

No.

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In The  
Supreme Court of the United States

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State of Arizona,

Applicant,

v.

Hector Sebastian Nunez-Diaz,

Respondent.

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APPLICATION DIRECTED TO THE HONORABLE ELENA KAGAN  
FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A  
WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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October 3, 2019

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

The State of Arizona intends to file a petition for a writ of certiorari in this case and respectfully seeks a 30-day extension of time to do so. The jurisdiction of this Court would be invoked pursuant to 28 U.S.C. § 1254(1).

This case presents important issues of federal law, including whether aliens not lawfully present in the United States (and thus subject to deportation) may establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), for deficient attorney advice regarding the immigration law consequences of pleading guilty to deportable felonies.

The lower courts are divided on this issue. The Fourth, Fifth, and Eleventh Circuits have held that unauthorized aliens are categorically barred from establishing such prejudice.<sup>1</sup> So too have the Supreme Court of Tennessee and the Texas Court of Criminal Appeals,<sup>2</sup> as have a broad array of federal district courts.<sup>3</sup>

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<sup>1</sup> *United States v. Batamula*, 823 F.3d 237, 242 (5th Cir.) (en banc) *cert. denied* 137 S. Ct. 236 (2016) (“[C]ontrolling law unequivocally” establishes that a criminal defendant cannot “show prejudice because he was already deportable.”); *Gutierrez v. United States*, 560 F. App’x 924, 927 (11th Cir.) *cert. denied* 135 S. Ct. 302 (2014) (holding that *Strickland*’s prejudice requirement was not satisfied because the defendant “never obtained legal status, and thus continued to be subject to removal”); *United States v. Sinclair*, 409 F. App’x 674, 675 (4th Cir. 2011) (holding that defendant’s “substantial rights were unaffected because he was an illegal alien and therefore his guilty plea had no bearing on his deportability”).

<sup>2</sup> *Garcia v. State*, 425 S.W.3d 248, 261 n.8 (Tenn. 2013) (“[C]ourts have consistently held that an illegal alien who pleads guilty cannot establish prejudice” under *Padilla*.) (collecting cases); *State v. Guerrero*, 400 S.W.3d 576, 588-89 (Tex. Crim. App. 2013) (“Unlike Jose Padilla, appellee was an undocumented immigrant and was deportable for that reason alone, both in 1998 and today.... The prospect of

In contrast, the Supreme Court of Iowa has held that an unauthorized alien can potentially show prejudice under *Strickland* by pointing to specific supporting evidence, such as potential eligibility for cancellation of removal. *See Diaz v. State*, 896 N.W.2d 723, 733-34 (Iowa 2017). And the Supreme Court of Arizona has now held that the defendant need not actually demonstrate any actual prejudice with record evidence; instead it is enough that the defendant “would [not] necessarily have been removed had he gone to trial and been acquitted.” *State v. Nunez-Diaz*, 444 P.3d 250, 255 (Ariz. 2019) (opinion attached hereto as Exhibit A).

Despite the complete absence of evidence supporting *Strickland* prejudice, the Arizona Supreme Court concluded such prejudice existed. *Nunez-Diaz*, 444 P.3d at 254-55.<sup>4</sup> In doing so, the court effectively established a presumption of prejudice in all cases involving deficient advice regarding deportation, which relieves criminal defendants of satisfying their burden under *Strickland*. Its decision thus also directly conflicts with *Strickland* and this Court’s recent decision in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), which put the burden on defendants to establish prejudice, rather than requiring the government to prove harmlessness.

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removal therefore could not reasonably have affected his decision to waive counsel and plead guilty.”)

<sup>3</sup> *See, e.g., United States v. Aceves*, No. 10-00738, 2011 WL 976706, at \*5 (D. Haw. Mar. 17, 2011); *United States v. Gutierrez-Martinez*, No. 10-2553, 2010 WL 5266490, at \*4 (D. Minn. Dec. 17, 2010); *Mudahinyuka v. United States*, No. 10-5812, 2011 WL 528804, at \*4 (N.D. Ill. Feb. 7, 2011); *United States v. Perea*, No. 11-2218, 2012 WL 851185, at \*5 n.4 (D. Kan. Mar. 8, 2012); *United States v. Perez*, No. 8-296, 2010 WL 4643033, at \*3 (D. Neb. Nov. 9, 2010).

<sup>4</sup> Notably, Nunez-Diaz’s own amici admitted that “[n]o evidence was presented about either Mr. Nunez understood about his immigration status or whether he was eligible for any discretionary relief upon removal.” Brief of Amici Curiae Arizona Attorneys For Criminal Justice et al. (filed Ariz. April 8, 2019).

*Weaver*, 137 S. Ct. at 1911 (“*Strickland* prejudice is not shown automatically. Instead, the burden is on the defendant[.]”); *Strickland*, 466 U.S. at 693 (recognizing a “general requirement that the defendant affirmatively prove prejudice”).

An extension is warranted because lead counsel for the State has numerous other commitments during the same time period, including responsibility for drafting or reviewing three other merits briefs in the Arizona Supreme Court in cases that were just recently granted review, all presently due on the same day as the State’s petition here. The State therefore respectfully seeks a 30-day extension of time, from October 15<sup>5</sup> to November 14, 2019, to file a petition for certiorari.

### CONCLUSION

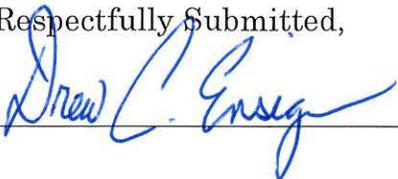
For the foregoing reasons, the undersigned respectfully requests that this Court extend the deadline to file a petition for certiorari in this action from October 15 to November 14, 2019.

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<sup>5</sup> Ninety days from the Arizona Supreme Court’s July 16 decision is October 14, which is a federal holiday (Columbus Day). *See* 5 U.S.C. § 6103.

October 3, 2019

Respectfully Submitted,



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