considered whether a conviction under Arizona Revised Statutes § 13–907 eliminated the petitioner's underlying conviction for immigration purposes. 769 F.3d 144 (2d Cir. 2014). In deciding this question, it adopted the Ninth Circuit's reasoning in *Poblete Mendoza*, looking to the statutory provision under which the conviction was vacated and concluding that "*any*" conviction vacated under that provision remains a valid conviction for immigration purposes. *Id.*

at 146 ("The Ninth Circuit has held that *any* conviction vacated under ARS § 13-907 is vacated on rehabilitative grounds and thus remains valid for immigration purposes. . . . We agree.").

To be sure, the *Sutherland* panel referenced the underlying record in the vacatur proceedings, but did so only to respond to an argument raised by the petitioner that, notwithstanding the limited nature of vacaturs permitted by Arizona Revised Statutes § 13-907, her vacatur could have been based on substantive defects in the underlying proceedings. *Id.* at 146–47; Petitioner's Br. & Special App'x at 22, *Sutherland*, 769 F.3d 144 (No. 12-4510) (arguing that it was not clear that the conviction had been vacated under ARS § 13-907 and "[t]he application [for vacatur] itself provides a sufficient basis to reasonably infer that the state court considered grounds unrelated to immigration hardships or rehabilitation"). Yet the Second Circuit rejected this argument and relied on *Poblete Mendoza*'s statute-focused reasoning instead. *See also Saleh v. Gonzales,* 495 F.3d 17, 25 (2d Cir. 2007) ("[T]he BIA has reasonably concluded that [a noncitizen] remains convicted of a removable offense . . . when a state vacates the predicate conviction pursuant to a rehabilitative *statute*." (emphasis added)).

Thus, courts of appeals throughout the country—including this Court—have consistently concluded that, where the vacatur order is based on a statute that only permits vacaturs of a certain type—whether rehabilitative or for substantive/ procedural defects—that alone is enough. And they have declined to undertake an in-depth investigation into the individual motivations of particular actors or the nuanced

facts of vacatur proceedings. *See, e.g., Pinho*, 432 F.3d at 215 (adopting a "categorical test" to avoid investigations into speculation and "accusations of dishonesty or complicity in 'subversion' leveled at state courts and prosecutors"); *Cruz-Garza* 396 F.3d at 1132 (noting the challenges of competing accounts, the "vagaries of the evidentiary record," and the inferences that would be required); *see also Moncrieffe v. Holder*, 569 U.S. 184, 200–01 (2013) (recognizing that "*post hoc* investigation[s] into the facts of predicate offenses" in immigration proceedings are inefficient and "undesirable").

The Board itself has applied this rule in numerous other cases. *See, e.g., In Re: Albert Limon Castro A.K.A. Albert Castro Limon*, AXXX-XX0-288, 2018 WL 8333468, at *1 (BIA Dec. 28, 2018) (finding the vacatur valid because, "[w]hile the state court's order does not indicate the specific reason for the state court's action, it appears to the Board that vacatur under Cal. Penal Code § 1473.7 is available only in cases of legal invalidity or actual innocence."); *In Re: Ernesto Rios Rodriguez A.K.A. Jorge Murillo Lozano A.K.A. Jorge Morillo Lazano*, No.: AXXX-XX4-738, 2019 WL 7859271, at *2 (BIA Dec. 2, 2019) (same with respect to vacatur under Cal. Penal Code § 1473.7(a)(1), which "is available only in cases of legal invalidity or actual innocence"); *In Re: Ignacio Javier Perez-Hernandez*, A092-259-726 at *1 (BIA July 18, 2013) (attached at Add. 10) (finding that the citation, in the vacatur order, to Cal. Penal Code § 1016.5, which provides for vacaturs when defendant is not informed of immigration consequences of a guilty plea, indicated that the vacatur was on substantive grounds and therefore valid). Indeed, in describing its prior precedents, the Board has emphasized its focus on what the vacatur

statute permitted rather than the underlying assertions or motivations of the actors involved. *See, e.g.*, *Pickering*, 23 I. & N. Dec. at 623 (describing the holdings of *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999), and *Rodriguez-Ruiz* as inquiries into whether the "alien has been the beneficiary of a *state rehabilitative statute*" or "*a statute* authorizing vacation of a conviction based on the legal merits of the underlying proceedings" (emphases added)).

B. The Board Abruptly Departed from this Widely-Adopted Approach by Requiring Additional Evidence Even Where the Vacatur Order and Underlying Statute *Only* Authorized Vacaturs for Substantive or Procedural Reasons.

Under this statute-focused approach, the Board should have recognized that the vacaturs in Mr. Siriboe's case eliminated his underlying convictions for immigration purposes. First, it is undisputed that Mr. Siriboe provided the Board with court orders that explicitly relied on N.Y. C.P.L. § 440.10(1)(h) when vacating each of the convictions that formed the basis of his removal order. AR 4–5, 27–41. Second, as the Board itself recognized, N.Y. C.P.L. § 440.10(1)(h) only authorizes the vacatur of a conviction when the "judgment was obtained in violation of a right of the defendant under the constitution of [New York State] or the United States." Third, the Board's own decisions make clear that "[a] conviction vacated on the merits—because of legal or constitutional defect . . . —is not a conviction for immigration purposes." *In Re: Reinis Georgiyevich Gurvics A.K.A. Reinis Gurvics*, AXXX-XX2-360, 2019 WL 2464466, at *1 (BIA Mar. 6, 2019); *see also In Re: Gary Maurice Fearon*, A046-845-833 (BIA Apr. 17, 2020) (attached at Add. 12) (finding that, where the evidence showed that the vacatur

was based "on constitutional grounds," it was "on the basis of a procedural or substantive defect in the underlying criminal proceedings" and therefore "the conviction is eliminated for immigration purposes"); *In Re: Javier Hector Plata-Herrera*, AXXX-XX4-825, 2019 WL 3776104, at *1 (BIA Apr. 30, 2019) (similar); *see, e.g.*, *In Re: Junior Rafael Perez*, A044 877 814 (BIA Nov. 20, 2020) (attached at Add. 1); *In Re: Clinton Daryl Alexander*, A096-649-248 (BIA August 15, 2018) (attached at Add. 5); *In Re: [Redacted]* (BIA Feb. 27, 2020) (attached at Add. 7). Accordingly, Mr. Siriboe did all that he was required to do to prove that his vacaturs eliminated the underlying convictions for immigration purposes.

Yet the Board refused to recognize the validity of Mr. Siriboe's vacatur orders on the basis that he did not provide a range of legally irrelevant details about the vacatur. For example, the Board faulted him for failing to specify whether the violation occurred under the state or federal constitution and for failing to provide "further details about the nature of the violation of his constitutional rights." AR 4. But the Board cited no case or rule that would have alerted Mr. Siriboe to the need to provide that additional information, nor did it explain why the requirements in his case departed so dramatically from its approach in other cases. AR 3–4. The Board also suggested that perhaps its decision would have been different if he had submitted a copy of his filing requesting vacatur from the state court, but it did not explain why that would be legally required, particularly when it indicated precisely the opposite in *Thomas & Thompson*. *Compare* AR 4, *with Thomas & Thompson*, 27 I. & N. Dec. at 685 (indicating that the validity of a

vacatur could be demonstrated by either "the text of the order of vacatur itself *or* the alien's motion requesting the vacatur," but not requiring both (emphasis added)). Thus, the Board's attempt to impose additional evidentiary requirements upon Mr. Siriboe constitutes an abrupt, unexplained, and legally indefensible departure from its longstanding policy and practice and warrants reversal. *See Vargas*, 938 F.2d at 362; *Zhao*, 265 F.3d at 93–95.

III. Requiring the Board to Adhere to its Own Precedent and Settled Practice is Particularly Important in the Immigration Arena, Especially Given the Many Pro Se Litigants Within the Immigration Adjudication System.

It is axiomatic that "[t]he consistent application of an agency's precedents, like the consistent application of its regulations, serves a critical purpose: the provision of fair notice to those subject to the agency's decisions." *Billeke-Tolosa*, 385 F.3d at 711. Indeed, the Supreme Court has recognized that adherence to precedent is key not only for "any system that aspires to fairness and equality," but also to provide litigants some assurance "that the substantive law will not shift and spring" when they have relied on it. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991); *see also Sheng Mei Lin v. Holder*, No. 11-4447, 531 F. App'x 58, 60 n.1 (2d Cir. Aug. 8, 2013) (recognizing the role of a "precedential opinion of the BIA" in "provid[ing] valuable guidance to courts and litigants"); 8 C.F.R. § 1003.1(d)(1) (recognizing the role of precedential decisions in providing "clear and uniform guidance to the . . . general public on the proper interpretation and administration of the [Immigration and Nationality] Act and its implementing regulations").

In the immigration context, an agency's consistent adherence to settled practice is also necessary to serve these purposes. As this Court has recognized, the Board only issues about 30 precedential opinions a year. *See New York Legal Assistance Group v. Board of Immigration Appeals*, 987 F.3d 207, 210–11 (2d Cir. 2021). Therefore, litigants, the government, immigration courts, and the Board itself regularly rely on unpublished decisions in litigation and agency adjudications. *Id.* As a result, unpublished decisions are often the only way that a litigant knows the substantive law on a particular issue and, therefore, play a similar notice-giving function as precedent.

Providing clear guidance and ensuring fairness to litigants is particularly important in the immigration context because of the high rates of pro se litigants in this arena and the enormous—potentially grave—stakes. As numerous studies have shown, a significant portion of litigants in removal proceedings face them alone, without the assistance of counsel. *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7 (2015) (showing that from 2007 to 2012, sixty-three percent of respondents in deportation proceedings appeared pro se). And, as is widely recognized, pro se litigants face special difficulties and trigger even greater fairness concerns. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (explaining that documents filed pro se should be "held to 'less stringent standards than formal pleadings drafted by lawyers'"); *Higgs v. Att'y Gen. of the U.S.*, 655 F.3d 333, 339 (3d Cir. 2011) (recognizing the need for "court[s] to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their

lack of legal training"); *United States v. Sosa*, 387 F.3d 131, 137 (2d Cir. 2004) (recognizing special affirmative duties that immigration judges owe to pro se respondents); *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004) (similar).

While courts have taken pains to prevent pro se litigants from forfeiting important rights due to a lack of legal training in a range of contexts, the stakes of doing so are especially high in the immigration realm. That is because a litigant's inability to show that they have complied with the relevant rules or met the relevant standard may result in deportation—"the loss 'of all that makes life worth living,'" *Bridges v. Wixon*, 326 U.S. 135, 147 (1945)—or even death, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the [noncitizen] makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."). Accordingly, it is particularly critical, in the immigration context, that the Board adhere to the precedents and settled practice on which litigants so heavily rely.

CONCLUSION

For the foregoing reasons, Amici respectfully urge the Court to find that the Board committed reversible error in failing to adhere to its longstanding precedent and practice recognizing that, where a court order shows that a vacatur was entered pursuant to N.Y. C.P.L. § 440.10(1)(h), that vacatur eliminates the underlying conviction for immigration purposes.

Respectfully submitted,

Dated: January 4, 2022

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CERTIFICATE OF COMPLIANCE

I, Lindsay Nash, hereby certify that: this brief complies with the type-volume limitation of the Second Circuit Local Rule 29.1(c), because, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), this document contains 6,696 words, as determined by the word-count function of Microsoft Word Version 16.56.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared using Microsoft Word Version 16.56, is proportionately spaced, and has a typeface of 14-point.

Dated: January 4, 2022

/s/ Lindsay Nash

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ADDENDUM

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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4250 Federal Dr.
Batavia, NY 14020

Name: P[redacted], J[redacted] R[redacted]

A [redacted]-814

Date of this notice: 11/20/2020

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Mann, Ana
Greer, Anne J.
Wilson, Earle B.

Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A[redacted]-814 – Batavia, NY

Date: NOV 20 2020

In re: J[redacted] R[redacted] P[redacted]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Craig M. Relles, Esquire

APPLICATION: Reopening

This matter was last before the Board on March 6, 2020, when we denied the respondent's November 19, 2019, motion to reopen and stay removal. On August 10, 2020, the respondent, a native and citizen of the Dominican Republic, filed the instant motion to reopen. The Department of Homeland Security did not file an opposition to the motion. The motion will be granted and the record will be remanded to the Immigration Judge.

On October 6, 2015, the respondent submitted an application for cancellation of removal for certain permanent residents under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The Immigration Judge determined that the respondent was ineligible for cancellation of removal as a result of his January 26, 2017, conviction pursuant to section 220.16(7) of the New York State Penal Law (IJ at 2-3). *See* section 240A(a)(3) of the Act.

The respondent seeks reopening for further consideration of his application for cancellation of removal. In support of his motion to reopen, he submitted evidence showing that his January 26, 2017 conviction of violation of New York State Penal Law section 220.16(7) has been vacated under New York Criminal Procedure Law section 440.10(1)(h) (Respondent's Mot. to Reopen, dated August 10, 2020, at 2-3, 6-7, 11). As section New York Criminal Procedure Law section 440.10(1)(h) provides for vacating judgments obtained in violation of a right of the defendant under the constitution of New York or of the United States, the conviction is eliminated for immigration purposes. *See Matter of Thomas & Matter of Thompson*, 27 I&N Dec. 674, 675 (A.G. 2019) (holding that a state court order vacating a criminal conviction has legal effect if based on a legal or substantive defect, but not if based on reasons unrelated to the merits, such as rehabilitation or immigration hardships); *Matter of Conde*, 27 I&N Dec. 251, 252 (BIA 2018) (reaffirming the rule that if a court vacates a conviction because of a procedural or substantive defect, rather than for reasons solely related to rehabilitation or immigration hardships, the conviction is eliminated for immigration purposes).

Based on the foregoing, the respondent appears eligible to apply for cancellation of removal under section 240A(a) of the Act. Accordingly, we will reopen proceedings sua sponte and remand the record to the Immigration Judge for further consideration of the respondent's cancellation of removal application. *See* 8 C.F.R. § 1003.2(a). The following orders will be entered.

ORDER: The motion to reopen is granted.

A[redacted]-814

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 72

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

[redacted],

Defendant.

ORDER VACATING
JUDGMENT OF CONVICTION

Ind. No. 2025/2015

Defendant having been convicted of a violation of Penal Law section 220.16(7) on January 3, 2017, under indictment number 2025/2015, and a motion having been made by Danielle Neroni, Esq., Attorney for Defendant, to vacate said conviction pursuant to Criminal Procedure Law section 440.10 (1) (h), and the District Attorney's Office of New York County having no opposition to Defendant's motion, and the matter having come before this Court, it is hereby

ORDERED that Defendant's motion to vacate the conviction pursuant to Criminal Procedure Law 440.10 (1) (h) is GRANTED and it is further

ORDERED that Defendant's conviction entered on January 3, 2017 under indictment number 2025/2015 is VACATED.

Dated:

Hon. Judge

PT.72 DEC 17 201

11

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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New York, NY 10278

Name: ALEXANDER, CLINTON DARYL **A 096-649-248**

Date of this notice: 8/15/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Kendall Clark, Molly

Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A096-649-248 – New York, NY

Date: AUG 15 2018

In re: Clinton Daryl ALEXANDER

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Craig Relles, Esquire

ON BEHALF OF DHS: Ada G. Guillod
Assistant Chief Counsel

APPLICATION: Reopening

The Board entered the final administrative decision on January 27, 2016, when we dismissed the respondent's appeal of the Immigration Judge's May 8, 2014, decision pretermitting his adjustment of status application and ordering him removed to Antigua and Barbuda in connection with his controlled substance-related convictions. The respondent seeks sua sponte reopening alleging that he is now eligible to apply for adjustment of status, because a criminal court vacated his convictions under N.Y. Crim. Proc. Law § 440.10 and substituted three disorderly conduct convictions.[1] The Department of Homeland Security ("DHS") opposes the motion, which will be granted.

Motions to vacate convictions under N.Y. Crim. Proc. Law § 440.10 concern various substantive and procedural grounds. Notwithstanding the DHS' arguments, the respondent's controlled substance-related convictions do not appear to remain valid for immigration purposes, as section 440.10(1)(a)-(i) does not include rehabilitation or the prevention of immigration hardships as a basis for vacating convictions. *Matter of Marquez Conde,* 27 I&N Dec. 251 (BIA 2018); *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003). Under the circumstances, the respondent appears eligible to apply for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a). Accordingly, we will sua sponte reopen the proceedings and remand the record to the Immigration Judge for further consideration of the respondent's adjustment of status application. 8 C.F.R. § 1003.2(a).

ORDER: The respondent's motion to reopen is granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this decision.

FOR THE BOARD

[1] The respondent has submitted multiple filings, including, inter alia, two motions, all of which have been considered in our decision.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A[redacted] – New York, NY

Date: FEB 2 7 2020

In re: [redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Michael J. Shannon, Esquire

APPLICATION: Continuance; remand

In a decision dated April 4, 2018, the Immigration Judge denied the respondent's request for a continuance and ordered him removed from the United States. The respondent, a native and citizen of the Dominican Republic and a lawful permanent resident of the United States, appeals from the decision of the Immigration Judge. He also has filed a motion to remand the record to the Immigration Judge as, during the pendency of the appeal, he was granted post-conviction relief for the criminal conviction that formed the basis of the Immigration Judge's decision sustaining the charge of removal. The Department of Homeland Security (DHS) has not responded to the appeal or motion. The respondent's motion will be granted, and the record will be remanded for further proceedings consistent with this opinion and the entry of a new decision.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent became a lawful permanent resident of the United States on or about November 2, 1977 (Motion at 2; Tabs D, E). On November 5, 1998, the respondent was convicted of attempted sale of a controlled substance in the third degree under N.Y. Penal Law §§ 101 (1965), 220.39 (1995) (Department of Homeland Security's (DHS's) Submission of Evidence; Respondent's Motion to Remand at 2). The DHS charged the respondent as an arriving alien who was inadmissible for, among other things, violation of a law relating to a controlled substance (Notice to Appear; Lodged Charge (Form I-261)). *See* sections 101(a)(13)(C), 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(13)(C); 1182(a)(2)(A)(i)(II). The respondent conceded the controlled substance charge under 212(a)(2)(A)(i)(II) of the Act, but contested his inadmissibility on any other basis, including the allegation that he was an illicit trafficker in a controlled substance under section 212(a)(2)(C)(i) of the Act (Motion at Tab E). The Immigration Judge found the respondent "removable as charged" and ordered him removed to the Dominican Republic (IJ Order; Tr. at 13-14).

On December 18, 2018, the respondent's 1998 conviction was vacated by a New York state court under N.Y. Crim. Proc. Law § 440.10(1)(h) because of a constitutional defect (Motion at Tab B). This vacatur is valid and effective for immigration purposes because it was based on "a procedural or substantive defect in the underlying proceedings." *Matter of Thomas & Thompson*, 27 I&N Dec. 674, 675 (A.G. 2019) (quoting *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA

A [redacted]

2003)). Concurrent with the vacatur of his prior conviction, the respondent pleaded guilty to and was convicted of criminal sale of a controlled substance in the fifth degree under N.Y. Penal Law § 220.31 (1979) (Motion at Tab B).

The United States Court of Appeals for the Second Circuit, the jurisdiction in which this case arises, has held that N.Y. Penal Law § 220.31 "defines a single crime and is therefore an 'indivisible' statute." *Harbin v. Sessions*, 860 F.3d 58, 61 (2d Cir. 2017). The court further held that a conviction under this statute is categorically not an aggravated felony because it "can punish conduct that is not criminal under the" Controlled Substances Act (CSA), 21 U.S.C. § 801, et seq. *Harbin v. Sessions*, 860 at 68. Accordingly, the respondent is no longer ineligible, due to being an alien convicted of an aggravated felony, to apply for cancellation of removal for certain permanent residents under section 240A(a) of the Act, 8 U.S.C. § 1229a(a) (Respondent's Br. at 4-7; Tab F). This constitutes sufficient grounds to remand, as the respondent has provided material, previously unavailable evidence that would likely change the result in the case. *See Matter of Coelho*, 20 I&N Dec. 464, 471-74 (BIA 1992).

Respondent also argues that he is no longer inadmissible or removable, because it necessarily follows from the reasoning of *Harbin v. Sessions* that the respondent's conviction is not a categorical match to section 212(a)(2)(A)(i)(II) of the Act because the New York statute defining a controlled substance is overbroad when compared to the definition of a controlled substance as defined in the CSA. *See Harbin v. Sessions*, 860 F.3d at 68. The DHS charged the respondent as inadmissible under section 212(a)(2)(A)(i)(I) of the Act for the commission of a crime involving moral turpitude. However, it is unclear from the record whether the DHS continued to pursue this charge after it filed the Additional Charges of Inadmissibility/Deportability (Motion at Tab D). It is also unclear from the record which charges of inadmissibility were sustained by the Immigration Judge (Tr. at 13-14).

In light of the foregoing, we conclude that remand of the record is necessary to allow the Immigration Judge to ascertain which charges of inadmissibility or removability the DHS is pursuing, and to determine whether the respondent is inadmissible or removable under those charges. If the Immigration Judge determines that the respondent is inadmissible or removable as charged, the respondent should have an opportunity to establish his eligibility for cancellation of removal under section 240A(a) of the Act. In remanding, we express no opinion on the respondent's ultimate eligibility for relief. *See Matter of L-O-G-*, 21 I&N Dec. 413, 419 (BIA 1996).

Accordingly, the following order will be entered.

ORDER: The motion to remand is granted and the record will be remanded to Immigration Judge for further proceedings consistent with this opinion.

FOR THE BOARD

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

[redacted],
aka [redacted]

Defendant-Petitioner.

VACATUR ORDER

Ind. No. [redacted]

IT IS HEREBY ORDERED THAT defendant's conviction under Ind. No. [redacted], rendered November 5, 1998, convicting him of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110/220.39) is hereby VACATED pursuant to C.P.L. § 440.10(1)(h); and

IT IS FURTHER ORDERED THAT the defendant's guilty plea to criminal sale of a controlled substance in the fifth degree, Penal Law §220.31, entered on December 18, 2018, is accepted by the Court in full satisfaction of Ind. No. [redacted], and a sentence of five years' probation is imposed, *nunc pro tunc* to November 5, 1998, which sentence the defendant has fully satisfied.

PT. 66 DEC 18 2018

The Honorable Ruth Pickholz

Dated: New York, New York
December 18, 2018

HON. RUTH PICKHOLZ

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Delfino N. Varela, Esquire
Law Office of Delfino Varela
409 N. Soto Street
Los Angeles, CA 90033

DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: PEREZ-HERNANDEZ, IGNACIO ... **A 092-259-726**

Date of this notice: 7/18/2013

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Miller, Neil P.

lucasd
Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A092 259 726 – Los Angeles, CA Date: JUL 18 2013

In re: IGNACIO JAVIER PEREZ-HERNANDEZ a.k.a. Javier Ignacio Perez, Jr.
a.k.a. Ignacio Hernandez

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Delfino N. Varela, Esquire

APPLICATION: Reopening; termination

On November 9, 2000, the Board affirmed the Immigration Judge's September 9, 1998, decision ordering the respondent's removal to Mexico as an alien convicted of an aggravated felony. *See* section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii). On April 29, 2013, the respondent filed the instant motion seeking reopening and termination of the proceedings. *See* section 240(c)(7) of the Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c). The Department of Homeland Security has not opposed the motion. *See* 8 C.F.R. § 1003.2(g). The motion will be granted.

The evidence offered with the motion reveals that on April 6, 2011, the criminal court granted the respondent's motion, pursuant to California Penal Code section 1016.5, to vacate the conviction underlying his removability, and permitted him to plead to a lesser offence. *See* Motion Tab F. California Penal Code section 1016.5 requires that a criminal defendant must be advised of the potential immigration consequences of entering a plea of guilty prior to entering the plea. Inasmuch as the conviction underlying the sole basis of the respondent's removability has been vacated due to a substantive defect in the criminal proceedings, reopening is warranted. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000). Accordingly, the Board will exercise its sua sponte authority and grant the respondent's unopposed motion. *See* 8 C.F.R. § 1003.2(a). The following orders will be entered.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The removal proceedings are terminated.

FOR THE BOARD

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Mark, Eric M
Law Office of Eric M. Mark
201 Washington St.
Newark, NJ 07102

DHS/ICE Office of Chief Counsel - ELZ
625 Evans Street, Room 135
Elizabeth, NJ 07201

Name: FEARON, GARY MAURICE **A 046-845-833**

Date of this notice: 4/17/2020

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Morris, Daniel

Hun..dy l
Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A046-845-833 – Newark, NJ

Date: APR 17 2020

In re: Gary Maurice FEARON

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Eric M. Mark, Esquire

ON BEHALF OF DHS: Dominic A. Saglibene
Assistant Chief Counsel

APPLICATION: Termination; cancellation of removal under section 240A(a) of the Act

The respondent, a native and citizen of Jamaica, appeals the Immigration Judge's October 30, 2019, decision denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). During the pendency of the appeal, the respondent filed a motion to terminate proceedings. The Department of Homeland Security ("DHS") opposes termination and has not responded to the appeal.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The DHS charged the respondent with removability as an alien convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (Exh. 1). *See* section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i). In 2009, the respondent was convicted of possession of a controlled dangerous substance with intent to distribute, to wit: marijuana, in violation of New Jersey law (IJ at 1; Exh. 2). The respondent conceded the charge of removability as to section 237(a)(2)(B)(i), and the Immigration Judge sustained that charge (IJ at 1; Exh. 1).

With his motion to terminate, the respondent has submitted new evidence that, on March 4, 2020, the Superior Court of New Jersey vacated his 2009 conviction on constitutional grounds (Respondent's Mot. at 2, Exh. A). Because the state criminal court vacated the respondent's conviction on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is eliminated for immigration purposes. *See Matter of Thomas and Thompson*, 27 I&N Dec. 674, 690 (A.G. 2019). Despite the DHS's contentions in its opposition to the respondent's motion that the state court's order appears to be drafted by the respondent's counsel, the record indicates that whether the respondent's counsel drafted the order does not affect

the order's validity.[1] As such, the sole pending charge of removability under section 237(a)(2)(B)(i) of the Act cannot be sustained. Accordingly, the DHS cannot meet its burden by clear and convincing evidence that the respondent is removable pursuant to section 212(a)(2)(A)(i)(II) of the Act. *See* section 240(c)(3) of the Act. Thus, termination is appropriate.

In light of our disposition, we need not reach the respondent's appeal of the Immigration Judge's decision regarding his eligibility for relief, as that appeal is now moot. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (citing *INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that "courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach")). Accordingly, the following order will be entered.

ORDER: The removal proceedings are terminated.

FOR THE BOARD

[1] If the DHS has evidence showing that the state court's order was not, in fact, signed by the judge identified on the order and properly filed with the appropriate court, the DHS may file such evidence along with a motion to reconsider with the Board.