Case No. S269647

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

JUVENTINO ESPINOZA

Defendant and Appellant.

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

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICI CURIAE AND PROPOSED BRIEF OF AMICI CURIAE ASIAN AMERICANS ADVANCING JUSTICE – ASIAN LAW CAUCUS, ET AL. IN SUPPORT OF PETITIONER JUVENTINO ESPINOZA

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ADDITIONAL AMICI CURIAE

ALAMEDA COUNTY PUBLIC DEFENDER'S OFFICE, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, CALIFORNIA COLLABORATIVE FOR IMMIGRANT JUSTICE, CENTRO LEGAL DE LA RAZA, COMMUNITY LEGAL SERVICES IN EAST PALO ALTO, DREAMER FUND, DOLORES STREET COMMUNITY SERVICES, IMMIGRANT ALLIANCE FOR JUSTICE AND EQUITY, IMMIGRANT LEGAL DEFENSE, JEWISH FAMILY & COMMUNITY SERVICES EAST BAY, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, OPEN IMMIGRATION LEGAL SERVICES, ORGANIZATION FOR THE LEGAL ADVANCEMENT OF RAZA, PUBLIC COUNSEL, SAN FRANCISCO OFFICE OF THE PUBLIC DEFENDER, SAN JOAQUIN COLLEGE OF LAW NEW AMERICAN LEGAL CLINIC, SANTA BARBARA COUNTY IMMIGRANT LEGAL DEFENSE CENTER, SILICON VALLEY DE-BUG, STAND TOGETHER CONTRA COSTA, TAHIRIH JUSTICE CENTER, UNIVERSITY OF CALIFORNIA DAVIS IMMIGRATION LAW CLINIC, UNIVERSITY OF CALIFORNIA IRVINE CRIMINAL JUSTICE CLINIC, AND UNIVERSITY OF CALIFORNIA IRVINE IMMIGRANT RIGHTS CLINIC.

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APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICI CURIAE

Pursuant to Rule 8.520(f) of the California Rules of Court, the undersigned, on behalf of Asian Americans Advancing Justice – Asian Law Caucus, Alameda County Public Defender's Office, American Civil Liberties Union Foundation of Southern California, American Civil Liberties Union of Northern California, California Collaborative for Immigrant Justice, Centro Legal de la Raza, Community Legal Services in East Palo Alto, Dolores Street Community Services, Dreamer Fund, Immigrant Alliance for Justice and Equity, Immigrant Legal Defense, Jewish Family & Community Services East Bay, National Immigration Project of the National Lawyers Guild, Open Immigration Legal Services, Organization for the Legal Advancement of Raza, Public Counsel, San Francisco Office of the Public Defender, San Joaquin College of Law New American Legal Clinic, Santa Barbara County Immigrant Legal Defense Center, Silicon Valley De-Bug, Stand Together Contra Costa, Tahirih Justice Center, University of California Davis Immigration Law Clinic, University of California Irvine Criminal Justice Clinic, and University of California Irvine Immigrant

Rights Clinic, (collectively, "Amici" or the "organizations"), respectfully request permission to file this Amicus Curiae brief in support of Petitioner and Appellant Juventino Espinoza.

Amici are nonprofit legal service providers, community organizations, public defenders, and law clinics that provide support and legal representation to California immigrants[1] in removal proceedings and in motions for post-conviction relief under Penal Code Section 1473.7. As organizations that work closely with California's immigrants, their families, and their communities, we have a strong interest in ensuring that the Court consider these voices when resolving the legal issues in this case. This amicus brief presents the stories of California immigrant communities whose lives will be deeply affected by this Court's opinion.

No party or counsel for a party in this pending appeal either authored any part of the amicus curiae brief nor made any monetary contribution intended to fund the preparation or submission of the brief. Further, no person or entity, other than

[1] This application and the attached brief use the term "immigrant" to include all non-citizens.

Amici, made a monetary contribution intended to fund the preparation or submission of this brief.

DATED: May 31, 2022

Respectfully submitted,

By: /s/ Jayashri Srikantiah
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I. INTRODUCTION

Amici urge the Supreme Court to clarify an issue of exceptional importance to immigrants living in California: the prejudice standard immigrants must satisfy to obtain post-conviction relief under Penal Code Section 1473.7(a)(1). The Court should hold that the prejudice standard is a flexible and generous totality of the circumstances analysis, where no one factor or piece of evidence is dispositive. The Court should reverse the lower court's formulaic and unyielding application of the prejudice standard in Mr. Espinoza's case, one that failed to uphold the Legislature's intent of protecting California's immigrants from the unforeseen and unknown immigration consequences of a guilty plea.

Amici agree with both parties that the Court of Appeal erred in its application of this Court's previously articulated prejudice analysis in *People v. Vivar* (2021) 11 Cal.5th 510. Amici also agree with the parties that Mr. Espinoza has successfully established prejudice under Section 1473.7(a)(1). Given this agreement, we urge the Court to issue a published opinion advising the lower courts on Section 1473.7(a)(1)'s prejudice standard, clarifying the standard in three distinct ways. First,

the Court should hold that an immigrant defendant presumptively establishes prejudice when they demonstrate ties to family members in the United States, or if they establish lengthy residence in the United States. Second, the Court should hold that lower courts may consider *any* factor advanced by an immigrant defendant that pertains to whether there is a reasonable probability they would have rejected a plea had they known about the possible or actual immigration consequences of the plea. Third, the Court should clarify that no one piece of evidence is required to establish family ties, community ties, or any of the other factors relating to prejudice. Courts should consider a broad range of evidence, including declarations from the immigrant, when deciding whether the immigrant has established prejudice under the totality of the circumstances.

By issuing a published opinion, the Court will provide guidance to the lower courts as to the proper interpretation of Section 1473.7(a)(1)'s prejudice standard, thereby ensuring—consistent with Legislative intent—that California's immigrants, including Mr. Espinoza, can remain with their families and communities. (See Sen. Com. on Public Safety, com. on Assem. Bill No. 2867 (2017–2018 Reg. Sess.) June 12, 2018, p. 4 ["Many

immigrants suffered convictions without having any idea that their criminal record will, at some point in the future, result in mandatory immigration imprisonment and deportation, which only serves to permanently separate families"].)

II. BACKGROUND

The California Legislature passed Section 1473.7 to provide individuals who had served their criminal sentences—and thus are no longer in custody—with a mechanism to request court review of the legal validity of the underlying criminal proceeding. (Pen. Code § 1473.7(a).) Section 1473.7 protects immigrants who do not become aware of the immigration penalties of their conviction until an encounter with the immigration system, often many years after a conviction. (Sen. Com. on Pub. Safety, com. on analysis of Assem. Bill No. 813 (2015–2016 Reg. Sess.) May 10, 2016, p. 4 ["While the criminal penalty for a conviction is clear, the immigration penalty can remain 'invisible' until an encounter with the immigration system raises the issue"].) In passing Section 1473.7, the Legislature provided immigrants in California with a vehicle to challenge legally invalid convictions, when the immigrant only learns of the immigration consequences

after they have completed serving their sentence. (Pen. Code § 1473.7(a).)

Section 1473.7 protects immigrants who did not "meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence." (Pen. Code § 1473.7(a)(1).) Immigrants typically file Section 1473.7 motions to vacate prior convictions once they learn about the unforeseen immigration consequences of the conviction, such as when the immigrant receives a notice to appear in immigration court for removal (deportation) proceedings. (Pen. Code § 1473.7(b)(2).) Immigrants file Section 1473.7 motions in the Superior Court in which the conviction or sentence was entered, and each Section 1473.7 motion is heard by a judge. (Pen. Code § 1473.7(d).) If the judge grants the Section 1473.7 motion, the judge then allows the immigrant to withdraw the plea. (Pen. Code § 1473.7(e)(3).)

In order to grant a Section 1473.7(a)(1) motion, the judge must find that the movant met two separate requirements: (1) legal error, that the individual did not "meaningfully understand, defend against, or knowingly accept the actual or potential immigration consequences" of a conviction or sentence; and (2)

prejudice, that there was "a reasonable probability that the defendant would have rejected the plea if the defendant had correctly understood its actual or potential immigration consequences." (*Vivar, supra,* 11 Cal.5th at pp. 528-529.)[2] The Court granted review only on the second prong of Section 1473.7(a)(1)—how to establish prejudice under Section 1473.7—and not the legal error prong. (*People v. Espinoza* (Sept. 20, 2021, S269647) [Order Limiting Issue to be Briefed].)[3]

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[2] The distinction between the two prongs of Section 1473.7(a)(1), error and prejudice, is critical because of the federal government's definition of "conviction." (See *In re Pickering* (BIA 2003) 23 I. & N. Dec. 621, 624, *rev'd on other grounds sub nom. Pickering v. Gonzales* (6th Cir. 2006) 465 F.3d 263.) Under *Pickering*, a state court vacatur removes the conviction for immigration purposes only if it is based on "legal error," meaning that the vacatur was granted because of a procedural or substantive defect in the underlying criminal proceeding. (*Ibid.*) If the state court vacatur is granted "solely" based on post-conviction rehabilitative factors or immigration hardships, the underlying conviction is not eliminated for immigration purposes, and the immigrant may still be subject to the immigration consequences of the vacated conviction. (*Ibid.*)

[3] Indeed, the Court of Appeal did not address Mr. Espinoza's claim of legal error. (See Answer Br. at p. 14, fn. 4 ["The Court of Appeal did not address whether Espinoza had established that there was an 'error' that damaged his ability to 'meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence'"].)

"Reasonable probability" for the purpose of establishing prejudice under Section 1473.7(a)(1) is a low threshold: while it is "more than an *abstract possibility*," it is no more than "merely *a reasonable chance*." (*People v. Rodriguez* (2021) 68 Cal.App.5th 301, 324, *review den.* (Nov. 17, 2021) original italics). All it requires is that there is enough evidence to "undermine confidence in the outcome," or "at least such an *equal* balance of reasonable probabilities 'that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error.' [Citation.]" (*Ibid.*, italics added.)

After a conviction is vacated under Section 1473.7, an immigrant may be able to obtain citizenship, return home to California if they were already deported, or defend against removal. As the Legislature explained, when one in four people in California are foreign-born, and one in two children live in a household headed by a foreign-born person, providing family and community members a mechanism to remain in California is of great importance. (Pen. Code § 1016.2(g).)

III. ARGUMENT

Amici Join The Parties in Urging the Court to Clarify that an Immigrant Defendant Establishes Prejudice Through a Totality of the Circumstances Standard Under Which No Single Factor is Determinative.

The Court should clarify the flexible and fact specific nature of the prejudice standard it established in *Vivar* by holding that lower courts may consider a broad range of factors in deciding whether an immigrant has established prejudice under Section 1473.7(a)(1). These factors include, but are not limited to: U.S. citizen family, length of residency in the United States, community ties, and work history. The Court should also clarify that immigrants may establish these factors by submitting a wide range of evidence, including but not limited to: an immigrant's own declarations, declarations from an immigrant's employers, and attorneys' notes of meetings with the immigrant.

In *Vivar*, this Court held that the immigrant applicant had established prejudice based on a totality of the circumstances, clarifying that certain factors, like family ties, are "particularly relevant to this inquiry." (*Vivar, supra,* 11 Cal.5th at pp. 529-530.) Prejudice is established when an immigrant defendant demonstrates—by producing a broad range of evidence—that

they would have rejected the plea if they knew and fully understood the actual or potential immigration consequences of the plea. (*Id.* at pp. 528-529.) While highlighting the totality of the circumstances standard, the Court also noted some "[f]actors particularly 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 pp. 529-530.) The Court did not hold that any single fact was necessary to meet the prejudice standard.

Unfortunately, some lower courts, such as the one below, have misinterpreted the Court's standard in *Vivar*.[4] Rather than treating *Vivar* as an *example* of how the totality of the circumstances is applied to one immigrant, these courts have

[4] See, e.g., *People v. Salinas* (Aug. 18, 2021, F082342) 2021 WL 3660788, *1 (nonpub. opn.) (finding that Ms. Salinas was not prejudiced by the error despite the fact that at the time of the plea she had lived in the United States for over two decades and lived with her two daughters, a grandson, and a son-in-law); *People v. Bohmwald* (Oct. 20, 2021, B300743) 2021 WL 4891577, *3, *10 (nonpub. opn.) (holding that Ms. Bohmwald had not established prejudice even though she had immigrated to the United States when she was two-years-old).

treated each fact in *Vivar* as a *requirement* each immigrant must meet in order to establish prejudice. Amici now urge the Court to further clarify the standard for establishing prejudice under Section 1473.7(a)(1) in this case.

The Court should reaffirm its holding in *Vivar* that an immigrant defendant may establish prejudice in the totality of the circumstances, and further clarify the standard in three distinct ways. First, the Court should hold that an immigrant defendant presumptively establishes prejudice when they demonstrate "particularly relevant" factors such as family ties in the United States, or if they establish lengthy residence in this country. Second, the Court should hold that lower courts may consider *any* factor advanced by an immigrant defendant that pertains to whether there is a reasonable probability they would have rejected the plea had they known about the possible or actual immigration consequences of the plea. Third, and finally, the Court should further clarify that no one piece of evidence is necessary to establish family ties, community ties, or any of the other prejudice factors. Courts should consider a broad range of evidence, including declarations from the immigrant.

A. The Court Should Establish a Strong Presumption of Prejudice Under Section 1473.7 When an Immigrant Establishes "Particularly Relevant" Facts, Namely Family Ties Or Long Residence In This Country.

i. Family Ties to the United States Should Create a Strong Presumption of Prejudice.

The Court should hold that an immigrant defendant's family ties to the United States create a presumption of prejudice. This Court in *Vivar* held that "defendant's ties to the United States" are "particularly relevant" to the prejudice inquiry. (*Vivar, supra,* 11 Cal.5th at p. 530.) *Vivar* recognized that many immigrants have "formed attachments and families" in California since immigrating to the country. (*Id.* at p. 516.) Given these familial ties, "the most devastating consequence" of a criminal charge for immigrants may be their removal from the country and the ensuing separation from their family members, whether those family members include children, parents, or partners. (*Ibid.*) For an immigrant with these family ties, the Court should now establish a presumptive "reasonable probability" that they would have rejected the plea had they known of the possible consequences. In short: family ties should create a presumption of prejudice.

By clarifying that family ties to the United States establish a presumption of prejudice, the Court will ensure that Section 1473.7's protections extend to immigrants like Mr. Espinoza—whose wife and five children are U.S. citizens, and whose sibling and parents are either lawful permanent residents or citizens as well. (Appellant's Opening Br. at p. 8.)

Noe Lopez, whose Section 1473.7 motion to vacate was granted, showcases how family ties should create a presumption of prejudice. In 2013, Mr. Lopez was arrested for cultivation of marijuana. In 2018, Mr. Lopez submitted his Section 1473.7 motion to vacate to a trial court. After finding legal error—based on the fact that Mr. Lopez had limited English speaking abilities and a cognitive impairment—the court found the error was prejudicial, based on Mr. Lopez's family ties. Mr. Lopez's entire immediate family was in the United States, including his lawful permanent resident mother and his U.S. citizen sisters, and he had no close family in Mexico. Based on these ties, Mr. Lopez, an undocumented Californian, would have been eligible for ten-year cancellation of removal under 8 U.S.C. § 1229b(b)(i)(D)—a form of immigration discretionary relief—but for his conviction. The trial court considering Mr. Lopez's Section 1473.7 motion granted the

vacatur based on Mr. Lopez's family ties, allowing him to stay in the United States with his parents and sisters.[5] Family ties, such as those considered in Mr. Lopez's case, should be sufficient to establish a presumption of prejudice.

Vanessa Rodriguez represents another example of a successful Section 1473.7 motion to vacate, and also illustrates why family ties should result in a presumption of prejudice. Ms. Rodriguez was brought to the United States when she was just one-year-old, and has lived in Napa, California her entire life. In 2005, Ms. Rodriguez pled guilty to possession for sale of a controlled substance. At the time of her plea, she had two U.S. citizen children and was pregnant with a third child. Her U.S. citizen mother and legal permanent resident father also lived in the United States, along with Ms. Rodriguez's five sisters, and she had no close family or community ties in Mexico. Ms. Rodriguez sought a vacatur under Section 1473.7 fourteen years after her plea, when she learned of the immigration consequences

[5] The facts of Noe Lopez's case are alleged in the motion to vacate and supporting documents filed in the Superior Court of the State of California, County of Sonoma. (See Memorandum of Points and Authorities in Support of Motion (filed Feb. 14, 2018, SCR-638275) (on file with counsel).)

after ICE detained her as she returned from a trip abroad. But for the conviction, Ms. Rodriguez may have been eligible for adjustment of status based on her extensive family ties. Ultimately, Ms. Rodriguez successfully petitioned for a Section 1473.7 vacatur, allowing her to remain in the United States with her U.S. citizen spouse and four U.S. citizen children.[6]

As Mr. Lopez and Ms. Rodriguez demonstrate, remaining in California with their family is often a central concern for immigrants facing criminal convictions. Amici urge the Court to provide guidance to lower courts by explicitly holding that family ties create a strong presumption of prejudice under Section 1473.7(a)(1), so that immigrants like Mr. Espinoza are not separated from their families.

ii. Length of Residence in the United States Should Create a Strong Presumption of Prejudice.

The Court should also hold that long duration of residence in the United States independently establishes a presumption of prejudice. This Court recognized in *Vivar* that many immigrants in California have longstanding ties to the United States in their

[6] *People v. Rodriguez* (2021) 68 Cal.App.5th 301, *review den.* (Nov. 17, 2021).

"work and schooling . . . [and] how they have formed attachments" in this country. (*Vivar, supra,* 11 Cal.5th at p. 516.) This Court also emphasized the importance of community ties when it discussed the prejudice analysis in a related context, that of Penal Code Section 1016.5 motions to vacate convictions when a court has failed to give the defendant mandatory statutory advisements about potential immigration consequences. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 209.) As this Court explained, courts must recognize that a person who is deported "'loses his job, his friends, his home . . .' [Citation.]" (*Ibid*.)

By clarifying that lengthy residence in the United States establishes a presumption of prejudice, the Court will ensure that Section 1473.7's protections extend to immigrants like Mr. Espinoza—who immigrated to the United States in 1981 when he was thirteen-years-old and has lived here ever since. (Appellant's Opening Br. at p. 8.)

John Camacho's case also provides an illustration of why this Court should hold that long length of residence creates a presumption of prejudice. Mr. Camacho arrived in the United States when he was two-years-old and has remained in Los

Angeles, California ever since as an undocumented resident. In 2009, at the age of twenty-four, Mr. Camacho was arrested for possession of marijuana, and pled no contest to a no-custody disposition. In 2016 and 2017, Mr. Camacho brought and was granted motions to expunge his record and reduce the conviction to a misdemeanor. In 2017, Mr. Camacho consulted an immigration attorney to apply for lawful permanent residence based on his marriage to a U.S. citizen and was first notified of the immigration consequences of his plea. Mr. Camacho then petitioned for a Section 1473.7 vacatur. The Court of Appeal found that there was legal error in Mr. Camacho's plea and that his deep community ties, including length of residence, properly demonstrated he was prejudiced by the error. The Court granted the motion to vacate, allowing him to remain in the United States with his family.[7] The Court should hold that individuals like Mr. Camacho, who have long resided in this country, are presumed to establish prejudice under Section 1473.7(a)(1).

Lawful permanent resident and U.S. Army veteran **Steve Cybulski**, like Mr. Camacho, was two-years-old when he arrived

[7] *People v. Camacho* (2019) 32 Cal.App.5th 998.

in the United States from England in 1956. In 1999, Mr. Cybulski pled guilty to two marijuana-related offenses. Mr. Cybulski was deported as a result of his convictions. In 2019, Mr. Cybulski successfully petitioned for a vacatur under Section 1473.7, providing his community ties and length of residence in the United States as evidence of prejudice. He was thus able to return to the United States to help his U.S. citizen son recover from brain surgery, and back to the country where he spent the majority of his life.[8]

As Mr. Camacho and Mr. Cybulski's stories demonstrate, immigrants with long residence in the United States are deeply invested in remaining in this country when they face the possibility of criminal convictions. Amici urge the Court to provide guidance to lower courts and explicitly hold that length of residence in the United States creates a strong presumption of prejudice under Section 1473.7(a)(1), so that immigrants like Mr.

[8] The facts of Steve Cybulski's case are alleged in the motion to vacate and supporting documents filed in the Superior Court of the State of California, County of Orange, Central Justice Center. (See Motion to Set Aside the Plea and Vacate Judgment Pursuant to Penal Code Section 1473.7 (filed Mar. 18, 2019, 98WF1109) (on file with counsel).)

Espinoza are not removed from the country where they have long lived.

B. The Court Should Hold That Lower Courts May Consider Any Factor Advanced By An Immigrant Defendant In Their Section 1473.7 Motions That Pertains To Prejudice.

In addition to establishing presumptions of prejudice for family ties and long residence, the Court should clarify that an immigrant defendant can satisfy the totality of the circumstances prejudice test of Section 1473.7(a)(1) by demonstrating a wide variety of factors. The Court in *Vivar* held that prejudice is established through a totality of the circumstances approach that can be met by a producing a broad range of evidence (*Vivar, supra,* 11 Cal.5th at p 529), yet lower courts, such as the one below, have treated each fact in Mr. Vivar's case as a *requirement* each immigrant must meet in order to establish prejudice.

The Court should hold that lower courts may consider *any* factor an immigrant submits to show that they were concerned about immigration consequences at the time of the plea. Examples of such factors include, but are not limited to, community ties and financial ties. A broad range of such factors are routinely considered, for instance, by immigration courts,

when deciding discretionary applications for relief. (See, e.g., *Matter of C-V-T-* (BIA 1998) 22 I. & N. Dec. 7, 11.) In the immigration context, for example, "favorable considerations include such factors as . . . evidence of hardship to the respondent and his family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character." (*Ibid.*) The Court should hold that, because the totality test under Section 1473.7(a)(1) is flexible and case specific, the list of factors a lower court may consider is not exhaustive. The Court should explicitly clarify that lower courts may consider any factor that an immigrant defendant submits to prove they were prejudiced by the legal error in their plea.

The Court should hold that "ties to the United States" include not only length of residence and family ties, but broader community ties as well. Indeed, the job, friends, and home an immigrant loses if they are deported (*Zamudio, supra,* 23 Cal.4th at 209) exist regardless of whether the immigrant arrived when they were two-years-old and regardless of whether they have U.S.

citizen children. Immigrants who have developed strong ties within their community—whether through their jobs, volunteering, or friendships—have a strong reason to remain in the country and maintain those ties. Immigrants may also submit strong financial ties such as a consistent paycheck, paying a lease on an apartment or home, home ownership, or car payments. Declarations from employers, neighbors, friends, teachers, and other acquaintances may highlight these ties. The Court should hold that an immigrant defendant may establish prejudice through a broad, non-exclusive range of factors relating to their ties to California.

At the time of his plea agreement, for instance, Mr. Espinoza had owned his home with his wife for approximately ten years. (Appellant's Opening Br. at p. 8.) Additionally, in the twenty-three years he had been living in California he had gone to school, held jobs, and formed a community in California. (*Id.* at p. 15.) These facts demonstrate that Mr. Espinoza had established California as his home, and that had he known he faced deportation, he would not have accepted this specific plea. This Court should now clarify the totality of the circumstances

standard so that lower courts do not erroneously deny Section 1473.7 motions in the cases of individuals like Mr. Espinoza.

Jorge Lopez Merino, who arrived when he was a young child and has U.S. citizen children, also presents an example of the range of factors that courts should consider in evaluating Section 1473.7 motions. In 2005, Mr. Lopez Merino pled guilty to a controlled substance charge with the understanding that he would be referred to the Crossroads program, which would reduce his conviction to a misdemeanor. In 2018, Mr. Lopez Merino wanted to further his education and sought out the Clean Slate Clinic at the Alameda County Public Defender's Office. It was there—thirteen years later—through the immigration unit at the Public Defender's Office that he was first notified of the immigration consequences of his convictions. Mr. Lopez Merino successfully vacated his conviction under Section 1473.7, after arguing that his "deep roots here," in California, demonstrate that he was prejudiced by the legal error identified in his underlying proceedings. This relief allowed him to continue working as a Parent Partner at Alternative Family Services, a nonprofit that reunites children in the foster care system with their parents, a service integral to the Alameda County

community. By recognizing Mr. Lopez Merino's "deep roots" to the community, the superior court ensured that Mr. Lopez Merino could maintain these ties.[9]

Community ties and financial ties—such as those of Mr. Lopez Merino—are only two of many examples of factors an immigrant defendant may submit to a court to prove that there is a "reasonable probability" they would have rejected the plea had they known about the possible or actual immigration consequences of the plea. The Court should hold that, in evaluating the totality of the circumstances prejudice analysis, lower courts should consider any factor the immigrant defendant advances to demonstrate prejudice.

C. The Court Should Clarify That Courts Considering Section 1473.7 Motions Should Give Weight To An Immigrant Defendant's Own Declaration, Witness Statements, And Other Evidence of Behavioral Choices Taken To Avoid Immigration Consequences.

The Court should further clarify that an immigrant defendant can submit a wide variety of evidence to support their

[9] The facts of Jorge Lopez Merino's case are alleged in the motion to vacate and supporting documents filed in the Superior Court of the State of California, County of Alameda. (See Motion to Vacate Conviction Under Cal. Penal Code § 1473.7 (filed on Dec. 28, 2019, 150346) (on file with counsel).)

claim of prejudice—based on family ties, length of residence, community connections and other factors—in their Section 1473.7(a)(1) motion to vacate. No one piece of evidence should be necessary to establish prejudice. Declarations, from the immigrant defendant or other witnesses to their lives, are particularly useful to show the immigrant defendant's priorities and behavioral choices taken to avoid immigration consequences. To be effective, of course, the information in an immigrant's own declaration should be corroborated by objective evidence. (See *In re Alvernaz* (1992) 2 Cal.4th 924, 939.)

Amici agree with both parties that noncitizens may support their claims of prejudice through their own declarations or the witness declarations of other Californians in their community, because, as Respondent notes, "defendants know the details of their own lives." (Resp't's Answer Br. at p. 23.) Declarations by immigrant defendants and their family members are also powerful evidence that an immigrant suffered prejudice. Such declarations provide testimony regarding the immigrant defendant's priorities during the underlying criminal proceedings. (*Vivar, supra,* 11 Cal.5th at p. 530.) Declarations are particularly useful as evidence of behavioral choices and

priorities, such as to demonstrate rehabilitation or that an immigrant prioritized an immigration safe plea over a shorter prison sentence.

An immigrant defendant may submit a declaration detailing the "the importance the defendant placed on avoiding deportation[and] the defendant's priorities in seeking a plea bargain." (*Vivar, supra,* 11 Cal.5th at p. 530.). For example, an immigrant defendant may choose to take their case to trial. (See *Lee v. United States* (2017) 137 S.Ct. 1958, 1966-1968.) An immigrant who learns that a plea deal for a shorter prison sentence would render them deportable may throw a "Hail Mary" by taking the case to trial, in the hope that the jury would acquit them and they would not face any immigration consequences; a citizen, who does not fear deportation, would likely always accept a shorter prison sentence. (*Ibid.* [holding that the immigrant defendant had established prejudice because of his declarations "that avoiding deportation was *the* determinative factor for him" and as such he "would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial"].)

Other immigrants might present a declaration stating that they told their attorneys that immigration consequences were a paramount concern, but then unknowingly accepted a plea with immigration consequences. The U.S. Supreme Court, for instance, recounted how an immigrant defendant declared that he told his attorney that he was an immigrant, and repeatedly asked the attorney if he would face deportation because of the criminal proceeding, yet his attorney nevertheless erroneously informed him that he would not be deported as a result of the guilty plea. (*Lee, supra,* 137 S.Ct. at p. 1963.) This Court has also previously recognized that letters sent to the lower court after the immigrant defendant learned of the unforeseen immigration consequences of the plea is evidence that courts should consider. (*Vivar*, *supra*, 11 Cal.5th at pp. 530-531.)

Similarly, an immigrant defendant may submit a declaration describing that he would have chosen to accept a longer sentence if it did not carry immigration consequences. As the U.S. Supreme Court recognized in *Padilla*, "'preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.' [Citation.]" (*Padilla v. Kentucky* (2010) 559 U.S. 356, 368.)

Mr. Camacho's story illustrates how an immigrant's declaration can be powerful evidence of choices made to avoid deportation. Mr. Camacho was arrested for possession of marijuana, and his plea was vacated under Section 1473.7 after the Court of Appeal found that his deep community ties, including length of residence and family ties, sufficiently demonstrated he was prejudiced by the legal error in his plea. Mr. Camacho's counsel sought a no-custody plea, but did not discuss the immigration consequences of this plea. (*Camacho, supra*, 32 Cal.App.5th at p. 1002.) Mr. Camacho's declaration stated, "I would have never taken the plea that I was given if I would have known that it would have not permitted me to obtain legal status in the United States." (*Id.* at p. 1001.) Had Mr. Camacho known that there was a plea that required custody but did not trigger immigration consequences, he may have accepted the longer prison sentence.

Immigrants may also describe in their declarations their rehabilitative efforts as evidence proving that they valued their ability to remain in their community, and found immigration consequences to be of paramount concern in their underlying proceedings. **Jose Mejia** represents the rehabilitation many

Californians—both immigrants and citizens alike—achieve after a criminal conviction. Mr. Mejia, a lawful permanent resident, was convicted of a home invasion robbery. After this conviction, Mr. Mejia, who was a member of the Norteño gang, took several steps to rehabilitate his record. He left the gang. He cooperated with the District Attorney to arrest and convict another member of the gang. He completed Criminal Gangsters Anonymous and then helped others in his previous situation to leave their gangs. While in immigration detention for 34 months, he organized for safer conditions in detention. And he is now employed as a paralegal and is a valued community member continuing to advocate for better conditions in immigration detention centers. In addition to this rehabilitation, Mr. Mejia chose to remain in immigration detention for a year and a half to fight his deportation, further proving that avoiding deportation and becoming a contributing member of his community were his greatest concerns.[10]

[10] The facts of Jose Mejia's case are alleged in the motion to vacate and supporting documents filed in the Superior Court of the State of California, County of Santa Cruz. (See Motion to Vacate Conviction Pursuant to Penal Code §1473.7(a)(1) (filed on Oct. 23, 2020, F20201) (on file with counsel).)

Declarations like those in Mr. Mejia's case serve to establish many facts relating to prejudice. One immigrant may explain that they wrote to their defense counsel explaining their immigration concerns, another may describe relationships with their employers and neighbors, while another may write that they are a parent or a caretaker. The Court should clarify that an immigrant defendant may substantiate their claim of prejudice through their own declaration, and that in this declaration, they may describe the behaviors they took—including, but not limited to, gaining employment, remaining in immigration detention to fight deportation, or completing Criminal Gangsters Anonymous—to avoid deportation. Such declarations may "underscore[] how much [the immigrant] consistently valued [their] presence on American soil," their priorities while they were seeking a plea agreement, and "how likely it is that—properly advised—[they] would have prioritized a resolution of [their] case allowing [them] to stay in the country." (*Vivar, supra,* 11 Cal.5th at p. 522.)

IV. CONCLUSION

Amici respectfully ask that the Court publish an opinion providing guidance on the prejudice analysis of Section 1473.7(a)(1), emphasizing the flexible and fact-specific totality of the circumstances approach necessary to provide relief to countless Californian immigrants who experienced legal error in their plea agreements and unforeseen separation from their homes and families. First, the Court should hold that an immigrant defendant presumptively establishes prejudice when they demonstrate family ties or lengthy residence in the United States. Second, the Court should hold that lower courts may consider *any* factor advanced by an immigrant defendant that pertains to whether there is a reasonable probability they would have rejected the plea had they known about the possible or actual immigration consequences of the plea. Third, and finally, the Court should clarify that no one piece of evidence is necessary

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to establish family ties, community ties, or any of the other prejudice factors.

DATED: May 31, 2022

Respectfully submitted,

By: /s/ Jayashri Srikantiah
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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c)(1) of the California Rules of the Court, I hereby certify that this Brief of Amici Curiae contains 5,473 words, including footnotes. I have relied on the word count of the Microsoft Word program used to prepare this Certificate.

DATED: May 31, 2022

/s/ Jayashri Srikantiah
Jayashri Srikantiah

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STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305-8610.

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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.

Executed on May 31, 2022, at Stanford, California.

/s/ Jayashri Srikantiah
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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**

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5/31/2022
Date

/s/Jayashri Srikantiah

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