No. S269647

IN THE SUPREME COURT OF CALIFORNIA

The People of the State of California,

Plaintiff and Respondent,

v.

Juventino Espinoza,

Defendant and Petitioner.

After a Decision by the Court of Appeal,
Fifth Appellate District, Case No. F079209
Tulare County Superior Court, Case No. VCF109133B-03
(Hon. Steven D. Barnes)

APPLICATION TO FILE AMICI CURIAE BRIEF AND [PROPOSED] AMICI CURIAE BRIEF OF FORMER PROSECUTORS AND PUBLIC DEFENDERS IN SUPPORT OF JUVENTINO ESPINOZA

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APPLICATION TO FILE AMICI CURIAE BRIEF

Under rule 8.520(f) of the California Rules of Court, amici curiae request permission to file the attached brief.[1]

Amici are a group of former public defenders and prosecutors with many decades of criminal-justice experience at the federal and state levels. The issues presented in this appeal are of particular importance to amici, who have long had an interest in ensuring that prosecutors enforce the law fairly and consistently and that the rights of defendants are respected under the law.[2] Accordingly, amici request leave to file the attached brief, in which they argue that the Court should hold that those claiming prejudice under Penal Code section 1473.7 need not provide contemporaneous evidence corroborating their claims in every case.

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[1] No party or counsel for any party in this case authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief.

[2] Additional information regarding amici is included in the attached appendix.

For these reasons, amici curiae respectfully request that the Court accept the enclosed brief for filing and consideration.

May 30, 2022

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ *Daniel R. Adler*
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AMICI CURIAE BRIEF

INTRODUCTION

In most cases, defense lawyers discharge their duty to inform their clients of the immigration consequences of guilty pleas. And where justice demands it, prosecutors can seek an immigration-neutral disposition of a criminal case when they learn of a defendant's immigration status. That result benefits everyone concerned. The defendant wishing to stay in this country avoids a lifetime of exile, the prosecution secures a meaningful conviction, and an overburdened judiciary is spared a needless trial.

Many cases, unfortunately, don't follow this desirable pattern. This is one of them. When Mr. Espinoza pleaded guilty, he had no idea that the deal he took rendered him deportable. He wouldn't learn as much for ten years. The Court of Appeal nevertheless held that because Mr. Espinoza did not express any concerns about immigration consequences around the time of his plea, he could not prove that he would have declined the deal had he known about those consequences. In other words, the court held that Mr. Espinoza should have said something about a problem he wasn't even aware of. That amounts to an insistence on evidence that in nearly every case won't exist.

There is other evidence that will often help courts decide whether there is a reasonable probability that a defendant would have entered into the same guilty plea had he understood its immigration consequences: the basic facts about his life. A defendant with extensive ties to the United States and no ties to

his country of origin is likely to seek an immigration-neutral disposition or roll the dice at trial; he would do just about anything to avoid banishment. A recent arrival, by contrast, with no family in the United States and close family or other ties in his home country, may weigh his options differently. When there is no other evidence—and often there won't be—these basic facts alone should, in many cases, be enough to decide a section 1473.7 motion, particularly against the backdrop of live testimony that trial courts can hear and weigh.

This case is a perfect example. When Mr. Espinoza pleaded guilty—without understanding that the plea would result in his deportation—he had been living in this country for over 20 years, and his whole family lived here, too. He had every reason to stay and no reason to leave. These ties are by themselves enough to prove prejudice—in other words, a reasonable probability that Mr. Espinoza would not have entered into the same plea had he known its consequences.

Although initially it opposed review, the government now agrees. It concedes in its brief that the test for prejudice under section 1473.7 "is flexible and fact-specific" and that biographical facts of the sort Mr. Espinoza offered here are "'objective evidence'" that a noncitizen would have sought an immigration-neutral plea deal. (Govt. Br. at p. 18.) And it now recognizes that the Court of Appeal's contrary reasoning, which required "'corroborating evidence'" in the form of contemporaneous statements from the noncitizen, "is plainly incorrect." (*Id.* at p. 21.)

This Court should hold that basic biographical facts can be sufficient to demonstrate prejudice, and that courts should not—as the Court of Appeal did here—require section 1473.7 movants to provide direct evidence of what they would have done in the counterfactual world where they understood pleading guilty would consign them to deportation.

ARGUMENT

I. Prejudice in these cases often depends on basic biographical facts about the noncitizen.

When evaluating whether a noncitizen bringing a motion under Penal Code section 1473.7 suffered prejudice, courts consider whether he has demonstrated, with objective evidence, "a reasonable probability that if he had been properly advised by counsel about the immigration consequences of his plea, he wouldn't have pleaded guilty to an offense subjecting him to mandatory deportation." (*People v. Vivar* (2021) 11 Cal.5th 510, 517.) The Court has recognized several factors that are relevant to this inquiry, including "the defendant's ties to the United States, the importance the defendant placed on avoiding deportation, the defendant's priorities in seeking a plea bargain, and whether the defendant had reason to believe an immigration-neutral negotiated disposition was possible." (*Id.* at p. 530.)

The prejudice inquiry is inherently counterfactual, because it focuses on what the noncitizen "*would have done*" under different circumstances. (*Vivar*, *supra*, 11 Cal.5th at pp. 528-529, italics added, quoting *People v. Martinez* (2013) 57 Cal.4th 555, 562.) In conducting this analysis, courts should place emphasis

on whether the noncitizen had strong ties to the United States or lacked ties to his home country when he accepted his guilty plea, because that evidence is always available despite the counterfactual nature of the prejudice inquiry. If that evidence suggests there is a "'reasonable chance'" the noncitizen wouldn't have pleaded guilty to the crime (*People v. Rodriguez* (2021) 68 Cal.App.5th 301, 324, italics omitted), the prejudice inquiry should be satisfied even if there is little or no other evidence supporting his section 1473.7 motion.

A. Biographical facts are often the only and most probative evidence of prejudice.

In answering the question whether a noncitizen defendant would not have pleaded guilty if he'd been informed of the immigration consequences of doing so, courts can and should begin with his basic biographical facts, such as length of residence, familial ties to the United States, and any ties to his country of origin. Once informed of the consequence of deportation, a noncitizen who has extensive ties to his community and family in the United States is much more likely to reject a plea deal in favor of negotiating an immigration-neutral plea or playing the odds of an acquittal at trial. (See *United States v. Rodriguez-Vega* (9th Cir. 2015) 797 F.3d 781, 790 [a noncitizen "may rationally risk a far greater sentence for an opportunity to avoid lifetime separation from her family and the country in which [she] reside[s]"].)

In our experience, the most important objective for a noncitizen with longstanding ties to the United States is almost

always the ability to stay near family or in the only country where he has lived for years, often decades. And that desire is often heightened when the noncitizen has few or no ties to the country to which he would likely be removed. This Court recognized as much in *Vivar* when it acknowledged that "the most devastating consequence" for noncitizen defendants who "have formed attachments and families of their own" in the United States "may not be a prison sentence, but their removal and exclusion from the United States." (11 Cal.5th at p. 516.) And the government agrees that whether a noncitizen has "lengthy ties to this country [is] undoubtedly an important consideration" when "determining the weight that [he] would have placed on immigration consequences." (Govt. Br. at p. 20.)

In most cases, not only are biographical facts the most probative evidence in the prejudice inquiry, they are also the *only* evidence. Uninformed defendants are unlikely to voice concerns at the time they plead guilty about consequences of which they are unaware. In these cases, the Court should hold that basic facts about the defendant—strong ties to the United States and weak ties to his country of origin—are enough to show he suffered prejudice caused by his attorney's failure to advise him of the immigration consequences of a guilty plea. The Court of Appeal has correctly done so in some cases. (See, e.g., *People v. Alatorre* (2021) 70 Cal.App.5th 747, 771; *Rodriguez*, *supra*, 68 Cal.App.5th at pp. 324-326.)

Of course, there are some cases where evidence besides the noncitizen's biographical facts reveals whether he would have

still pleaded guilty to his criminal charges had he known about the immigration consequences. And in those cases, courts should evaluate that evidence in addition to the noncitizen's biographical facts. For example, some noncitizens may present evidence about their willingness to serve more jail time if they could have avoided immigration consequences, or about their efforts to avoid deportation.

Vivar offers a good example of such additional evidence: there, on top of evidence about his lengthy history and family ties in the United States, Vivar also presented evidence of uncounseled letters he wrote years before bringing his section 1473.7 motion (but after he learned of the immigration consequences of his plea) pleading not to be deported. (11 Cal.5th at pp. 530-531.) The Court held that this evidence supported its conclusion that Mr. Vivar "wouldn't have pleaded guilty had he known it would result in his deportation." (*Id.* at p. 531.) But as the government now recognizes, Mr. Vivar's case is rare because he was "alerted . . . to the immigration consequences of his plea" "just days after he entered [it]." (Govt. Br. at 21.) And although his letters offered additional evidence that he would not have pleaded guilty had he known about the immigration consequences, the Court never suggested that evidence was *necessary* to show he suffered prejudice. (See *Vivar*, *supra*, 11 Cal.5th at p. 531.) Other noncitizens who offer evidence of their strong ties to the United States should not be precluded from proving prejudice merely because they (unlike Mr. Vivar) did not happen to write about their immigration concerns shortly after

they entered their guilty pleas—especially because the basis for a section 1473.7 motion is that the noncitizen did not understand "the actual or potential adverse immigration consequences of a conviction or sentence." (Pen. Code, § 1473.7, subd. (a)(1).)

B. Holding that biographical facts alone can be sufficient to establish prejudice will not invite unworthy section 1473.7 motions.

The Court of Appeal seems to have suggested that without evidence of the kind Mr. Espinoza (and most section 1473.7 movants) cannot produce, there will be no way for courts to distinguish valid from invalid motions to vacate convictions. That view does not give either courts or section 1473.7 enough credit. Holding that a noncitizen's biographical evidence may be sufficient to demonstrate prejudice will not open the floodgates to courts granting *all* noncitizens' motions under section 1473.7 for several reasons.

First, there will be plenty of cases where, in the totality of circumstances, a noncitizen's biographical facts will weigh *against* granting a section 1473.7 motion. If, for example, he has not been in the United States for long or retains strong ties to his home country, he could be less likely to have been motivated to risk a longer jail sentence if convicted at trial to avoid deportation. *People v. Bravo* (2021) 69 Cal.App.5th 1063 is a good example. There, the Court of Appeal held that the movant did not demonstrate prejudice because he had been in the United States for only four years and the same people he had relationships with in the United States (his girlfriend and son)

were the victims of his domestic violence and child-cruelty felonies that rendered him deportable. (*Id.* at p. 1076.) This evidence "undercut[] any claim" that he would not have pleaded guilty to his crimes had he known about the immigration consequences of his guilty plea. (*Id.* at pp. 1076-1077.)

Second, even if a noncitizen can show he has strong ties to the United States, a court might still reasonably conclude he suffered no prejudice if other evidence suggests he still would have accepted his guilty plea had he known he would be deported. The circumstances of the noncitizen's charges and potential sentence may be relevant, for example. In our experience, a noncitizen who faces a very long prison sentence if convicted of a crime at trial or a much shorter sentence (or no prison time at all) if he pleads guilty may accept the plea deal even if it means he will be deported. As part of a fact-specific prejudice inquiry, courts should consider this and any other evidence that bears on whether a noncitizen would have accepted a guilty plea had he known its immigration consequences.

Third, section 1473.7 affords trial courts the opportunity to assess a witness's credibility. The statute provides that a movant seeking relief "shall be entitled to a hearing" at which he must be present absent good cause. (Pen. Code, § 1473.7, subd. (d).) Trial courts can—and should—encourage cross-examination of movants and supporting witnesses in assessing whether movants would have still pleaded guilty if they had known the consequences of doing so.

Fourth, appellate courts are another check on weak motions to vacate convictions. The standard of review in section 1473.7 cases—"independent review"—ensures a rigorous analysis of each case. (*Vivar*, *supra*, 11 Cal.5th at pp. 524, 527-528.) Under this standard, rather than giving deference to all of the trial court's factual findings, appellate courts independently review any facts "derive[d] entirely from written declarations and other documents." (*Id.* at p. 528.) They give "particular deference" only to the trial court's "factual findings based on [its] personal observations of witnesses." (*Id.* at pp. 527-528; see also *id.* at p. 534.)

In short, it's not every case that presents facts like these—a defendant with every reason to stay in the country and no apparent reason to leave. And courts will be able, through credibility assessments in the trial court and independent review on appeal, to ensure that relief is being granted only in cases the circumstances warrant it.

II. The Court of Appeal's requirement of contemporaneous memorialization is artificial, unrealistic, and unfair.

In rejecting Mr. Espinoza's section 1473.7 argument, the Court of Appeal fixated on one factor: the lack of "significant contemporaneous evidence" corroborating his claim that immigration consequences were "a material concern" when he pleaded guilty. (Opn. at pp. 5-7.) That reasoning has no basis in precedent, logic, or fairness, and the government makes no effort to defend it. The nature of the prejudice inquiry, both under

section 1473.7 and in every other area of the law, is that it is counterfactual: it requires courts to imagine what *might have happened* had the error not occurred. Here, that requires courts to ask what noncitizen defendants would have done had they been properly advised of the immigration consequences of their pleas.

But the Court of Appeal's analysis turns the counterfactual into the actual, at the defendant's expense, by requiring contemporaneous evidence of a defendant's immigration concerns *as if* he had been appropriately advised. But as the government recognizes, "that kind of evidence is . . . quite unlikely to be available in a typical case," where the noncitizen "d[oes] not have any reason to 'memorialize his immigration concerns' at or near the time of his plea.'" (Govt. Br. at pp. 21-22.)

This Court in *Vivar* explained that the Legislature designed section 1473.7 to protect vital interests and ensure that noncitizens facing criminal prosecution receive accurate advice about the potentially devastating immigration consequences that conviction can have. But the Court of Appeal's analysis, if widely applied, would make a successful showing under section 1473.7 virtually impossible for most—including for those noncitizens most vulnerable to ineffective assistance at the plea-negotiation stage. Nothing supports that inequitable outcome.

A. The Court of Appeal's holding defies the counterfactual nature of the prejudice inquiry.

When he pleaded guilty, Mr. Espinoza had good reasons to avoid deportation. He had lived in the United States for over

20 years, and his family—his wife, children, parents, and siblings—all lived here, too. The Court of Appeal nevertheless held that this "biographical history" was insufficient to corroborate his claim that his "paramount concern" was avoiding deportation. (Opn. at p. 6.)

The court reached that conclusion for one overriding reason: Mr. Espinoza could not document that he discussed his immigration concerns with his lawyer before his plea or wrote letters lamenting the immigration consequences soon after his plea. (Opn. at pp. 6-7.) But as the court acknowledged, Mr. Espinoza contended that he "did not learn of actual adverse immigration consequences until more than 10 years after his conviction." (*Id.* at p. 7.) It is unreasonable to expect Mr. Espinoza to have documented concerns about an immigration problem a decade before he knew it existed. This lack of advice, of course, was the reason Mr. Espinoza moved to vacate his conviction. Yet the court transformed his lack of contemporaneous understanding (the proof of the error) into a strike against prejudice.

The Court of Appeal's approach to prejudice is wrong. In any section 1473.7 case, courts must answer an inherently counterfactual question: what would the movant have done had he meaningfully understood the potential immigration consequences of an offered guilty plea? (See Pen. Code, § 1473.7, subd. (a).) The question is not whether a defendant, though unaware that an offered plea might result in his deportation, nevertheless spontaneously expressed concern about that result.

The question is instead whether the defendant, if properly advised, would have tried to negotiate a different plea or taken his chances at trial.

This counterfactual analysis follows from the core premise of section 1473.7. The statute provides the prospect of relief when an error made it impossible for the movant to understand the immigration consequences of his plea—either an error on the part of defense counsel or an error on the part of the movant himself. Because the record reflects the state of the world in which the movant "was not properly advised—and thus was ignorant—of the immigration consequences attached to his various plea options," the court must piece together from "the totality of the circumstances" what the movant likely would have done had he been put on adequate notice of potential immigration consequences. (*Vivar*, *supra*, 11 Cal.5th at pp. 529-532.) No specific type of evidence should be given talismanic significance, so long as the movant can show "at least a reasonable probability that he could have tried to obtain a better bargain that did not include immigration consequences." (*Id.* at p. 531, cleaned up.) This is why Mr. Vivar could demonstrate prejudice even though he actually "rejected an immigration-neutral option"—one that he doubtless would have accepted in the counterfactual world in which he understood the immigration consequences of potential guilty pleas. (*Id.* at p. 532.)

Courts routinely perform just this sort of counterfactual analysis in related contexts. This Court, for example, has held that a trial court's failure to advise noncitizens that a guilty plea

can result in immigration consequences is prejudicial if circumstantial evidence supports an inference that the noncitizen would have rejected the plea deal. (*Martinez*, *supra*, 57 Cal.4th at pp. 568-569.) Specifically, courts should consider "the presence or absence of other plea offers, the seriousness of the charges in relation to the plea bargain, the defendant's criminal record, the defendant's priorities in plea bargaining, the defendant's aversion to immigration consequences, and whether the defendant had reason to believe that the charges would allow an immigration-neutral bargain that a court would accept." (*Id.* at p. 568; see Pen. Code, § 1016.5.) The U.S. Supreme Court has likewise looked to circumstantial evidence—and in particular, "strong connections to the United States"—in finding a reasonable probability that a noncitizen, if properly advised, would have declined to accept a plea deal with adverse immigration consequences. (*Lee v. United States* (2017) 137 S.Ct. 1958, 1968.) More broadly, the prejudice analysis of *Strickland v. Washington* (1984) 466 U.S. 668 directs courts to "make findings about what likely would have transpired" in the "counterfactual scenario" where defense counsel provided effective representation. (*Mayfield v. United States* (8th Cir. 2020) 955 F.3d 707, 713.) "Counterfactuals necessarily involve some speculation" because there is rarely concrete evidence of what would have happened without defense counsel's mistake. (*Collins v. Secretary* (3d Cir. 2014) 742 F.3d 528, 550.)

Strickland and related statutes, such as section 1473.7, are not outliers in demanding a counterfactual analysis. Courts often

must decide what might have happened if the facts had been different. Consider just a few examples:

- When a client sues a lawyer for malpractice, courts compare "historical events to a hypothetical narrative" of "*what would have happened* if the defendant attorney had not been negligent." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1242.) Courts do not require direct evidence of the counterfactual outcome but instead rely on "circumstantial evidence." (*Ibid.*)
- When a manufacturer infringes a patent, the patentee can recover a "reasonable royalty" for the infringing activity. (*State Industries, Inc. v. Mor-Flo Industries, Inc.* (Fed. Cir. 1989) 883 F.2d 1573, 1577.) Courts do not require evidence of actual license negotiations because the violation was the infringer's *refusal* to secure a license—to require contemporaneous evidence of license negotiations would "completely miss[] the point of the counterfactual exercise." (*Conceptus, Inc. v. Hologic, Inc.* (N.D.Cal. 2010) 771 F.Supp.2d 1164, 1179-1180, citing *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.* (6th Cir. 1978) 575 F.2d 1152, 1159.)
- And when candidates challenge electoral contribution limits, courts have upheld the laws as narrowly tailored under the First Amendment even though "no data can be marshaled to capture perfectly the counterfactual world in which [such] limits do not exist."

(*McCutcheon v. FEC* (2014) 572 U.S. 185, 219 [plur. opn. of Roberts, C.J.].)

Each of these examples reflects the general principle that although "[i]t is one thing to" object to the "failure to adduce empirical data that can readily be obtained," "[i]t is something else to insist upon obtaining the unobtainable." (*FCC v. Fox Television Stations, Inc.* (2009) 556 U.S. 502, 519.) This rule reflects both common sense and fairness. As the government forthrightly acknowledges (Govt. Br. at pp. 21-22), the Court of Appeal flouted this principle by denying relief because Mr. Espinoza did not come forward with direct evidence of his unwillingness to be deported, even though he "may not have had a[n] . . . opportunity to contemporaneously memorialize his immigration concerns" (Opn. at p. 7).

The government admits that "no single type of evidence is necessarily dispositive of a claim" under section 1473.7. (Gov't Br. at p. 25.) And it observes that the counterfactual analysis should be "flexible and cognizant of the substantial challenges facing any immigrant who must gather evidence of prejudice years (and sometimes decades) after a conviction." (*Id.* at pp. 25–26.) In amici's view, these principles deserve a strong reaffirmation from this Court given some courts' willingness to accept the government's prior arguments with respect to *Vivar*.

B. Evidence of the sort the Court of Appeal required will be rare.

The Court of Appeal's decision here reduces to a simple idea: because this Court in *Vivar* noted that "contemporaneous"

evidence "corroborate[d] Vivar's concern about the immigration consequences of his plea options" (11 Cal.5th at pp. 530-531), evidence of that sort must be the *only* way defendants can win on section 1473.7 claims. (Opn. at pp. 5-7.) That's not what *Vivar* says, and for good reason. There's no reason to believe that in enacting section 1473.7, the Legislature intended it to be limited to extraordinary cases in which the noncitizen's immigration-related concerns are memorialized in contemporaneous writings.

In its opening paragraph, *Vivar* explains that for millions of noncitizens living in the United States, their "ties to our country are evident not only in their work and schooling, but in how they've formed attachments and families of their own." (11 Cal.5th at p. 516.) And for many of those noncitizens, this Court continued, "what ties they once had to their country of birth—from which they may lack even memories—often slip away." (*Ibid.*) Right from the beginning, in other words, *Vivar* recognized that proof of the potentially "devastating" immigration consequences that can result from convictions can be found in a noncitizen's biographical facts and circumstances (*ibid.*)—not just in contemporaneous writings.

This Court in *Vivar* addressed the "contemporaneous" record only because that was the basis on which the Court of Appeal had denied Vivar relief under section 1473.7. (See *Vivar*, *supra*, 11 Cal.5th at p. 521.) The Court of Appeal had "insisted there was 'no contemporaneous evidence in the record' to corroborate Vivar's claim that he would've preferred an immigration-neutral disposition." (*Ibid.*) As this Court explained

in reversing, that "premise" of the Court of Appeal's analysis was wrong; "reviewing the record independently," this Court determined that there *was* contemporaneous evidence supporting Vivar's claim. (*Id.* at pp. 530-531.)

But nothing in *Vivar* suggests that contemporaneous evidence is required in every case. To the contrary, *Vivar* confirmed that the prejudice inquiry requires courts to "consider the totality of the circumstances" and that examples of relevant factors "include the defendant's ties to the United States, the importance the defendant placed on avoiding deportation, the defendant's priorities in seeking a plea bargain, and whether the defendant had reason to believe an immigration-neutral negotiated disposition was possible." (11 Cal.5th at pp. 529-530.) What's required is "'objective evidence'" (*id.* at p. 530), meaning real-world facts rather than mere say-so. That's why this Court noted objective biographical facts about Vivar, including that he "had virtually no ties to Mexico, spoke Spanish 'like an American,'" and had lived and worked in this country for forty years. (*Ibid.*) The contemporaneous evidence in the record merely "underscore[d] how much Vivar consistently valued his presence on American soil" (*id.* at p. 522)—it was not a necessary foundation without which his section 1473.7 argument would have crumbled.

Most of what this Court identified as contemporaneous evidence in *Vivar* came about because of an accident of timing. Vivar had a drug problem, and when he was sentenced, the court told him it would recommend he be admitted to a treatment

facility. (*Vivar*, *supra*, 11 Cal.5th at pp. 518-519.) But "[a] few days" after being sentenced, Vivar learned he couldn't enter the drug program "due to an 'immigration hold.'" (*Id.* at p. 520.) It just so happened, in other words, that Vivar learned of an unforeseen immigration consequence of his plea deal just days after the sentence. And that consequence was what caused him to write a "series of letters," which this Court called "revealing," in which he happened to set out facts that would later support his section 1473.7 motion. (See *id.* at pp. 520, 530-531.)

Most cases aren't like Vivar's. As this Court has recognized, the very problem that motivated the passage of section 1473.7 was that defendants often become "[]aware of the immigration consequences posed by a plea" only *years later*. (*Vivar*, *supra*, 11 Cal.5th at p. 523.) *Vivar* was the rare case in which the section 1473.7 movant became aware of those consequences almost immediately after he was sentenced, allowing him to point to writings "at or near the time of his plea." (*Id.* at pp. 530-531.) Most section 1473.7 movants, by contrast, are unaware of the potential immigration consequences of guilty pleas—and thus have no reason to contemporaneously memorialize their concerns about those consequences—until they have served any prison sentence and again encounter the authorities. For Mr. Espinoza, it took ten years.

The government agrees. In a "typical case" unlike Vivar's, there's no reason to expect a noncitizen would "'memorialize his immigration concerns' at or near the time of his plea." (Govt. Br. at pp. 21-22.) The "unusual facts in *Vivar*," the government

concedes, "do not create a legal standard or baseline for measuring prejudice in other cases," and any requirement to that effect would defy the Legislature's instruction that courts "apply section 1473.7 'in the interests of justice.'" (*Id.* at p. 22.)

Nor can noncitizens expect to learn about immigration consequences from the prosecutors on the other side of the table, at least without competent representation from their own lawyers. In fact, California law prohibits law enforcement officers from "[i]nquiring into an individual's immigration status." (Gov. Code, § 7284.6, subd. (a)(1)(A).) So in practice, noncitizens' only source of information on immigration consequences will be their own lawyers—but many section 1473.7 motions depend on those lawyers' failure to advise their clients about those consequences.

It would be exceedingly strange for the Legislature, which designed section 1473.7 to address the potentially devastating "immigration consequences posed by a plea entered many years earlier" (*Vivar*, *supra*, 11 Cal.5th at p. 523), to have limited that remedy to noncitizens who happened to learn of immigration consequences at the time of or shortly after their convictions and who then had the foresight to document their concerns in writing for use in a later collateral attack.

C. Requiring contemporaneous evidence in every case would be inequitable.

This country's immigration system is "Byzantine." (*Carranza v. INS* (1st Cir. 2002) 277 F.3d 65, 68.) It can therefore be difficult to understand whether any offered guilty

plea might carry immigration consequences. The Court of Appeal's analysis nevertheless effectively requires noncitizen defendants to understand and accurately predict those consequences themselves so they can memorialize them around the time of their guilty pleas. That's too high a burden, especially because the point of section 1473.7 is to ensure that there is a remedy for defendants who didn't understand that the guilty pleas they were offered would result in their deportation.

The problems with the Court of Appeal's across-the-board requirement of contemporaneous memorialization go deeper still. There are untold reasons a noncitizen who has recently pleaded guilty may not be able to produce the sort of contemporaneous evidence the Court of Appeal demanded. Some may be housed in detention facilities that lack consistent access to writing and legal materials. Some may fear that acknowledging their immigration status, to authorities or in writing, might itself usher in their deportation. Others may be ill equipped to memorialize their feelings about the prospect of deportation because of their language skills, education level, access to effective translation, or mental incompetency. Still others may suffer from drug addiction and be unable to put pen to paper, either because they're experiencing withdrawals or because (as is unfortunately often the case) they find ready access to drugs in detention facilities.

The government again does not take issue with these principles. It recognizes that section 1473.7's prejudice requirement must remain "flexible and cognizant of the

substantial challenges facing any immigrant who must gather evidence of prejudice years (and sometimes decades) after a conviction." (Govt. Br. at pp. 25–26.) That is correct, and it puts in sharp relief that the Court of Appeal's "excessive focus on the facts in *Vivar*" (*id.* at p. 22) would produce unjust results.

Embracing the Court of Appeal's analysis would only harm those noncitizens who, for any number of reasons, are most vulnerable to bad legal advice and most worthy of the protection that section 1473.7 provides.

CONCLUSION

The decision below sets the wrong standard for prejudice in section 1473.7 cases. When a defendant doesn't know the immigration consequences of his guilty plea, there is no reason to expect him to contemporaneously document concerns about those consequences—by definition, those concerns cannot exist yet. In some cases, this one included, it should be enough that the defendant had every reason to want to stay in the United States and no reason to leave.

The Court should reverse and order that Mr. Espinoza's section 1473.7 motion be granted.

May 30, 2022

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ *Daniel R. Adler*
Daniel R. Adler

Attorneys for amici curiae

CERTIFICATION OF WORD COUNT

Under rule 8.204(c)(1) of the California Rules of Court, I certify that this application and brief contain 5,344 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

Dated: May 30, 2022

/s/ *Daniel R. Adler*
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Appendix of Signatories

1. **Alyssa Bell** served as a Deputy Federal Public Defender in the Office of the Federal Public Defender in the Central District of California.

2. **Reuven Cohen** served as a Deputy Federal Public Defender in the Office of the Federal Public Defender in the Central District of California.

3. **Professor Ingrid V. Eagly** served as a Deputy Federal Public Defender in the Office of the Federal Public Defender in the Central District of California.

4. **Gilbert Garcetti** served two terms as Los Angeles County's 40th District Attorney.

5. **Meline Mkrtichian** served as a Deputy District Attorney in the Los Angeles County District Attorney's Office.

6. **Ronald J. Nessim** served as an Assistant United States Attorney in the Central District of California.

7. **Gabriel Pardo** served as a Deputy Federal Public Defender in the Office of the Federal Public Defender in the Central District of California.

8. **Jennifer Resnik** served as an Assistant United States Attorney in the United States Attorney's Office for the Central District of California.

PROOF OF SERVICE

I certify that on May 30, 2022, I electronically served this application and the accompanying brief on the parties through TrueFiling:

Stephen K. Dunkle
Sanger, Swysen & Dunkle
222 East Carillo Street, Suite 300
Santa Barbara, CA 93101
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Kari Ricci Mueller
Kimberly M. Castle
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Suite 11000
San Francisco, CA 94102
Kimberly.Castle@doj.ca.gov

I also made arrangements for a copy of the application and the brief to be mailed to the trial court on the next business day, May 31, 2022, at the following address:

Hon. Michael B. Sheltzer
Tulare County Superior Court, Dept. 5
County Civic Center
221 South Mooney Blvd.
Visalia, CA 93291

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 30, 2022

Daniel R. Adler

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. ESPINOZA**
Case Number: **S269647**
Lower Court Case Number: **F079209**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **dadler@gibsondunn.com**

3. I served by email a copy of the following document(s) indicated below:

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Filing Type	Document Title
APPLICATION	Application to file amicus brief on behalf of former prosecutors and defenders

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/30/2022
Date

/s/Daniel R. Adler
Signature

Adler, Daniel R. (306924)

Last Name, First Name (PNum)

Gibson, Dunn & Crutcher LLP

Law Firm