No. 19-645

In the Supreme Court of the United States

STATE OF ARIZONA,
Petitioner,

v.

HECTOR SEBASTION NUNEZ-DIAZ,
Respondent.

On Petition for a Writ of Certiorari to the Arizona Supreme Court

ARIZONA'S REPLY BRIEF

MARK BRNOVICH
Attorney General

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

BRUNN W. ROYSDEN III
Division Chief

ORAMEL H. (O.H.) SKINNER
Solicitor General
DREW C. ENSIGN
Deputy Solicitor General
Counsel of Record
ANTHONY R. NAPOLITANO
ROBERT J. MAKAR
Assistant Attorneys General

OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
Drew.Ensign@azag.gov

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES–Continued

STATUTES

OTHER AUTHORITIES

REGULATIONS

ARGUMENT

In Respondent's telling, this Court should not grant review of the questions presented because this Court has already resolved them conclusively in *Lee v. United States*, 137 S.Ct. 1958 (2017). Respondent's brief in opposition ("BIO") is unequivocal on this: arguing that "[t]his case is squarely governed by *Lee*," and thus the State's argument that "the lower courts are divided after *Lee* is indefensible." BIO 2, 9-11 (citation omitted). Respondent's not-quite-explicit premise is that *Lee* obliterated *all distinctions* between lawful permanent residents and unauthorized aliens for purposes of prejudice under *Padilla v. Kentucky*, 559 U.S. 356 (2010), thereby burying a robust, pre-*Lee* split of authority.

But *Lee* involved a *lawful* permanent resident who, absent a conviction, had a *vested right* to remain in the United States permanently. *Lee* does not address unauthorized aliens specifically at all. Nor does *Lee*'s reasoning address whatsoever the rationale of the courts applying the categorical bar: *i.e.*, that, absent any vested right to remain in the United States, a criminal defendant/unauthorized alien cannot suffer cognizable prejudice from a *Padilla* violation. And this Court lacked any conceivable reason to address that issue in *Lee* given Lee's *lawful* status.

Lee thus leaves open the question of how *Padilla* applies to unauthorized aliens. And while Respondent believes his interpretation of *Lee* is so unassailable as to put contrary arguments beyond fair debate, BIO.2, he cites no court decision outside of Arizona that has adopted his reading of *Lee*.

In reality, the entrenched divisions on the two questions presented persist post-*Lee*. Indeed, Texas and Florida state courts regard the categorical inability of unauthorized aliens to establish *Padilla* prejudice as sufficiently beyond debate as to warrant *summary* reversals/affirmances. And Massachusetts and Iowa courts (unlike Arizona's) continue, post-*Lee*, to require actual evidence of objective rationality to establish prejudice. Those positions continue to stand in stark contrast to the decision below.

Respondent's position does have the virtue of simplifying this petition. If Respondent's reading of *Lee* is correct, the State agrees certiorari should be denied. Conversely, if *Lee* did not conclusively resolve these issues, Respondent offers precious little argument in opposition to the State's petition and review should be granted.

Alternatively, at a bare minimum, this Court should free the Arizona Supreme Court from its mistaken belief that *Lee* squarely controlled these issues by summary vacatur and remand.

I. *LEE* DID NOT DECIDE THE QUESTION PRESENTED

Respondent's opposition rests almost exclusively on the proposition that *Lee* controls here because it annihilates any distinction lower courts have previously recognized between lawful and unauthorized aliens for purposes of *Padilla* prejudice. Indeed, the BIO simply glosses over the lawful/unauthorized distinction. But since that distinction is central to the courts adopting the majority categorical bar, Pet.16-18, the proposition that *Lee* controls here stands or falls on the conclusion that *Lee* swept away any such

lawful/unauthorized distinction for purposes of *Padilla* prejudice. And *Lee* didn't.

Lee involved a lawful permanent resident. 137 S.Ct. at 1963. By definition, Lee was lawfully present in the United States and had a vested right to remain if he were acquitted. 8 C.F.R. §1001.1(p). This Court therefore had no reason to consider whether an alien who was not lawfully present in the United States—and thus subject to removal at any time without any criminal conviction—could assert cognizable prejudice for a *Padilla* violation. Indeed, this Court did not discuss how its holding would apply to unauthorized aliens at all—the words "undocumented" and "unauthorized" do not appear at all, and "illegal" is used only once, in dissent, modifying "drugs." 137 S.Ct. at 1974 (Thomas, J., dissenting). In short, *Lee* is not controlling as to how *Padilla* applies to unauthorized aliens; instead, it is *silent*.

Nor is the rationale of *Lee* even in tension with the categorical bar recognized by a majority of jurisdictions. Pet.16-18. Those courts' rule is faithfully derived from this Court's recognition that *Strickland* prejudice cannot exist absent an underlying "substantive or procedural right to which the law entitles him." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). The Fifth Circuit, for example, recognized "unequivocally" that unauthorized aliens cannot "show prejudice because [they were] already deportable." *United States v. Batamula*, 823 F.3d 237, 242 (5th Cir. 2016) (en banc); *accord State v. Guerrero*, 400 S.W.3d 576, 588-89 (Tex. Crim. App. 2013). The outcome of Nunez-Diaz's claim under the majority rule/*Lockhart* is clear: while Nunez-Diaz's asserted *Strickland* prejudice consists entirely of

alleged interference with his right to stay in the U.S./avoid deportation, he has *no such right* and hence cannot show prejudice.[1]

Lee does not disturb this rationale in the slightest. Lee, as a lawful permanent resident, had an unquestioned "substantive … right to which the law entitles [him]," *Lockhart*, 506 U.S. at 372—*i.e.*, the right to remain in the U.S. (absent conviction). But this Court had no occasion to evaluate whether an unauthorized alien with no right to remain in the U.S. had an equivalent right that could give rise to cognizable prejudice; and its opinion plainly did not. Indeed, the Tenth Circuit, post-*Lee*, continues to doubt whether "*Padilla* applies" *at all* to those "already subject to removal." *United States v. Donjuan*, 720 F. App'x 486, 490 (10th Cir.), *cert. denied* 139 S.Ct. 590 (2018).

---

[1] Respondent also points in passing to the permanent reentry bar. BIO.1, 14. But Nunez-Diaz does not dispute that he *never* testified that he placed any value on avoiding the readmission bar, Pet.9, or the implausibility of prejudice on that theory, Pet.24-25. Nor does the decision below or the BIO point to any contrary evidence. And the BIO is flatly wrong in contending (at 1) that "all agreed" that Nunez-Diaz would have gone to trial to avoid the *readmission bar* (rather than deportation). *See* Pet.9, 24-25.

In addition, the readmission bar was equally applicable to most or all of the other unauthorized aliens in the cases recognizing the categorical bar. 8 U.S.C. §1182(a)(2)(A)(i)(II). But all of those defendants failed to obtain *Padilla* relief. Moreover, Nunez-Diaz has not even *alleged* that *Padilla* extends to advice about lesser immigration consequences such as the readmission bar, rather than deportation. *Cf. Daramola v. State*, 294 Or. App. 455, 467-68 (2018) (noting split of authority on issue of whether *Padilla* "extends beyond mere removability to broader immigration consequences").

Lee is not controlling on issues on which it is completely silent. Respondent's bluster (at 2) that the State purportedly lacks "the courage of its conviction to ask the Court to overrule *Lee*" is thus misplaced—the State has no need to seek to overrule *Lee*, as *Lee* self-evidently did not extend itself to unauthorized aliens such as Respondent.

II. SPLITS EXIST BOTH PRE- AND POST-*LEE*

Aside from his *Lee*-resolves-all-questions premise, Respondent's BIO advances only a perfunctory attempt to discount the split amongst lower courts. That effort is unavailing. And these splits continue to persist—and indeed have become even *more entrenched* to the point of summary, unreasoned reversals/affirmances—post-*Lee*.

A. THE LOWER COURTS ARE SPLIT ON WHETHER A CATEGORICAL BAR EXISTS

Respondent attempts (at 11-15) to discount the existence of any courts applying a categorical rule. But Respondent is alone in denying the existence of courts applying that categorical rule and the resulting split.

Respondent contends that neither the Fifth Circuit nor Texas Court of Criminal Appeals adopted a categorical rule, characterizing the former as "self-consciously limited to its facts" and the latter as "case-specific." BIO.11, 14. But seemingly *no decision* has ever failed to recognize that either court adopted a categorical rule, and Respondent tellingly does not cite any authority for his position.

Notably, the Arizona Supreme Court credited the Fifth Circuit's rule as being categorical and based on defendant being "already removable." App.9a. And

the Horowitz article otherwise favorably cited by Respondent (at 15) had no difficulty in recognizing that those decisions had held that *Padilla* categorically did not apply to unauthorized aliens. *See* Daniel A. Horwitz, *Actually,* Padilla *Does Apply to Undocumented Defendants*, 19 Harv. Latino L. Rev. 1, 5 (2016). Indeed that article exhaustively catalogs the extensive splits here. *Id.* And other courts similarly recognize that the Fifth Circuit and Texas have adopted a categorical rule. *See*, *e.g.*, *Artica-Romero v. United States*, No. 3:17-CR-44-J-34PDB, 2019 WL 447881, at *7 (M.D. Fla. Feb. 5, 2019); *Rosario v. State*, 165 So.3d 672, 672-73 (Fla. Ct. App. 2015) ("prejudice cannot be established if the defendant was present in the country unlawfully or was otherwise subject to removal"; citing *Guerrero*).

Respondent similarly discounts (at 14-15) the Tennessee Supreme Court's decision in *Garcia v. State*, 425 S.W.3d 248 (Tenn. 2013). This particular argument has a glimmer of merit, as that court did indeed decide *Garcia* on the performance prong. *Id.* at 261. But other courts and Respondent's own article recognize Tennessee as adopting the categorical rule. *See* Horowitz, *supra*, at 5; Pet.18. And Respondents do not cite a single decision adopting a contrary reading of *Garcia*.

Respondent also does not address the "nearly half a dozen Florida [appellate] courts" that have adopted the categorical rule. *See id.* at 4-5. Although the Florida Supreme Court has never reached the issue itself, it has never had reason to do so, given the unanimity of its lower appellate courts. That uncontested unanimity further adds to the splits warranting this Court's review.

Respondent also summarily discounts in one breath (at 15) the categorical holdings of the Fourth and Eleventh Circuits because they are unpublished. While that consideration might militate against review if all of the divergent decisions were unpublished, here the unpublished circuit court decisions provide further evidence of the depth of the splits and the sheer improbability of them all resolving on their own absent this Court's review.

For all of these reasons, Respondent's attempt to deny the existence of a split pre-*Lee* fails.

B. Those Courts Rejecting The Categorical Bar Are Divided Amongst Themselves

Even if the categorical rule did not apply (or was somehow overruled in *Lee*), there remains a robust split amongst state high courts as to what quantum of evidence is needed to establish *Strickland* prejudice for a *Padilla* claim. Pet.16-20. Respondent's contrary position fails for two reasons.

First, Respondent insists that there is no split because of the "robust evidentiary record" here. Pet.15-16. That is specious. Respondent's own amici admitted *three times* that there was "no evidence" supporting the objective rationality of Respondent's desire to go to trial to avoid deportation. Pet.4-5. Respondent does not even acknowledge—let alone contest—these repeated no-supporting-evidence admissions.

Second, Respondent improperly conflates the subjective and objective components of the *Strickland* prejudice inquiry. Nunez-Diaz tellingly points to "testimonial evidence" that he "would have

opted instead to go to trial" if properly counseled. BIO.16. That satisfies Respondent's burden of proving his subjective intent—which the State does not seek review of.

But the *Strickland* prejudice inquiry is not satisfied by mere subjective intent and instead also requires *objective rationality*. To establish prejudice, *Padilla* and *Lee* expressly demand that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372; *accord Lee*, 137 S.Ct. at 1968; *accord Heard v. Addison*, 728 F.3d 1170, 1184 (10th Cir. 2013) (This "threshold of rationality" is "objective.").

Nunez-Diaz's *Padilla* claim is that he would have rejected the plea to preserve some possibility of remaining in the U.S. App.3a-4a; 71a-72a. He thus necessarily needed to show some evidence that such a strategy had even the slightest of chances in resulting in his ability to remain in the U.S. for such a scheme to be "rational under the circumstances."

But there is *absolutely no such evidence*. Respondent's own amici forthrightly acknowledged as much. Pet.4-5. And Respondent tellingly points exclusively (at 15-16) to testimonial evidence of his subjective intent and not to a *scintilla* of evidence supporting objective objective rationality. And the *ir*rationality of that strategy is patent: requiring success on successive "Hail Mary's" without any evidence even hinting at a viable defense in *either* criminal trial *or* deportation proceedings. Pet.22-28. If Nunez-Diaz satisfies *Padilla*/*Lee*'s objective rationality requirement, no one else will ever fail to do so and this Court should abandon the pretense that such a requirement exists.

Respondent ultimately attempts to elide the splits on the second question presented by conflating subjective intent with objective rationality. This Court should see through that ruse.

C. THESE SPLITS PLAINLY PERSIST POST-*LEE*

Contrary to Respondent's assertion, the irreconcilable splits that existed pre-*Lee* have not disappeared. Instead, they have become even more entrenched and intractable.

1. QP1

As to the categorical bar, *Lee* has not eliminated any split. Indeed, the decision below stands utterly peerless in believing that *Lee* actually decided these issues and overruled the majority categorical bar. App.9a.

Texas state courts notably have not retreated whatsoever. Texas intermediate courts have continued to recognize a categorical bar post-*Lee*. *See*, *e.g.*, *Simon v. State*, No. 03-17-00215-CR, 2018 WL 3468688, at *7 (Tex. Ct. App. July 19, 2018). Indeed, the categorical bar has become so entrenched in Texas as to merit summary, otherwise-unreasoned reversal by Texas's highest criminal court. *See Ex parte Vences*, No. WR-89,064-01, 2019 WL 575918, at *1 (Tex. Feb. 13, 2019) (citing solely *Guerrero*, 400 S.W.3d at 588–89 (categorical prejudice holding)).

That emphatic, summary reversal based solely on *Guerrero*'s categorical bar squarely belies Respondent's contention that no "other court … would have decided this case any differently." BIO.15.

Like Texas, Florida state courts have similarly persisted such that they summarily affirmed denials

of relief, citing cases adopting the categorical bar. *See Vaz v. State*, No. 3D20-0107, 2020 WL 808744, at *1 (Fla. Ct. App. Feb. 19, 2020) (citing *Yanez v. State*, 170 So. 3d 9, 11 (Fla. Ct. App. 2015) (adopting categorical bar)).

To be sure, the Fifth Circuit has yet to restate its categorical bar post-*Lee*. But lower courts continue to believe *Batamula* survives *Lee*. *See*, *e.g.*, *Artica-Romero*, 2019 WL 447881, at *7; *State v. Marzouq*, 836 S.E.2d 893, 897 (N.C. Ct. App. 2019) (applying *Batamula* post-*Lee*). And there is not the slightest reason to believe that the Fifth Circuit—which took the case en banc *sua sponte* to reverse a non-categorical holding by a lopsided 13-2 vote—has the slightest inclination to reverse itself, particularly based on nothing more than *Lee*'s silence on this issue.

2. QP2

Both Iowa and Massachusetts state courts continue—unlike the Arizona Supreme Court—to require *actual evidence* of prejudice post-*Lee*. *See State v. Mellish*, 928 N.W.2d 167 (Iowa Ct. App. 2019) (rejecting "per se rule of prejudice" and reiterating Iowa's case-by-case rule); *Commonwealth v. Lopez*, 96 Mass. App. Ct. 34, 39-41 *review denied*, 483 Mass. 1105 (2019) (denying relief under *Padilla* to unauthorized alien that failed to "meet his burden" under *Strickland*).

In contrast, the Arizona Supreme Court granted relief under *Padilla* despite the absence of *any* evidence supporting the objective rationality of Respondent's position. Pet.4-5; 21-28; *supra* at 7-8. This square split—which persists post-*Lee*—continues to warrant this Court's review.

III. THIS COURT'S REVIEW IS WARRANTED

Respondent does not deny (at 18) that there is a particularly acute need for uniformity in immigration law. Pet.34-35. Instead, Nunez-Diaz suggests that "there is no disagreement among the lower courts"—which fails as discussed above.

Respondent further suggests (at 17-18) that the questions presented "are not important" as there is neither "a single post-*Lee* case that turns on either of the questions presented," nor a case "applying *one* of those decisions in an outcome determinative way." But as discussed above, the Texas and Florida courts regard these issues as so settled that they apply the categorical bar not only in an outcome-determinative fashion, but summarily and without further reasoning. *Supra* at 9-10. And many lower courts rely on *Batamula*, *Guerrero*, and *Garcia* to reject categorically *Padilla* prejudice claims. *See Artica-Romero*, No-2019 WL 447881, at *7 (relying on *Batamula inter alia*); *Rosario*, 165 So. 3d at 672 (citing *Guerrero* and *Garcia inter alia* and adopting categorical bar). Indeed, the North Carolina Court of Appeals applied *Batamula* for its categorical holding in the short window between the petition and the BIO. *Marzouq*, 836 S.E.2d at 897 ("agree[ing] … in principle" with categorical rule of *Batamula*).

Respondent offers little other reason to doubt the highly recurrent nature of these questions. He does not contest that nearly 150,000 aliens were deported in 2018 based on criminal convictions alone. Pet.31. Nor does he contest that "*Padilla* is notably one of the most-cited decisions of all time." Pet.31. Indeed, it has been cited by courts almost 200 additional times in the short window between the petition and

this reply—more than once a day. The potential mischief presented by the decision below is thus enormous. Nor should this Court wait for the pernicious effects to become calamitous before granting review.

Nunez-Diaz also makes little effort to contest that this case presents an ideal vehicle to resolve the questions presented aside from his curious contention that the record here is "robust." It isn't. *Supra* at 7-8. And the court below tellingly pointed to no evidence whatsoever supporting the objective rationality of Nunez-Diaz's proposed strategy.

IV. ALTERNATIVELY, THIS COURT SHOULD SUMMARILY VACATE AND REMAND

At a minimum, this Court should summarily vacate, make plain that *Lee* did not control this case, and remand. A clear majority of the Arizona Supreme Court was convinced both that (1) *Lee* mandated the outcome here and (2) that result was profoundly unjust. And Respondent offers no apparent opposition to summary vacatur aside from his *Lee*-controls-everything-here premise.

Because *Lee* is actually silent as to *Padilla* prejudice for unauthorized aliens, this Court should free the lower court from its mistaken belief that its hands were tied by *Lee* and permit Arizona courts to adjudicate this case free from manifest injustice that Arizona's judges believed they were compelled to inflict.

CONCLUSION

The petition for certiorari should be granted, and the case should be heard on the merits. Alternatively, this Court should summarily vacate, make clear that *Lee* is not controlling as to aliens not lawfully present in the U.S., and remand for further proceedings.

Respectfully submitted.

MARK BRNOVICH
Attorney General

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

BRUNN W. ROYSDEN III
Division Chief

ORAMEL H. (O.H.) SKINNER
Solicitor General
DREW C. ENSIGN
Deputy Solicitor General
Counsel of Record
ANTHONY R. NAPOLITANO
ROBERT J. MAKAR
Assistant Attorneys General

OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
Drew.Ensign@azag.gov

Counsel for Petitioner