Nos. 17-73065, 18-71743

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Anthony SANCHEZ-MIRANDA,

Petitioner,

v.

William P. BARR, Attorney General,

Respondent.

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ON PETITIONS FOR REVIEW OF DECISIONS OF
THE BOARD OF IMMIGRATION APPEALS AND A DECISION OF U.S.
IMMIGRATION AND CUSTOMS ENFORCEMENT

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# BRIEF OF THE AMERICAN IMMIGRATION COUNCIL, NORTHWEST IMMIGRANT RIGHTS PROJECT, AND WASHINGTON DEFENDER ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER'S PETITION FOR PANEL AND EN BANC REHEARING

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## CORPORATE DISCLOSURE STATEMENT UNDER FRAP 26.1

I, Trina Realmuto, attorney for amici certify that the American Immigration Council, Northwest Immigrant Rights Project, and Washington Defender Association are non-profit 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: December 5, 2019 *s/ Trina Realmuto*

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## I. INTRODUCTION[1]

Pursuant to Federal Rules of Appellate Procedure 29(b), 35, and 40 and Ninth Circuit Rule 29-2, the American Immigration Council, the Northwest Immigrant Rights Project, and the Washington Defender Association urge the Court to rehear the two consolidated petitions for review (PFRs) filed by Petitioner Anthony Sanchez-Miranda (Mr. Sanchez-Miranda) because they raise questions of exceptional importance, because review is necessary to maintain uniformity of this Court's decisions and avoid a circuit split, and because the panel misapprehended the law.

Mr. Sanchez-Miranda is a 49-year-old long-time resident of the United States with six U.S. citizen children. He was deported in 1992 based on a single 1991 conviction that was vacated by the Superior Court of Washington for King County on constitutional grounds in 2017.

The PFR in Case No. 18-71743 challenges U.S. Immigration and Customs Enforcement's (ICE) November 16, 2016 decision to reinstate the 1992 deportation order under 8 U.S.C. § 1231(a)(5) and the Board of Immigration Appeals' (BIA or Board) June 8, 2018 denial of withholding of removal and protection under the

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

Convention Against Torture. Rehearing of that petition is warranted because the panel's decision conflicts with this Court's decision in *Vega-Anguiano v. Barr*, _ F.3d _, No. 15-72999, 2019 U.S. App. LEXIS 34334 (9th Cir. 2019), and earlier circuit precedent finding that removal orders predicated on vacated convictions are invalid and void *ab initio*. In addition, the panel misapprehended the agency's authority to review collateral challenges in withholding-only proceedings.

The PFR in Case No. 17-73065 challenges the Board's October 27, 2017 decision affirming the denial of Petitioner's motion to reopen and terminate the prior deportation proceedings. Absent rehearing, the decision, in effect, bars review of the BIA's failure to follow its settled course of adjudication in reopening orders predicated on vacated convictions. Rehearing of that petition is warranted because the decision is in tension with the decisions of the Third Circuit Court of Appeals. *See e.g.*, *Cruz v. Att'y Gen.*, 452 F.3d 240 (3d Cir. 2006). Furthermore, because the panel did not engage with the evidence of the BIA's pattern of adjudications that Mr. Sanchez-Miranda provided, as required by this Court in *Menendez-Gonzalez v. Barr*, 929 F.3d 1113 (9th Cir. 2019), the decision is legally erroneous and creates a lack of uniformity with precedent from this Court.

Absent rehearing, the panel's decision authorizes the issuance and execution of removal orders predicated on unconstitutional convictions. Amici urge the Court to grant rehearing to remedy this injustice.

## II. STATEMENT OF AMICI

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Northwest Immigrant Rights Project (NWIRP) is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status. NWIRP provides direct representation to low-income immigrants placed in removal proceedings. The Washington Defender Association is a statewide non-profit organization with a membership of public defender agencies, indigent defenders and those working to improve the quality of indigent defense in Washington State.

All three organizations have a direct interest in ensuring that noncitizens are not deported based on removal orders that were predicated on vacated convictions under 8 U.S.C. § 1231(a)(5) and that the BIA does not deviate from its settled course of adjudication by refusing to reopen proceedings predicated on a vacated convictions.

## III. STATEMENT OF RELEVANT FACTS

In 1992, Mr. Sanchez-Miranda, then a lawful permanent resident, was deported based on a single 1991 conviction from the Superior Court of Washington

for King County. *See* Administrative Record in Case No. 17-73065 (A.R.1) at 264-66; Administrative Record in Case No. 18-71743 (A.R.2) at 942. He returned to the United States shortly thereafter.

In 2017, the Superior Court of Washington for King County vacated that conviction on constitutional grounds after Mr. Sanchez-Miranda presented evidence of both ineffective assistance of counsel that he received during criminal proceedings and the failure of the criminal court to obtain a knowing, voluntary and intelligent guilty plea, amounting to violations of his Fourteenth and Sixth Amendments rights. A.R.2 at 434-52; A.R.1 at 135-37.

### A. Petition Challenging ICE's Issuance of the 2016 Reinstatement Order and the Board's 2018 Decision Denying Fear-Based Claims, Case No. 18-71743

On November 16, 2016, ICE issued an order to reinstate the 1992 deportation order under 8 U.S.C. § 1231(a)(5). A.R.2 at 941. Because Mr. Sanchez-Miranda expressed a fear of return to Mexico, ICE referred his case to the asylum office. An asylum officer interviewed Mr. Sanchez-Miranda, found that his fear was reasonable, and referred his case to "withholding only proceedings," in which an immigration judge (IJ) can review only applications for withholding of removal and protection under the Convention Against Torture (CAT). A.R.2. 939-40; *see also* 8 C.F.R. §§ 241.8(e), 1241.8(e), 208.31, 1208.31. The IJ denied Mr. Sanchez-Miranda's withholding and CAT applications on December 14, 2017 and

he appealed that decision to the Board of Immigration Appeals. A.R.2 92-130. On June 8, 2018, the Board affirmed the IJ's decision. A.R.2 at 3-6.

Pursuant to this Court's precedent, the reinstatement order only became a final administrative removal order for purposes of judicial review on June 8, 2018, after the conclusion of withholding only proceedings. *See Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012) ("In order to preserve judicial review over petitions challenging administrative determinations made pursuant to 8 C.F.R. § 208.31(e) or (g), we hold that where [a noncitizen] pursues reasonable fear and withholding of removal proceedings following the reinstatement of a prior removal order, the reinstated removal order does not become final until the reasonable fear of persecution and withholding of removal proceedings are complete."); *see also Ayala v. Sessions*, 855 F.3d 1012, 1018-20 (9th Cir. 2017) (same). Mr. Sanchez-Miranda timely filed a petition for review within 30 days of the Board's decision, challenging both the reinstatement of the 1992 deportation order and the denial of his applications for protection. Relevant here, the panel concluded that the collateral challenge was "not properly before [the court]," reasoning that BIA did not address the reinstatement order and res judicata somehow applied to preclude review allegedly because the BIA addressed a challenge to the 1992 order in adjudicating Mr. Sanchez-Miranda's motion to reopen. *Sanchez-Miranda v. Barr*,

Nos. 17-73065, 18-71743, 2019 U.S. App. LEXIS 21750, at *7 (9th Cir. July 22, 2019).

### B. Petition Challenging the Board's Decision Affirming the Denial of Mr. Sanchez-Miranda's Motion to Reopen Based on a Vacated Conviction, Case No. 17-73065

In April 2017, within a month of the Washington Superior Court's vacatur of the 1991 conviction which formed the basis of the 1992 deportation order, Mr. Sanchez-Miranda filed a motion to reopen deportation proceedings and to restore his lawful permanent resident status. A.R.1 117-132. He filed a statutory motion to reopen pursuant to 8 U.S.C. § 1229a(c)(7) and also requested that the immigration court exercise its authority to reopen sua sponte pursuant to 8 C.F.R. § 1003.23(b)(1). After the IJ denied the motion, he appealed the denial to the BIA, and on October 27, 2017, the BIA dismissed the appeal. A.R.1 at 66-70 (IJ decision); A.R.1 at 3-5 (BIA decision). Mr. Sanchez-Miranda timely filed a petition for review challenging the BIA's decision affirming the denial of the motion to reopen and terminate deportation proceedings.

Relevant here, the panel rejected Mr. Sanchez-Miranda's argument that the Board's refusal to reopen sua sponte is contrary to its settled course of adjudication in cases seeking reopening based on vacated convictions. *Sanchez-Miranda*, 2019 U.S. App. LEXIS 21750, at *4. Although Mr. Sanchez-Miranda and amici put forth at least 35 examples of such adjudications, the panel found that this did not

constitute "a sufficient pattern of adjudication." *Id*. In so holding, the panel relied exclusively on this Court's then recent decision in *Menendez-Gonzalez v. Barr*, in which the Court similarly faulted the petitioner for the lack of public access to BIA decisions. 929 F.3d 113 (9th Cir. 2019), *pet. for reh'ng pending*, No. 15-73869 (filed Nov. 25, 2019).[2]

## IV. THE COURT SHOULD GRANT REHEARING

### A. The Panel's Decision Affirming the Reinstatement Order in Case No. 18-71743 Conflicts with *Vega-Anguiano v. Barr* As Well As Earlier Circuit Precedent Finding That Removal Orders Predicated on Vacated Convictions Are Invalid and Void *Ab Initio*

Rehearing of the petition seeking review of the 2016 reinstatement order is warranted because: (1) the panel's decision conflicts with Ninth Circuit precedent invalidating removal orders predicated on vacated convictions, and "consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions," Fed. R. App. P. 35(b)(1)(A); and (2) the panel misapprehended relevant law and facts governing Mr. Sanchez-Miranda's collateral challenge, Fed. R. App. P. 40(a)(2).

First, rehearing is warranted because the panel's decision is in direct conflict with this Court's decision in *Vega-Anguiano v. Barr*. As here, that case involved a

[2] The petition for panel rehearing and for rehearing en banc filed on November 25, 2019 and the amicus brief in support of that petition filed on December 5, 2019 in *Menendez-Gonzalez* raise similar issues to those put forth in Mr. Sanchez-Miranda's petition for rehearing and this amici brief.

petition for review of a reinstatement order where the petitioner collaterally challenged the validity of the underlying removal order. The underlying order was predicated on a 1991 conviction that was subsequently expunged in 1999; the order was nevertheless executed in 2008. 2019 U.S. App. LEXIS 34334 at *10-12. The court recognized that the collateral challenge would be successful if the prior "order could not have withstood judicial scrutiny under the law in effect at the time of either its issuance or its execution." *Id*. at *14 (citing *Matter of Farinas*, 12 I&N Dec. 467 (BIA 1967)). The court held that "[t]here was no valid legal basis for Vega-Anguiano's removal order at the time of its execution in 2008 because the conviction on which it had been based had been expunged in 1999." *Id*. Relying on BIA and Ninth Circuit precedent, the Court vacated the reinstatement order because the petitioner had suffered "a gross miscarriage of justice" in the initial proceeding. *Id*. at *14-19 (citing, *inter alia*, *Matter of Farinas*, 12 I&N Dec. at 471-72; *Hernandez-Almanza v. INS*, 547 F.2d 100 (9th Cir. 1976)).[3]

[3] Amici believe that the standard for judicial review of collateral challenges is *de novo* because the court's jurisdiction to review such challenges arises from 8 U.S.C. § 1252(a)(2)(D), which restores judicial review over legal and constitutional claims. Without question the standard for judicial review over legal and constitutional claims is de novo. *See, e.g., Chay Ixcot v. Holder*, 646 F.3d 1202, 1206 (9th Cir. 2011) ("Pure questions of law raised in a petition for review are reviewed de novo."). Notably, this Court adopted the gross miscarriage of justice standard solely based on out of circuit cases, which likewise adopted the standard without any independent assessment of whether the plain language of § 1252(a)(2)(D) provides a *de novo* standard of review. *See* Brief of Amici Curiae in Support of Petitioner at 15-18. Because no panel of this Court has "squarely

Just as in *Vega-Anguiano*, Mr. Sanchez-Miranda collaterally challenges the validity of the underlying 1992 deportation order which was predicated on a 1991 conviction that was subsequently vacated on constitutional grounds. As such, the 1992 deportation order lacked a valid legal basis both at the time it was issued and at the time it was executed. *Vega-Anguiano*, 2019 U.S. App. LEXIS 34334 at *14. That is because convictions vacated based on errors in the underlying criminal proceedings render the convictions invalid *ab initio*. *See Matter of Adamiak*, 23 I&N Dec. 878, 879 (BIA 2006) (distinguishing "between situations in which a conviction is vacated based on post-conviction events . . . and those in which a conviction is vacated because of a defect in the underlying criminal proceedings"); *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006) (same); *Estrada-Rosales v. INS*, 645 F.2d 819, 821 (9th Cir. 1981) (noting that, where a conviction is no longer valid for immigration purposes, it "*had not been* proper proof that the defendant committed the crime as charged" and thus was not a proper basis for deportation) (emphasis added). Accordingly, in keeping with *Vega-Anguiano*, the

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addressed" or even considered this position, on rehearing, this Court can and should assess the merits of reviewing collateral challenges de novo and not for gross miscarriage of justice. *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (stating that *stare decisis* is not applicable unless the issue was "squarely addressed" in the prior decision). However, under either a gross miscarriage of justice or *de novo* standard of review, Mr. Sanchez-Miranda's 1992 deportation order is constitutionally infirm and cannot be reinstated.

Court should grant rehearing and vacate the reinstatement order.

Doing so would be consistent with earlier circuit precedent recognizing that "a conviction vacated because of a procedural or substantive defect is not considered a conviction for immigration purposes and cannot serve as the basis for removeability." *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006) (quotations omitted); *see also Nath v. Gonzales*, 467 F.3d 1185, 1189 (9th Cir. 2006) (same); *Mendoza v. Holder*, 606 F.3d 1137, 1141-42 (9th Cir. 2010) (assessing whether vacatur was for "rehabilitative purposes" or "because of a procedural or substantive defect in the criminal proceedings"); *Wiedersperg v. INS*, 896 F.2d 1179, 1182 (9th Cir. 1990) (recognizing that where a conviction that once provided the basis for removal proceedings is vacated such that it is no longer valid for immigration proceedings, it "deprives deportation of a legal basis").[4]

Second, rehearing is also warranted to remedy the panel's misapprehension regarding the BIA's authority to review collateral challenges in withholding-only proceedings. At the agency level, only ICE can reconsider issuance of a reinstatement order based on a collateral challenge. The BIA expressly has held that it lacks jurisdiction to do so. *Matter of G-N-C-*, 22 I&N Dec. 281, 287 (BIA 1998) ("We therefore find that we lack any jurisdiction to consider challenges to a

[4] *See also Matter of Adamiak*, 23 I&N Dec. at 879; *Matter of Pickering*, 23 I&N Dec. at 624.

reinstated order of deportation under [8 U.S.C. § 1231(a)(5)].”); *cf. Matter of W-C-B-*, 24 I&N Dec. 118, 123 (BIA 2007) (concluding “that there is no statutory or regulatory authority that allows an Immigration Judge to reinstate a prior order of deportation pursuant to [8 U.S.C. § 1231(a)(5)]”). Thus, contrary to the panel’s rationale, the BIA did not “refus[e] to address” Mr. Sanchez-Miranda’s collateral challenge in withholding only proceedings, *Sanchez-Miranda*, 2019 U.S. App. LEXIS 21750, at *8; rather, it lacked authority to do so.[5] As such, it would have been futile for Mr. Sanchez-Miranda to ask either the IJ or the BIA to review the 1992 deportation order in withholding-only proceedings.[6]

Likewise, the panel was wrong to claim that “res judicata” precluded the BIA from reviewing the 1992 deportation order in withholding only proceedings because it previously adjudicated and denied Mr. Sanchez-Miranda’s motion to reopen those proceedings. *Sanchez-Miranda*, 2019 U.S. App. LEXIS 21750, at *7. The BIA’s lack of jurisdiction over any claims other than Mr. Sanchez-Miranda’s claims for withholding and CAT—not res judicata—explains why the BIA did not

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[5] In withholding only proceedings, immigration judges and the BIA are only authorized to review applications for withholding and CAT protection. 8 C.F.R. §§ 208.31, 1208.31, 241.8(e), 1241.8(e); *Matter of L-M-P-*, 27 I&N Dec. 265, 269-70 & n.4 (BIA 2018).

[6] Moreover, under this Circuit’s case law, individuals in withholding-only proceedings have no other option but to wait until the conclusion of those proceedings to file a petition challenging the reinstatement order issued by ICE. *Ortiz-Alfaro*, 694 F.3d at 957-59; *Ayala*, 855 F.3d at 1017-20.

engage in review of the 1992 order in withholding only proceedings.

Finally, Mr. Sanchez-Miranda adequately challenged the validity of the 1992 deportation order, and therefore the panel was wrong to suggest he forfeited this argument. *Sanchez-Miranda*, 2019 U.S. App. LEXIS 21750, at *8. In his opening brief, Mr. Sanchez-Miranda plainly stated: "In reinstatement proceedings, a noncitizen may collaterally attack the underlying deportation order where he demonstrates the order constituted a 'gross miscarriage of justice.'" Pet. Op. Br. at 27 (quoting *Garcia de Rincon v. Dep't of Homeland Sec.*, 539 F.3d 1133, 1137 (9th Cir. 2008)). Mr. Sanchez-Miranda also raised the issue in his reply brief. *See, e.g.*, Pet. Rep. Br. at 3 ("Either a *de novo* or 'gross miscarriage of justice' standard applies to Petitioner's collateral challenge of his deportation order, raised in Case No. 18-71743 (the reinstatement petition for review).").

* * * * *

In sum, the Court should grant rehearing in Case No. 18-71743 because whether noncitizens can be re-deported based on orders predicated on vacated convictions is an issue of exceptional importance. In addition, panel's decision directly conflicts with *Vega-Anguiano* and earlier Ninth Circuit precedent and misapprehends the agency's authority in withholding-only proceedings.

### B. The Panel's Decision in No. 17-73065 Is in Tension with Decisions of This and Other Courts of Appeals and Would Functionally Bar Review of the BIA's Deviation from Its Settled Course of Adjudication

Rehearing of the petition seeking review of the motion to reopen is also warranted because: (1) the panel's decision conflicts with decisions of the Third Circuit Court of Appeals providing for review of BIA decisions not to reopen sua sponte that depart from the agency's settled course of adjudication and therefore presents a question of exceptional importance, *see* Fed. R. App. P. 35(b)(1)(B); and (2) the panel misapprehended relevant law by failing to engage with evidence of the BIA's settled course of adjudication claims as required by *Menendez-Gonzalez*, 929 F.3d 1113, *see* Fed. R. App. P. 40(a)(2).

Mr. Sanchez-Miranda argued to the panel that the BIA erred by denying his motion to reopen because the agency had a settled course of adjudication establishing that it would reopen sua sponte in similar circumstances. He explained that, although this Court frequently does not have jurisdiction to review such denials, it did in his case because the departure from the BIA's general rule of granting reopening amounted to legal error. *See Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016). As an initial matter, the panel suggested that review was not necessarily available where the BIA "depart[s]" from a "consistent pattern" of its decisions "absent explanation," because such patterns may not be able to be sufficiently "clearly defined" to make a departure a legal error. *Sanchez-Miranda*,

2019 U.S. App. LEXIS 21750, at *4. The panel went on to find that, even if review were available, just as in *Menendez-Gonzalez*, Mr. Sanchez-Miranda had "failed to establish a sufficient pattern" because the analogous BIA decisions granting motions to reopen based on vacated convictions he provided to the Court were simply not enough. *Id.*[7]

The panel's decision conflicts with the decisions of the Third Circuit recognizing jurisdiction over claims that the BIA has deviated from a settled adjudicatory practice and taking a practical approach to reviewing such claims. The Third Circuit has held that it has jurisdiction to review a sua sponte reopening insofar as "the BIA has limited its discretion via a policy, rule, settled course of adjudication, or by some other method, such that the BIA's discretion can be meaningfully reviewed for abuse." *Sang Goo Park v. Att'y Gen.*, 846 F.3d 645, 653 (3d Cir. 2017). In another case, citing to ten analogous BIA decisions, the Third Circuit recognized that remand was necessary where the BIA denied a request to reopen sua sponte based on "cursory treatment of [petitioner's] predicament" as

[7] The panel did not specify how many decisions were provided or how many would have been sufficient. Unlike the panel in this case, in *Menendez-Gonzalez*, the Court expressly acknowledged the number of similar BIA decisions the petitioner cited in attempting to establish a settled course of adjudication. *See Menendez-Gonzalez*, 929 F.3d at 1118 (describing citation "to ten unpublished BIA decisions over a period of about eight years"). However, the Court erred in its count and failed to include several other relevant decisions the petitioner had provided. *See* Petition for Panel Rehearing and Petition for Rehearing En Banc at 8-10, *Menendez-Gonzalez v. Barr*, No. 15-73869 (9th Cir. filed Nov. 25, 2019).

compared to "its practice in every other case we have examined that presents the same issue." *Cruz v. Att'y Gen.*, 452 F.3d 240, 250 (3d Cir. 2006); *cf. Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008) (assuming without deciding that "a settled course of adjudication could establish a meaningful standard by which to measure the agency's future exercise of discretion").[8] Absent rehearing in this case or in *Menendez-Gonzalez*, petitioners face an insurmountable standard to establish the BIA's adjudicatory pattern let alone a deviation from it.

Furthermore, even if *Menendez-Gonzalez* is not reheard, the panel committed legal error by failing to distinguish Mr. Sanchez-Miranda's case from that decision. The panel claimed that *Menendez-Gonzalez* established that presenting "a few analogous unpublished cases" could not establish the necessary pattern of adjudications. 2019 U.S. App. LEXIS 21750, at *4. *But see supra* n.7. However, the panel failed to consider *any*, let alone all, of the more than 35 analogous decisions evidencing of the BIA's pattern of granting motions to reopen based on vacated convictions. *See, e.g.*, Pet. Op. Br. at 35 (noting that the Petitioner's brief to the BIA "cited a dozen unpublished decisions in which the

[8] Notably, if the Court were concerned that it did not have access to all relevant decisions regarding the issue, it could have ordered the BIA to provide decisions about a particular issue to the parties. *See Uddin v. Att'y Gen.*, 870 F.3d 282, 291-92 (3d Cir. 2017) (vacating BIA decision as inconsistent with prior pattern of adjudications after the court had ordered the government to produce all recent decisions about the issue before the court for its review).

Board exercised its *sua sponte* authority to reopen proceedings in cases involving constitutionally defective convictions"); Pet. Rep. Br. at 11-12 (noting that Mr. Sanchez-Miranda provided "26 additional cases . . . in which the Board *sua sponte* reopened proceedings on untimely motions following state courts' vacation or modification of convictions"); Brief of Amici Curiae in Support of Petitioner at 11-12 (citing more than 10 additional unpublished cases). The panel's failure to engage with the evidence of the BIA's adjudicatory pattern that Mr. Sanchez-Miranda presented is legal error requiring rehearing.

## V. CONCLUSION

Because these petitions involve issues of exceptional importance and because rehearing is necessary to maintain the uniformity of its decisions and avoid a circuit split, the Court should grant rehearing and vacate its prior decision. With respect to Case No. 18-71743, the Court should vacate the 2016 reinstatement order because the underlying deportation order was predicated on a conviction that was vacated on constitutional grounds. With respect to Case No. 17-73065, the Court should vacate the Board's 2017 decision refusing to reopen proceedings and remand with instructions that the Board adhere to its settled course of granting motions to reopen based on vacated convictions.

Respectfully submitted,

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Dated: December 5, 2019

## CERTIFICATION OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Ninth Circuit Rule 29-2(c)(2), because it contains 3,919 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). 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 brief has been prepared using Microsoft Word 2016, is proportionately spaced, and has a typeface of 14 point.

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Dated: December 5, 2019

## CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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