Case No. S260270

IN THE
SUPREME COURT
OF THE
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

ROBERT LANDEROS VIVAR
Defendant, Appellant, and Petitioner.

AFTER A DECISION BY THE COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION TWO
CASE NO. E070926

APPLICATION FOR PERMISSION TO FILE *AMICI* BRIEF AND PROPOSED BRIEF OF AMICI CURIAE THE IMMIGRANT LEGAL RESOURCE CENTER, PUBLIC COUNSEL, UNIVERSITY OF CALIFORNIA IRVINE LAW IMMIGRANT RIGHTS CLINIC, UNIVERSITY OF CALIFORNIA IRVINE LAW CRIMINAL JUSTICE CLINIC, EAST BAY COMMUNITY LAW CENTER, COMMUNITY LEGAL SERVICES IN EAST PALO ALTO, AND UNIVERSITY OF CALIFORNIA DAVIS IMMIGRANT RIGHTS CLINIC

O'MELVENY & MYERS LLP
CATALINA J. VERGARA (S.B. # 223775)
400 SOUTH HOPE STREET
LOS ANGELES, CALIFORNIA 90071-2899
TELEPHONE: (213) 430-6000
FACSIMILE: (213) 430-6407
EMAIL: cvergara@omm.com

APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF

Pursuant to California Rules of Court, Rule 8.520(f), the undersigned, on behalf of the Immigrant Legal Resource Center, Public Counsel, University of California Irvine Law Immigrant Rights Clinic, University of California Irvine Law Criminal Justice Clinic, East Bay Community Law Center, Community Legal Services in East Palo Alto, and University of California Davis Immigrant Rights Clinic (collectively, "Amici" or the "organizations"), respectfully request permission to file this *Amicus Curiae* brief in support of Petitioner and Appellant Robert Landeros Vivar.

The *Amicus Curiae* brief will assist the Court in deciding this matter by providing first-hand knowledge on two critical points raised in this case: (i) the legislative intent behind the codification of Penal Code section 1473.7 and (ii) the impact misapplication of the section has had and may continue to have on California's immigrant community. Amici provide support and legal representation to noncitizens in immigration proceedings and in motions for post-conviction relief under section 1473.7. Amici have a strong interest in the guidance this Court would bring by issuing an opinion clarifying the issues on review for the benefit of lower courts, and remanding with instructions to grant the motion for relief under section 1473.7.

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

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I.
INTRODUCTION

This case offers the Supreme Court an opportunity to provide much-needed guidance to California's increasingly divergent lower courts on an issue of exceptional importance to thousands of immigrant families: the evidentiary standard noncitizens must satisfy to obtain post-conviction relief under Penal Code section 1473.7, and the appellate standard of review of factual determinations related to those claims. The Court of Appeal in this case applied an incorrect evidentiary standard to Robert Landeros Vivar's case—one that failed to uphold the Legislature's intent of protecting noncitizens from the unforeseen immigration consequences of a guilty plea.

Even Respondent agrees, conceding error and acknowledging that Mr. Vivar has established prejudice under section 1473.7. Given this concession, we urge the Court to issue a published opinion advising the lower courts on section 1473.7's evidentiary standard and appellate standard of review. The Court could, of course, simply transfer the case back to the Court of Appeal or direct the Court of Appeal to depublish its opinion. But neither of those dispositions would address the root cause of the Court of Appeal's error: the dearth of Supreme Court precedent on the evidentiary standard to establish prejudice under section 1473.7 and standard of review on appeal. By issuing a published opinion, the Court will not only avoid future erroneous applications of section 1473.7 but also prevent situations, like Mr. Vivar's, where a noncitizen's unintended separation from his or her family and home country is needlessly prolonged because a court fails to consider facts highly relevant to the prejudice inquiry. Accordingly, the below signed immigration organizations ("Amici") respectfully submit this brief in support of Mr. Vivar's request that the Court reverse the Court of Appeal, issue an opinion clarifying the

issues on review for the benefit of lower courts, and remand with instructions to grant the motion for relief under section 1473.7.

II.
ARGUMENT

A. The California Supreme Court Should Publish an Opinion Giving Guidance to Lower Courts on Penal Code Section 1473.7

Mr. Vivar and Respondent agree on the legal reasoning here. Both agree that Mr. Vivar established that: (i) if he had been properly advised on the immigration consequences of his plea, he would not have agreed to it, and that he suffered prejudice as a result of his attorney's ineffective assistance (Appellant's Opening Br. at 25-27; Resp't's Answer Br. at 40); (ii) contextual evidence is often critical to the prejudice inquiry, particularly where many years have passed between the initial plea and the request for relief or review on appeal (Appellant's Opening Br. at 29; Resp't's Answer Br. at 32-33); and (iii) courts should apply a *de novo* standard of review to factual determinations based on a cold record in section 1473.7 claims on appeal (Appellant's Opening Br. at 43-44; Resp't's Answer Br. at 37-39). The sole point on which the parties differ—and even then, only marginally—is whether this Court should reverse the lower court in a published opinion or transfer back to the lower court. Respondent is indifferent to the Court's method of disposing of this case. Mr. Vivar, on the other hand, is adamant that the Court should take this opportunity to ensure that the parties' unified positions are adopted below, resolving not only the plight Mr. Vivar and his family have endured for the past two decades, but also the growing confusion surrounding section 1473.7 among California appellate courts. Amici agree with Mr. Vivar.

A published opinion reversing the Court of Appeal and clarifying the proper application of section 1473.7 is the best course of action for many reasons. First, it would ensure the parties' unified position is adopted

below. Despite Respondent's and Mr. Vivar's alignment on the core outcome of this case, the lower court could still disregard the parties' agreed-on positions if this Court were simply to transfer the case back to the Court of Appeal. Even if such a result were only a remote possibility, this Court has an opportunity to forestall it entirely, and should do so. Further, the issues in this case have been fully briefed and are ripe for decision. And Mr. Vivar and his family have waited decades to be reunited and to reach a conclusive determination that Mr. Vivar received ineffective assistance of counsel that ultimately prejudiced him. This Court has an opportunity, in other words, to bring peace to the Vivar family and prevent future families from being subjected to the same hardship.

The increasing discrepancies among appellate decisions discussing section 1473.7 also demonstrate that statewide guidance from this Court is needed to ensure the integrity and efficacy of California's judicial system. Specifically, appellate courts have differed in the factors they consider in determining whether a petitioner has established prejudice under section 1473.7 and in the standard of review they apply. In *People v. Camacho* and *People v. Espinoza*, for example, the courts found strong ties to the United States indicative of prejudice. (*See People v. Camacho* (2019) 32 Cal.App.5th 998, 1102; *People v. Espinoza* (2018) 27 Cal.App.5th 908, 917.) But another court, in an unpublished opinion, found that even with corroborating evidence, the defendant was not prejudiced due to the low likelihood of her success at trial. (*See People v. Chen* (June 28, 2019, A152754), review den. and opn. ordered nonpub. Oct. 9, 2019, S257172.) A Supreme Court opinion will clarify the relative importance of these factors and affirmatively state that the prejudice inquiry under section 1473.7 asks whether the petitioner would have rejected the plea if properly advised, not the petitioner's likelihood of success at trial. It should also clarify that contextual evidence—such as ties to the United States, lack of

connection to the country of removal, contemporaneous statements expressing concern about immigration consequences, and confusion about the plea—is valid, potentially dispositive in this inquiry, and should be reviewed *de novo* on appeal.

The Court should also publish an opinion to clarify on a statewide basis the appropriate standard of review of prejudice under section 1473.7 on appeal. While some courts, such as in *People v. Ogunmowo*, have applied a de novo standard of review to the trial court's factual findings, others have accorded deference to the trial court, as in *People v. Tapia*. (*Compare People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 79 *with People v. Tapia* (2018) 26 Cal.App.5th 1112, 1116.) Both Mr. Vivar and Respondent agree that the *de novo* standard is the correct standard of review for a section 1473.7 claim on appeal, whether the right at issue is statutory or constitutional. The Court should adopt this standard, resolving the current split of authority and setting a clear precedent for lower courts moving forward.

B. Depublication of the Court of Appeal's Opinion Is Insufficient to Ensure Proper Application of Section 1473.7

Merely depublishing the Court of Appeal's opinion is not an adequate solution. At Amici's request, the Court has previously changed the publication status of various decisions to ameliorate conflicting applications of section 1473.7. But as demonstrated by the Court of Appeal's decision here, depublishing these cases did not forestall further confusion by lower courts. Amici, for example, asked this Court to depublish *People v. Landaverde* (2018) 20 Cal.App.5th 287, which incorrectly stated that California defense attorneys did not have a duty to affirmatively advise noncitizen clients about immigration consequences before *Padilla v. Kentucky*. (Request for Depublication or Partial

Depublication (Cal. Rules of Court, rule 8.1125), *People v. Landaverde* at 1.) This Court granted the request. Similarly, in *People v. Novoa* (2019) 34 Cal.App.5th 564, the Court depublished the opinion at Amici's urging after Amici explained that the Court of Appeal in *Novoa* improperly characterized "the law governing the scope of defense counsel's duties in California prior [to] the Supreme Court decision in *Padilla v. Kentucky* (2010) 559 U.S. 356" and that these misstatements could "cause confusion in the lower courts and may ultimately harm many noncitizen defendants who pleaded guilty or no contest before 2010." (Request for Depublication or Partial Depublication (Cal. Rules of Court, rule 8.1125), *People v. Novoa* (2019) 34 Cal.App.5th 564 at 1.) Amici also asked this Court to depublish *People v. Gonzalez* (September 27, 2018, D073436) , which incorrectly stated that, pre-*Padilla*, defense attorneys had no affirmative obligation to advise noncitizen clients about potential adverse immigration consequences. (Request for Depublication (Cal. Rules of Court, rule 8.1125), *People v. Gonzalez* (September 27, 2018 D073436) at 1.) The Court granted this request as well.

While Amici applaud the Court's decisions to depublish various cases that have misconstrued section 1473.7, depublication alone is not enough to unambiguously set forth the appropriate standard of review, as it only removes as binding certain misstated appellate opinions. Without a published opinion providing guidance on the prejudice inquiry in the section 1473.7 context, appellate courts will likely continue to diverge in their interpretations. But if the Court were to issue a published opinion directly addressing the key issues—(1) that prejudice in the section 1473.7 context revolves around what the petitioner would have chosen if properly advised; (2) that contextual evidence is fundamental to that inquiry; and (3) that appellate courts should review the factual determinations in these

claims *de novo*—it would reduce the need for the Court's continued piecemeal intervention.

The Court has the opportunity now to stem the tide and clarify once and for all the evidentiary standard and standard of review under section 1473.7, thereby preventing future outcomes like Mr. Vivar's case, where a family has endured unintended and unnecessary separation due to erroneous applications of section 1473.7.

C. The Immigrant Legal Resource Center, as a Main Sponsor of Section 1473.7, Is Well Positioned to Speak to the Legislative Intent

The Immigrant Legal Resource Center ("ILRC") is qualified to address the intent of section 1473.7 because it worked with the Legislature to draft the statutory language. A national resource center based in San Francisco, the ILRC is one of the lead agencies in the United States with expertise in the immigration consequences of criminal convictions. Specifically, the ILRC provides technical assistance to criminal defenders throughout the state on the immigration consequences of criminal cases and writes the only legal treatise in the Ninth Circuit on the intersection between immigration and criminal laws. The publication is widely referenced by immigration judges, federal court judges, and immigration and criminal defense attorneys. For the 25 years ILRC has worked in this space, it has encountered and assisted countless immigrants who have been adversely impacted by their criminal cases many years and sometimes decades later in immigration proceedings.

Through its work with California's immigrant families, ILRC became aware of a major deficiency in California law that had a devastating impact on the state's immigrant communities. Before section 1473.7's enactment, only individuals in prison, on parole, or on probation could ask

a court to review the validity of their convictions. Individuals who had already served their criminal sentences were left with no avenue for relief. This gap was particularly problematic for immigrants, because the immigration penalty of a conviction could remain "invisible" until an encounter with the immigration system. Despite California case law dating back to, at least, 1987, requiring defense counsel to inform defendants about the immigration consequences of their convictions, some defense attorneys still failed to do so. That meant some immigrants did not discover until years later that their conviction made them deportable—learning of their predicament only when immigration authorities initiated removal proceedings. By that time, however, there was no mechanism by which to avoid the unintended immigration consequences of their conviction.

Before 2009, Californians facing deportation for old, legally invalid convictions could use *coram nobis* to challenge those convictions. But in 2009, the California Supreme Court held that *coram nobis* could not be used to raise claims of ineffective assistance of counsel, thereby eliminating the last post-custodial vehicle to vacate legally invalid convictions. (*People v. Kim* (2009) 45 Cal.4th 1078.) To ensure an alternative, the Court specifically invited legislative action, noting that, "when these established remedies have proved inadequate, the Legislature has enacted statutory remedies to fill the void." (*Ibid*. at 1106.)

During the 2015-2016 Legislative Session, ILRC worked with the California Legislature to answer the Supreme Court's call and remedy this gap in California law by drafting and passing AB 813 to afford post-conviction relief to people no longer in custody who pleaded guilty without understanding the immigration consequences. (*See* Sen. Floor, analysis of Assem. Bill No. 813 (2015–2016 Reg. Sess.) p. 4.) Before AB 813's passage, California lagged behind the rest of the country in providing a

mechanism for challenging unlawful convictions based on prejudicial error after criminal sentences had been served. Forty-four states and the federal government provided opportunities for relief at the time, but not California. (*See* Sen. Public Safety Com., analysis of Assem. Bill No. 813 (2015–2016 Reg. Sess.) p. 4.) Through AB 813—and its codification as section 1473.7—the Legislature intended to provide California's millions of immigrants with a much-needed safeguard the community had lacked. To this end, the statute allowed a "person no longer imprisoned or restrained" to "prosecute a motion to vacate a conviction or sentence" that was "legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty." (Pen. Code, § 1473.7, subd. (a)(1)).

Here, Respondent concedes error and agrees that Mr. Vivar established prejudice under section 1473.7. Simply remanding to the Court of Appeal would not be enough to fulfill section 1473.7's mandate: to rectify a gross injustice and provide necessary post-conviction relief to California immigrants. Without a judgment of reversal, a transfer could risk leaving the case open for resolution on the lower court's terms—an outcome that could have widespread ramifications and thwart the Legislature's intent. Also, without a published opinion explaining the contours of the prejudice inquiry and the standard of review on appeal, lower courts may continue to act in a manner that frustrates the Legislature's intent.

Mr. Vivar's situation is not unique. By providing guidance now, the Court has an opportunity to prevent countless other families from enduring unintended and unnecessary separation due to erroneous applications of section 1473.7.

III.
CONCLUSION

Amici respectfully request that the Court hear oral argument, reverse the Court of Appeal, issue an opinion clarifying the issues on review for the benefit of lower courts, and remand with instructions to grant the motion for relief under section 1473.7.

Dated: October 12, 2020

Respectfully submitted,

O'MELVENY & MYERS LLP

By: /s/ Catalina J. Vergara
Catalina J. Vergara

O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071-2899
Telephone: (213) 430-6000
Facsimile: (213) 430-6407

Attorneys for *Amici Curiae* University of California, Irvine Law Immigrant Rights Clinic; University of California, Irvine Law Criminal Justice Clinic; East Bay Community Law Center; Community Legal Services in East Palo Alto; University of California, Davis Immigrant Rights Clinic; and Public Counsel

CERTIFICATE OF WORD COUNT

The text of this *Amicus Curiae* Brief consists of 2,400 words as counted by the Microsoft Word 2016 software program used to generate the *Amicus Curiae* Brief.

Dated: October 12, 2020

Respectfully submitted,

O'MELVENY & MYERS LLP

By: /s/ Catalina J. Vergara
Catalina J. Vergara

Attorneys for *Amici Curiae* University of California, Irvine Law Immigrant Rights Clinic; University of California, Irvine Law Criminal Justice Clinic; East Bay Community Law Center; Community Legal Services in East Palo Alto; University of California, Davis Immigrant Rights Clinic; and Public Counsel

PROOF OF SERVICE

I am over the age of eighteen years and not a party to the within action. I am employed in the county where the service described below occurred. My business address is 400 South Hope Street, 18th Floor, Los Angeles, California 90071-2899. I am readily familiar with this firm's practice for collection and processing of electronic and physical correspondence. Participants who are registered with TrueFiling will be served electronically. On October 12, 2020, I served the following:

APPLICATION FOR PERMISSION TO FILE AMICI BRIEF AND PROPOSED BRIEF OF AMICI CURIAE THE IMMIGRANT LEGAL RESOURCE CENTER, PUBLIC COUNSEL, UNIVERSITY OF CALIFORNIA IRVINE LAW IMMIGRANT RIGHTS CLINIC, UNIVERSITY OF CALIFORNIA IRVINE LAW CRIMINAL JUSTICE CLINIC, EAST BAY COMMUNITY LAW CENTER, COMMUNITY LEGAL SERVICES IN EAST PALO ALTO, AND UNIVERSITY OF CALIFORNIA DAVIS IMMIGRANT RIGHTS CLINIC electronically through TrueFiling to the participants listed below:

Adrian R. Contreras
OFFICE OF THE STATE ATTORNEY GENERAL
P.O. Box 85266
San Diego, CA 92186
Adrian.Contreras@doj.ca.gov
Attorneys for Respondent

Dane Shikman
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
Telephone: (415) 512-4092
Dane.Shikman@mto.com
Attornevs for Appellant

Office of the Clerk
Court of Appeal
Fourth Appellate District
Division 2
3389 Twelfth Street
Riverside, CA 92501

Joseph Lee
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue, 50th Floor
Los Angeles, CA 90071
Telephone: (213) 683-9157
Joseph.Lee@mto.com
Attorneys for Appellant

Superior Court of the County of Riverside
Attn: Hon. Bambi J. Moyer
Riverside Hall of Justice
4100 Main Street
Riverside, CA 92501
appealstream@riverside.courts.ca.gov

Riverside County District Attorney's Office
3960 Orange Street, First Floor
Riverside, CA 92501
appellate-unit@rivcoda.org

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 12, 2020, at Los Angeles, California

/S/ Emma M. Tehrani
Emma M. Tehrani