No. 19-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Padilla v. Kentucky*, 559 U.S. 356 (2010) and *Lee v. United States*, 137 S. Ct. 1958 (2017), this Court held that *lawful* permanent residents that received deficient advice regarding immigration-law consequences of a plea can assert claims under *Strickland v. Washington*, 466 U.S. 668 (1984). Although this Court has not yet addressed how these precedents apply to unlawfully present aliens, the lower courts are deeply divided as to how they do.

Respondent, an unauthorized alien, asserted a *Padilla*/*Lee* claim. It is undisputed that he had no substantive right to remain in the United States, and was thus subject to deportation at any time. Respondent also submitted no evidence whatsoever that he had a viable defense *either* against the criminal charges *or* deportation if he were acquitted. The Arizona Supreme Court nevertheless extended *Padilla* and *Lee* to unauthorized aliens and held that Respondent had established prejudice under *Strickland*.

The questions presented are:

1. Whether Respondent is categorically barred from establishing *Strickland* prejudice for a *Padilla*/*Lee* claim because, as an unauthorized alien, he is without any legal right to remain in the United States.

2. Whether the Arizona Supreme Court erred in finding *Strickland* prejudice, where *inter alia* there was no evidence that Respondent had a viable defense either to the criminal charges or deportation.

STATEMENT OF RELATED PROCEEDINGS

State v. Nunez-Diaz, CR-18-0514-PR (Ariz.) (opinion affirming post-conviction relief filed July 16, 2019).

State v. Nunez-Diaz, 1 CA-CR 16-0793 PRPC (Ariz. App.) (opinion affirming post-conviction relief filed September 18, 2018).

State v. Nunez-Diaz, CR2013-420489-001 DT (Maricopa Cty. Super. Ct.) (post-conviction relief ruling entered December 23, 2015).

State v. Nunez-Diaz, CR2013-420489-001 DT (Maricopa Cty. Super. Ct.) (judgment and suspension of sentence entered July 22, 2013).

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JURISDICTION

The Arizona Supreme Court entered judgment on July 16, 2019. On October 7, Justice Kagan extended the time to file this petition until November 14, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. Const. amend. VI, § 1.

INTRODUCTION

Respondent Hector Nunez-Diaz is a citizen of Mexico. There is no evidence that his presence in the United States was ever authorized, and he was thus subject to deportation during the entirety of his time in the country. This case involves his conviction, pursuant to a plea agreement, of a lesser controlled substance offense. Although Nunez-Diaz was already deportable as an unauthorized alien, he agreed to voluntary departure based on his conviction. No evidence was presented that Nunez-Diaz had a viable defense either at trial or in potential deportation proceedings in the unlikely event he were acquitted.

Nunez-Diaz has asserted an ineffective assistance of counsel claim under *Padilla v. Kentucky*, 559 U.S.

356 (2010) and *Lee v. United States*, 137 S. Ct. 1958 (2017). In *Padilla*, this Court held that a lawful permanent resident who received deficient attorney advice about the immigration consequences of a conviction (*i.e.*, deportation) could satisfy the performance prong of *Strickland v. Washington*, 466 U.S. 668 (1984). 559 U.S. at 369. *Padilla* deferred resolution of the *Strickland* prejudice requirement, and the performance prong is not at issue here.

In *Lee*, this Court directly addressed prejudice for a lawful permanent resident's *Padilla*/*Strickland* claim. It held there that in the "unusual circumstances" of the case, where Lee provided "substantial and uncontroverted evidence," Lee had sufficiently established *Strickland* prejudice. *Lee*, 137 S. Ct. at 1967-69.

This case presents two important and recurrent issues left open by *Padilla* and *Lee*. Neither case addressed a *Strickland* claim by an alien not lawfully present in the country. Notably, lawful permanent residents have a vested right to remain in the United States permanently, subject only to very limited exceptions (principally conviction for certain felonies). In contrast, unauthorized aliens have no such right to continued presence in the U.S. and are subject to deportation (without any criminal conviction) at any time.

Although this Court has never considered a *Strickland* claim by an unauthorized alien, the lower courts have done so repeatedly—and are deeply split on the issue. A majority of courts have recognized a categorical bar against cognizable *Strickland* prejudice. The Fifth Circuit, sitting en banc, has held that unauthorized aliens "unequivocally" cannot

"show prejudice because [they were] already deportable" and "it would not have been rational for [them] to proceed to trial in the hopes of avoiding deportability." *United States v. Batamula*, 823 F.3d 237, 242 (5th Cir.) (en banc), *cert. denied*, 137 S. Ct. 236 (2016). This categorical position has also been adopted by the Fourth and Eleventh Circuits, the highest courts of Texas and Tennessee, and numerous other courts. If adopted below, this rule would have conclusively barred the relief granted.

The reasoning of these courts closely tracks this Court's other *Strickland* precedents, which recognize that *Strickland* prejudice cannot exist in the absence of an underlying "substantive or procedural right to which the law entitles [defendant]." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). And because unauthorized aliens have no right to remain in the United States, it necessarily follows that they do not suffer cognizable prejudice from deficient immigration-law advice that hastens their departure. To be sure, mandatory deportation following a criminal conviction may be swifter or more certain than ordinary deportation proceedings for non-felons, but this Court has rejected "*focusing solely on mere outcome determination*" as a *"defective*" approach. *Id.* at 369 (emphasis added).

In contrast to the majority approach, several courts have rejected the categorical bar and adopted a purely outcome-based standard. Those courts focus on how the vagaries of the immigration system might permit the defendant to escape deportation notwithstanding the lack of a legal right to remain. Those courts include the court below, as well as the highest courts of Iowa and Massachusetts, along with two federal district courts.

The Arizona Supreme Court notably went so far as to hold that *Lee* compelled that result, even though *Lee* involved a lawful permanent resident and is silent as to unauthorized aliens. App.8-9a. That confusion as to *Lee*'s holding and direct conflict with this Court's other *Strickland* precedents, along with the square and persistent split of authority as to whether unauthorized aliens can demonstrate *Strickland* prejudice for immigration-law advice, warrant this Court's review.

Even assuming the Court does not adopt the majority categorical bar, the decision below creates another important split as to what quantum of evidence is required for an unauthorized alien to prove that "a decision to reject the plea bargain *would have been rational* under the circumstances" and thereby demonstrate *Strickland* prejudice. *Padilla*, 559 U.S. at 372 (emphasis added).

The Arizona Supreme Court's answer is effectively *none*: Nunez-Diaz offered no evidence of even a colorable defense to either the criminal charges or deportation. In the repeated words of his own amici, "*No evidence was presented* about … whether [Nunez-Diaz] was eligible for any discretionary relief from removal." App.241a (emphasis added); *accord* App.226a ("[N]o evidence [was] presented … about … immigration benefits); App.236a ("[N]o evidence [was] presented … about *any* form of discretionary [immigration] relief). The stark absence of evidence stands in glaring contrast to the "substantial and uncontroverted evidence," this Court found sufficient to demonstrate rationality in *Lee*. 137 S. Ct. at 1969. Nevertheless, the court below believed that "*Lee* control[led] [its] resolution of this case." App.8a.

The Arizona Supreme Court stands nearly alone in requiring no evidence to prove rationality. Most of the courts that have rejected the categorical bar have at least insisted on genuine evidence supporting the rationality of rejecting a plea: the Supreme Court of Iowa granted relief because the defendant there presented specific evidence that he was eligible for cancellation of removal, while the Massachusetts Supreme Judicial Court denied relief because no evidence of prejudice was offered. But the District of Maryland has, much like the court below, accepted the bare existence of possible deportation defenses as establishing *Strickland* prejudice, without requiring any actual evidence of defendant's eligibility. This split of authority also warrants this Court's review.

These questions are recurrent and important. *Padilla* is notably one of the most cited precedents of this Court, reflecting how frequently these issues arise. Indeed, the United States deported nearly 150,000 convicted criminals last year alone, and many of them could potentially avail themselves of the decision below, particularly if other courts follow suit. That danger is particularly acute given how low the Arizona Supreme Court has set the bar: requiring *no evidence* of a viable defense *either at trial or in deportation proceedings* following an acquittal, and in the teeth of a pre-conviction immigration hold indicating that deportation was exceedingly likely even absent a conviction.

This petition also presents an ideal vehicle to resolve these issues: both questions presented are case dispositive. And the simplicity of the factual record—there is no evidence of viable defense to anything—presents these pure questions of law

crisply with little factual complexity. The State's petition should therefore be granted.

STATEMENT OF THE CASE

Factual Background

1. *Nunez-Diaz Is Arrested And Charged With Drug Crimes*

Nunez-Diaz was pulled over for speeding in June 2013. App.52a. The police officer asked Nunez-Diaz to provide identification, which he refused to do. *Id.* The officer then arrested Nunez-Diaz for operating a vehicle and failing to provide a driver's license. *Id.*

The officer conducted a search incident to arrest, which revealed two different drugs: methamphetamine wrapped in a dollar bill in Nunez-Diaz's right pocket and a plastic bag of cocaine in his left pocket. App.52a-53a. Nunez-Diaz has not challenged the lawfulness of the initial stop, his arrest, or the resulting search.

Respondent was subsequently charged with two class-four felonies: possession or use of methamphetamine and cocaine, as well as a class-six felony of possessing drug paraphernalia. App.20a, 53a. The presumptive sentence for the class-four felonies is 2.5 years. App.9a.

During Nunez-Diaz's detention, his identity as an unauthorized alien was discovered. Prior to any plea, the U.S. Immigrations and Customs Enforcement ("ICE") placed a detainer (also known as a "hold") on Nunez-Diaz. App.24a. A detainer is a notice that ICE "seeks custody of an alien presently in the custody of that [other] agency, for the purpose of arresting and removing the alien" and requests that ICE be notified "prior to release of the alien" so

it may "arrange to assume custody." 8 C.F.R. § 287.7(a).

2. *Nunez-Diaz Pleas To A Lesser Charge*

Shortly after his arrest, Nunez-Diaz retained private counsel. App.4a. He then made clear to his attorney, Julia Cassels, that he did not want to go to trial; she accordingly set about negotiating a plea or finding other means of avoiding trial. App.122a-24a.

Cassels initially attempted to place Nunez-Diaz in a diversion/treatment program, through which participants can avoid felony convictions. App.122a-23a. After those attempts failed, Cassels approached the Maricopa County prosecutor to request a plea agreement to a charge of solicitation to possession (a class-six felony), rather than the two class-four possession felonies being charged. App.123a-24a. A solicitation conviction is not a "controlled substance offense" that would lead to mandatory deportation in the Ninth Circuit. *See Coronado-Durazo v. I.N.S.*, 123 F.3d 1322, 1326 (9th Cir. 1997). The prosecutor's office, however, refused that plea because Nunez-Diaz possessed two different drugs. App.123a.

After additional negotiations, Cassels finally secured, and Nunez-Diaz accepted, a plea of "Possession of Drug Paraphernalia." App.43a, 122a-27a. This deal dismissed the two more-serious class-four felonies, and allowed Nunez-Diaz to plea to a single class-six felony. App.43a, 124a.

The plea agreement included a written warning that Respondent's "plea or admission of guilt could result in my deportation." App.47a-48a. The plea colloquy also included an oral warning that

admitting guilt may result in Respondent's deportation. App.74a, 124-25a. Nunez-Diaz acknowledged receiving a warning about potential immigration consequences and indicated that he had no questions about the warning. App.73a.

Following the plea colloquy, the court accepted Nunez-Diaz's plea and gave a suspended sentence of eighteen months' unsupervised probation. App.20a. Shortly after sentencing, and pursuant to ICE's immigration hold, ICE officials took Respondent into custody to begin the removal process. App.4a. Because he had been convicted of a controlled substance offense, Nunez-Diaz was subject to mandatory deportation and a permanent bar to reentry. 8 U.S.C. § 1226(c)(1)(B). Respondent "was able to negotiate for [his] voluntary removal to Mexico." App.4a.

Procedural Background

1. *Superior Court Grants Post-Conviction Review Relief*

Nunez-Diaz subsequently filed a petition for post-conviction relief, alleging ineffective assistance of counsel. App.59a-87a. The petition alleges two distinct forms of allegedly ineffective assistance: Cassel (1) making "an affirmative representation to Mr. Nunez Diaz that the plea would not have significant immigration consequences" and (2) failing to secure a better plea. App.71a, 159a. The petition "request[ed] that [the superior court] allow him to withdraw from his plea to allow him to plead to a different offense that will not … subject him to mandatory detention." App.76a, 159a. The State argued Nunez-Diaz's petition did not satisfy *Strickland*. App.93a-94a.

Not limiting itself to the grounds actually pled in Nunez-Diaz's petition for post-conviction review, the trial court instead focused on an unpled assertion that Nunez-Diaz would not have pled guilty and instead gone to trial absent deficient immigration advice. App.30a-34a. After an evidentiary hearing, the trial court found that Nunez-Diaz "would not have signed the plea if he was adequately advised of the immigrations [sic] consequences." App.34a. The court did not address whether such an approach would have been rational. App.34a. Neither Nunez-Diaz's petition nor testimony addressed the readmission bar; instead they focused only on immediate deportation. App.59a-87a, 96a-108a.

2. *The Court Of Appeals Affirms*

The Arizona Court of Appeals affirmed in a divided opinion. It rejected the State's arguments and viewed the trial court's "credibility finding" alone as "establish[ing] … both deficient performance and prejudice." App.22a-23a. That court also did not analyze whether Nunez-Diaz's asserted subjective desire to reject the plea agreement and go to trial was objectively rational. App.23a. It then affirmed the trial court's prejudice holding because the State "failed" to "prove beyond a reasonable doubt that the constitutional violation was harmless." App.23a (quotation marks and alterations omitted).

Judge Morse dissented, and cited numerous cases holding that unauthorized aliens are categorically barred from establishing *Strickland* prejudice from deficient immigration-law advice. App.24a-26a (collecting cases). The panel majority offered no response to these cases. App.20a-24a.

3. *The Arizona Supreme Court Grants Review, Rejects The Categorical Bar, And Finds* **Strickland** *Prejudice*

The Arizona Supreme Court granted the State's request for discretionary review, and the State argued in briefing that Nunez-Diaz could not show *Strickland* prejudice both due to his unauthorized status and lack of record support. App.3a.

The Arizona Supreme Court affirmed on July 16, 2019, issuing three separate opinions between the seven justices. App.1a-18a.

The four-Justice majority rejected the categorical bar on *Strickland* prejudice for unauthorized aliens. App.8a-10a. Although *Lee* dealt solely with a lawful permanent resident, the majority reasoned that the cases recognizing the categorical bar "were decided before *Lee* and their reasoning does not survive [it]." App.9a.

After rejecting the categorical prejudice bar, the court concluded that Nunez-Diaz had established *Strickland* prejudice because "it would not have been irrational for Nunez-Diaz to reject the plea." App.9a. The majority did not point to any record evidence supporting that rationality: its opinion does not cite any evidence of a colorable defense to either the criminal charges or deportation if he were to be acquitted. (There was none.) It further admitted that Nunez-Diaz's "chances of winning at trial … were 'highly improbable.'" App.9a (citation omitted).

The court further reasoned that *Strickland* prejudice existed because "[d]eportable immigrants are potentially eligible for cancellation of removal … under § 1229b(b)(1)" absent "drug conviction[s]."

App.10a. The majority did not point to any evidence that Nunez-Diaz was actually eligible for such relief, however. App.10a. Nor was there any such evidence. App.17a-18a n.1.

Despite the absence of evidence supporting a defense to either conviction or deportation, the majority believed that "*Lee* control[led] [its] resolution of this case." App.8a.

Justices Bolick and Pelander concurred. App.11a-14a. Although they agreed that *Lee* controlled, but believed that "*Lee* grossly diverges from *Strickland*, and thus was wrongly decided." App.14a (Bolick, J., concurring). The concurrence therefore "hope[d] the Supreme Court will reconsider that decision." App.14a.

Justice Lopez, joined by Justices Brutinel and Gould, concurred only in the result. They agreed with the Fifth Circuit and other courts that "deportation and ineligibility for discretionary relief … do not constitute prejudice under *Strickland* if a defendant is previously subject to removal as a deportable alien." App.15a. "[I]t would not have been rational for Nunez-Diaz to go to trial to avoid deportation when he was deportable no matter the outcome of the case." App.16a. The justices nonetheless concurred because, in their view, the "permanent bar to admission into the United States constitutes prejudice." App.18a.

The three justices further "agree[d]" with Justice Bolick's opinion that although "although *Lee* controls the result," *Lee* was wrongly decided. App.18a.

REASONS FOR GRANTING THE WRIT

This petition presents two recurrent issues of federal law: (1) whether unauthorized aliens are categorically precluded from establishing *Strickland* prejudice for *Padilla*/*Lee* claims and, if not, (2) whether unauthorized aliens must prove *Strickland* prejudice with specific record evidence, or whether such prejudice is instead presumed. These issues are exceptionally important and this case presents an ideal vehicle to resolve them.

I. THE ARIZONA SUPREME COURT JOINED THE WRONG SIDE OF A DEEP, PERSISTENT, AND LOPSIDED SPLIT

The lower courts are deeply divided as to whether aliens with no right to remain in the United States can establish *Strickland* prejudice for deficient immigration-law advice. A wide variety of courts recognize a categorical bar, although several do not. This persistent split merits this Court's review.

A. THE DECISION BELOW IS WRONGLY DECIDED BECAUSE *STRICKLAND* PREJUDICE CANNOT EXIST WITHOUT AN UNDERLYING RIGHT

The categorical bar recognized by a majority of courts (*see infra* Section I.B) is plainly correct under this Court's prior *Strickland* precedents. Although neither *Padilla* nor *Lee* addressed *Strickland* prejudice for unauthorized aliens receiving deficient immigration-law advice, this Court's non-immigration *Strickland* precedents make plain no such prejudice can exist.

As this Court has explained, there is no *Strickland* prejudice "if the ineffectiveness of counsel does not deprive the defendant of *any substantive or*

procedural right to which the law entitles him." *Lockhart*, 506 U.S. at 372 (emphasis added). Because Nunez-Diaz has no right to remain in the United States, it necessarily follows that he cannot suffer cognizable prejudice from a conviction contributing to or hastening his departure.

In repeatedly recognizing that prejudice cannot exist unless there is an underlying right that was infringed, this Court has explained that analyzing *Strickland* prejudice by "*focusing solely on mere outcome determination*, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, *is defective*." *Id.* at 369 (emphasis added). Applying this rule, this Court has refused to find prejudice where the purported ineffective "assistance of counsel [was] in the presentation of false testimony." *Nix v. Whiteside*, 475 U.S. 157, 174 (1986). Because there is no right to "testify[] *falsely*," there was no *Strickland* prejudice from counsel "ineffectively" presenting perjured testimony. *Id.* at 173-76. That was so even though "the jury might have believed his perjury," leading to an acquittal. *Id.* at 175-76; *accord Lockhart*, 506 U.S. at 370.

Similarly, in *Lockhart* this Court refused to find prejudice where counsel failed to make an argument that would have been meritorious under then-governing precedent, which had since been overruled by the time that the case reached this Court. *Lockhart*, 506 U.S. at 372.

Much as the *Nix* defendant had no right to commit perjury and the *Lockhart* defendant had no right to prevail under overruled precedent, Nunez-Diaz has no right to remain in the United States. It

necessarily follows that because he has no substantive right to continued presence in the U.S., he suffers no cognizable prejudice if a conviction hastens or even causes his departure/deportation.

The Arizona Supreme Court reached the opposite conclusion, reasoning that "Nunez-Diaz would [not] necessarily have been removed had he gone to trial and been acquitted. There are many reasons that a deportable immigrant may not be removed." App.10a. The Supreme Court of Iowa similarly explained that "removal is not a foregone conclusion for every unauthorized alien. Immigration policy is subject to change, as is enforcement." *Diaz v. State*, 896 N.W.2d 723 (Iowa 2017). And the Massachusetts Supreme Judicial Court similarly reasoned that "[n]ew avenues may open" that permit defendants to show "how different performance of counsel could have led to a better outcome." *Commonwealth v. Marinho*, 464 Mass. 115, 130 n.21 (Mass. 2013).

All of this reasoning is precisely the sort that this Court found "defective" in *Lockhart*: "focusing solely on mere outcome determination." 506 U.S. at 369. While it might be factually true that Nunez-Diaz might have escaped deportation absent a conviction, the *Nix* defendant might similarly have beat a conviction through perjured testimony, and the *Lockhart* defendant absolutely would have prevailed on the issue in question if his counsel had made the proper objection under then-prevailing law.

But in neither *Nix* nor *Lockhart* was that sufficient to establish *Strickland* prejudice. Instead, the question is whether "the result of the proceeding was fundamentally unfair or unreliable." *Id.* And there is nothing "fundamentally unfair or unreliable"

about someone who is unlawfully present in the United States being deported. Indeed, that is typically what is *supposed* to occur—even for unauthorized aliens not convincingly charged with crimes that provide for mandatory deportation. There is thus nothing "fundamentally unfair" about Nunez-Diaz's inability to continue to remain in the United States illegally.

In focusing on the vagaries of the deportation process, which potentially might have delayed or prevented Nunez-Diaz's ultimate deportation, the Arizona Supreme Court further ignored this Court's direction in *Strickland* that a reviewing court must assume that "the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision" and that the decision "should not depend on the idiosyncracies of the particular decisionmaker." *Strickland*, 466 U.S. at 695. "A defendant has no entitlement to the luck of a lawless decisionmaker." *Id.*

Because Nunez-Diaz provided zero evidence of a viable defense to deportation, *supra* at 4-5, an impartial, conscientious decision-maker would necessarily have to order Nunez-Diaz deported. Deportation hearings where unlawful presence is conceded and no defense to deportation is offered have but one *lawful* outcome. Although "idiosyncracies" might lead to a different result, Nunez-Diaz suffered no cognizable prejudice because he has no right to a decision-maker that would reach an unlawful decision.

Ultimately, the only prejudice that Nunez-Diaz asserts is potential immigration consequences. And because he has no right to continued presence, this

Court's decisions in *Nix* and *Lockhart* make clear that he cannot suffer any *Strickland* prejudice from such consequences. The Iowa, Arizona, and Massachusetts Supreme (Judicial) Courts' endorsement of reasoning directly contrary to this Court's precedents accentuates the need for this Court's review.

B. THE LOWER COURTS ARE DEEPLY SPLIT AS TO WHETHER UNAUTHORIZED ALIENS CAN ESTABLISH PREJUDICE UNDER *STRICKLAND*

Although this Court has never addressed whether aliens without a legal right to remain can establish *Strickland* prejudice from deficient immigration-law advice, a broad array of lower courts have. Based on this Court's *Strickland* precedents, those courts have largely—but not unanimously—held that no cognizable prejudice exists under *Strickland*. But the Arizona Supreme Court is hardly alone in reaching the opposite conclusion, and is joined *inter alia* by the highest courts of Iowa and Massachusetts. This split of authority on this important question of federal law warrants this Court's review.

1. Majority Position Recognizing A Categorical Bar

The Fifth Circuit sitting en banc has laid out a categorical and unambiguous rule: "controlling law unequivocally" establishes that a criminal defendant cannot "show prejudice [where] he was already deportable for having overstayed his visa." *Batamula*, 823 F.3d at 242. Thus, "[b]ecause Batamula was already deportable … *before* he pleaded guilty …, it would not have been rational for him to proceed to trial in the hopes of avoiding

deportability." *Id.* at 243. The Fifth Circuit's categorical rule, if followed below, would have been dispositive.

The Fourth Circuit has similarly held that an unauthorized alien advancing an equivalent claim could not establish prejudice, explaining that defendant's "substantial rights were unaffected because he was an illegal alien and therefore his guilty plea had no bearing on his deportability." *United States v. Sinclair*, 409 F. App'x 674, 675 (4th Cir. 2011). So too has the Eleventh Circuit: holding that the prejudice requirement could not be satisfied because the defendant "never obtained legal status, and thus continued to be subject to removal." *Gutierrez v. United States*, 560 F. App'x 924, 927 (11th Cir.), *cert. denied*, 135 S. Ct. 302 (2014).[1]

State appellate courts have similarly recognized a categorical bar on *Strickland* prejudice. The highest criminal court in Texas has categorically rejected a *Strickland* prejudice claim by "an undocumented immigrant [who] was deportable for that reason alone." *State v. Guerrero*, 400 S.W.3d 576, 588-89 (Tex. Crim. App. 2013). "Had [defendant] gone to trial with counsel and been acquitted he would not have been transformed into a legal resident .... The prospect of removal therefore could not reasonably have affected his decision to waive counsel and plead guilty." *Id.*

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[1] The Tenth Circuit, while not directly addressing prejudice, has also recognized that the absence of lawful status "is fundamentally different than a lawful resident alien being subject to removal due to a guilty plea" and distinguished *Padilla* on that basis. *United States v. Donjuan*, 720 F. App'x 486, 490 (10th Cir.), *cert. denied*, 139 S. Ct. 590 (2018).

The Supreme Court of Tennessee has similarly recognized that "courts have consistently held that an illegal alien who pleads guilty cannot establish prejudice." *Garcia v. State*, 425 S.W.3d 248, 261 n.8 (Tenn. 2013); *see also* App.25a-26a (citing *Garcia* as endorsing categorical bar); *Rosario v. State*, 165 So. 3d 672, 672 (Fla. Dist. Ct. App. 2015) (same).

In addition, a Michigan intermediate court of appeals,[2] and "nearly half a dozen Florida [appellate] courts" have reached the same results, as have "U.S. District Courts in Georgia, Hawaii, Illinois, Kansas, Minnesota, Nebraska and Texas," among others. Daniel A. Horwitz, *Actually,* Padilla *Does Apply to Undocumented Defendants*, 19 Harv. Latino L. Rev. 1, 4-5 (2016) (footnotes omitted) (collecting cases).[3]

Notably, as of Spring 2016, "the conclusion that undocumented defendants are not entitled to relief under *Padilla* appear[ed] to be *all but unanimous across the courts that ha[d] considered it*." *Id.* at 6 (emphasis added). Even at that point, however, courts in "Massachusetts, Colorado, and, to a lesser extent, California" had suggested otherwise. *Id.* at 6 (footnotes omitted) (citing cases).

2. Minority Position Rejecting Categorical Bar

The prior near-consensus has now been definitively broken by Supreme Courts of Arizona and Iowa, as well as the Western District of Washington and

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[2] *People v. Gomez-Perez*, No. 319745, 2015 WL 1227721, at *2 (Mich. Ct. App. Mar. 17, 2015).

[3] The Harvard Latino Law Review changed its name to the "Harvard Latinx Law Review." To avoid confusion, the publication-date citation is used.

District of Maryland. *See Diaz*, 896 N.W.2d at 733; *United States v. Arce-Flores*, No. CR15-0386JLR, 2017 WL 4586326, at *10 (W.D. Wash. Oct. 16, 2017) (distinguishing *inter alia* Fourth and Eleventh Circuit precedents); *United States v. Yansane*, 370 F. Supp. 3d 580, 587 (D. Md. 2019) (reasoning that Fourth Circuit's categorical rule was overruled by *Lee* and vacating guilty plea of unauthorized alien).

The Iowa Supreme Court, notably citing the Horwitz article, expressly "reject[ed]" Iowa's contention that "unauthorized aliens cannot be prejudiced … because they are already subject to removal." *Diaz*, 896 N.W.2d at 733. Instead, it reasoned that "[t]here is a vast difference for an unauthorized alien between being generally subject to removal and being convicted of a crime that … [results in] automatic, mandatory, and irreversible removal." *Id.* It therefore found the very prejudice under *Strickland* that all of the courts above have held is categorically barred. *Id.*

The Massachusetts Supreme Judicial Court has also rejected the proposition that "an undocumented defendant can never successfully state a claim of ineffective assistance of counsel," and instead "simply ask[ed] that undocumented defendants address the issue of their particular status and how different performance of counsel could have led to a better outcome." *Marinho*, 464 Mass. at 130 n.21. In doing so, the Massachusetts high court necessarily rejected the majority categorical position.

* * *

The upshot is that there is now a square, albeit lopsided, split of authority on the prejudice issue presented here. That split is now sufficient

widespread that it is virtually certain to persist—and spread—absent review by this Court.

C. THE ARIZONA SUPREME COURT ERRED IN CONCLUDING *LEE* RESOLVED THE SPLIT

The Arizona Supreme Court attempted to sidestep this split, believing that "*Lee* controls" and that the Fifth Circuit's decision in *Batamula* and all other similar cases cited by the State did "not survive" *Lee*. App.8-9a. That reasoning is simply wrong. *Lee* does not resolve the persistent split as to the categorical bar. But the lower court's palpable confusion as to what *Lee* means underscores the need for this Court's review.

The majority rule identified by the State is a categorical rule applicable *only* to aliens *not lawfully present* in the United States. *Supra* at 16-18. This Court's decision in *Lee*, however, addressed *Strickland* prejudice with respect to a *lawful permanent resident*. *Lee*, 137 S. Ct. at 1963. (*Padilla* also involved a lawful permanent resident, and did not address prejudice at all. 559 U.S. at 359.). Nor did *Lee* offer even dicta as how *Padilla*/*Lee* applied to unauthorized aliens. 137 S. Ct. at 1962-69. Far from announcing a holding that is controlling here, *Lee* offers only silence on this dispositive issue.

Unlike unauthorized aliens, lawful permanent residents *do* have a "substantive … right to which the law entitles [them]." *Lockhart*, 506 U.S. at 372. Indeed, they have a near-absolute, vested right to remain in the United States for the rest of their lives, subject only to narrow exceptions—principally committing specific types of felonies. *See* 8 U.S.C. § 1227(a)(2). A lawful permanent resident thus suffers direct, cognizable prejudice from a conviction

that requires mandatory deportation, as this Court recognized in *Lee*. But the same is not true for unauthorized aliens.

This Court should free the Arizona Supreme Court—and likely several other courts—of the misconception that *Lee* resolved the issue of whether unauthorized aliens can show *Strickland* prejudice on *Padilla*/*Lee* claims. *Lee* plainly did not, leaving the issue open (though *Nix* and *Lockhart* all but compel the opposite answer). But the confusion demonstrated by the opinions below is likely to persist—and indeed proliferate—until this Court explains as much expressly.

This Court should therefore either grant plenary review or summarily vacate the Arizona Supreme Court's decision and free that court of its misconception that *Lee* was controlling. Given that *five of the seven* Justices below thought *Lee*—at least if construed to apply to unauthorized aliens—was wrongly decided, *supra* at 11, such a vacatur and clarification could alone resolve this case.

II. ASSUMING PREJDUICE IS COGNIZABLE UNDER *STRICKLAND*, THERE IS A FURTHER SPLIT AS TO WHETHER SUCH PREJUDICE IS PRESUMED OR MUST BE PROVEN

In addition to the split as to whether unauthorized aliens are categorically barred from establishing *Strickland* prejudice, there is another split as to what quantum of evidence is necessary to establish such prejudice.

The Arizona Supreme Court's answer to that question is essentially "*none*": notably Nunez-Diaz

offered no evidence of a viable defense either to deportation or the underlying criminal charges *at all*. *Supra* at 4-5. As a result, the decision below likely establishes an irrebuttable presumption of prejudice.

Nunez-Diaz splits with the highest courts of Iowa and Massachusetts, as well as one of the two district courts that have rejected the categorical bar. Those courts all required *specific* evidence that a viable defense to deportation existed, typically cancellation of removal under 8 U.S.C. § 1229b. No such evidence was presented here. App.17a-18a n.1; *supra* at 4-5. This split is thus also outcome determinative.

The Arizona Supreme Court's presumption of prejudice is also directly contrary to this Court's precedents, further militating in favor of review.

A. THE ARIZONA SUPREME COURT WRONGLY PRESUMED PREJUDICE, ESTABLISHING AN EFFECTIVELY IRREBUTTABLE PRESUMPTION

This Court has repeatedly made clear that defendants asserting *Strickland* claims "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Thus, "a court making the prejudice inquiry must ask *if the defendant has met the burden* of showing" prejudice. *Id.* at 696 (emphasis added).

The Arizona Supreme Court inverted this Court's clear allocation of the burden of proof, and instead found *Strickland* prejudice in the absence of *any* supporting evidence because the State failed to prove the outcome "necessarily" would have been the same. App.10a. In doing so, it violated this Court's precedents in at least four ways.

First, the Arizona Supreme Court improperly relieved Nunez-Diaz of his burden by holding it was sufficient that "the record does not establish that Nunez-Diaz *would necessarily* have been removed had he gone to trial and been acquitted." App.10a (emphasis added). As an initial matter that is flawed because that myopic "focus[] solely on mere outcome determination" is "defective." *Lockhart,* 506 U.S. at 369; *supra* Section I.A.

But even if Nunez-Diaz's theory of prejudice were cognizable, the Arizona Supreme Court's analysis still conflicts directly with this Court's *Strickland* precedents. Requiring the State to prove that Nunez-Diaz "necessarily" would have been deported after a hypothetical (and improbable) acquittal unlawfully shifts the burden from Nunez-Diaz. *Strickland* requires *him* to prove a reasonable probability that the outcome would have been different, not the State to prove beyond a reasonable doubt the result "necessarily" would have been the same. As this Court has explained, "In assessing prejudice under *Strickland*, the question is *not whether a court can be certain counsel's performance had no effect on the outcome*.... The likelihood of a different result *must be substantial, not just conceivable*." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (emphasis added). Indeed, "*Strickland* does not require the State to 'rule out' [an outcome] to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." *Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (quoting *Strickland*, 466 U.S. at 694).

The Arizona Supreme Court's "not necessarily" standard flouts *Wong* and *Harrington*. It shifted the

burden to the State and required it to "rule out" the possibility that Nunez-Diaz would escape removal absent a conviction. *Id.* And the "not necessarily" standard similarly demands certainty that "counsel's performance *had no effect* on the outcome." *Harrington*, 562 U.S. at 111 (emphasis added). The violations of this Court's precedents warrant review no less than in *Wong* and *Harrington*.

Second, the Arizona Supreme Court focused on the readmission bar of 8 U.S.C. § 1182(a)(2)(A)(i)(II) and reasoned that "[s]uch a consequence can hardly be called *harmless*." App.11a (emphasis added). The use of the word "harmless," of course, wrongly conflates *Strickland*'s actual prejudice standard with the harmless-error standard for preserved objections.[4]

Nor could the reentry bar satisfy *Strickland* here. Absent some evidence that Nunez-Diaz was likely to (1) apply for reentry and (2) the federal government was likely to grant such an application but for the reentry bar, there simply is no prejudice. And there is *no* such evidence here. Nor would such prejudice plausible: given Nunez-Diaz's previously demonstrated willingness to violate U.S. immigration law, it would be foolhardy to grant him

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[4] The Arizona Supreme Court pointed to Arizona Rule of Criminal Procedure 32.8 in support of lessening Nunez-Diaz's burden. But that burden-shifting rule only applies after "defendant proves a constitutional violation." Ariz. R. Crim. P. 32.8(c). Because proof of prejudice is part of establishing a constitutional violation under *Strickland*, the state rule cannot dilute Nunez-Diaz's burden of establishing *Strickland* prejudice. *See, e.g., Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017) (*Strickland* violation "is not 'complete' until the defendant is prejudiced." (citation omitted)).

a visa. And there similarly was no evidence offered that the federal government was likely to grant him a green card.

It therefore would not have been rational to insist on trial simply to preserve the extremely remote chance of escaping the reentry bar through acquittal, so that Nunez-Diaz could then gamble on the exceptionally remote (at best) chance that the federal government would ever voluntarily re-admit him. The effect of that readmission bar is purely theoretical on this record—since there is no evidence that Nunez-Diaz would ever be legally readmitted absent the bar—and thus does not cause Nunez-Diaz tangible prejudice.

In relying on the reentry bar, the Arizona Supreme Court also flouted this Court's admonition that "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee*, 137 S. Ct. at 1967. But Nunez-Diaz did not offer even such a *post hoc* statement. Both his briefs and his testimony were *silent* as to the readmission bar. App.59a-87a, 96a-110a; 172a-213a. The reentry-bar rationale is thus a purely *post hoc* invention of the Arizona Supreme Court; there is no evidence it affected Nunez-Diaz's actual decision to plead guilty *at all*. And because *Strickland* puts the burden on Nunez-Diaz to prove prejudice, the complete absence of evidence regarding the reentry bar necessarily requires reversal.

Third, the Arizona Supreme Court ignored this Court's statements that "'[s]urmounting *Strickland*'s high bar is never an easy task,'" and that *Lee* involved "unusual circumstances" where Lee

provided "substantial and uncontroverted evidence" in support of his *Strickland* prejudice claim. *Lee*, 137 S. Ct. at 1367-69. In stark contrast, Nunez-Diaz *offered no evidence at all* of viable criminal or deportation defenses.

That cannot possibly be sufficient under *Lee*. If it were, proving a *Strickland* claim will not merely be an "easy task," it would be *nearly a foregone conclusion*. By requiring nothing more than a *post hoc* self-serving say-so, the Arizona Supreme Court makes a finding of *Strickland* prejudice in this context all-but automatic. *Lee* is directly to the contrary.

Moreover, the court below utterly failed to address that the federal government had already placed a "hold" on Nunez-Diaz *before* his plea, App.24a—underscoring that deportation was exceptionally likely even absent a conviction. This omission underscores that the Arizona Supreme Court's *de facto* presumption of prejudice is so strong that it is apparently irrebuttable and immune to contrary evidence.

Fourth, in concluding that Nunez-Diaz's purported desire to go to trial to avoid deportation was objectively rational, the Arizona Supreme Court stretched this Court's "Hail Mary" analogy from *Lee* beyond its breaking point. The majority reasoned that for Nunez-Diaz "it was not irrational … to try for a 'Hail Mary' win in order to avoid the 'particularly severe penalty' of deportation. App.8a (quoting *Lee*, 137 S. Ct. at 1767-68). But as three justices correctly observed in concurrence, "*Lee*'s reasoning does not apply here. Nunez-Diaz's victory (avoiding deportation) required not just a

'Hail Mary' win at trial, but also a 'Hail Mary' win in subsequent immigration proceedings." App.18a (Lopez, J., concurring in the result).

The failure to appreciate that *Lee* involved throwing a single successful Hail Mary—while this case necessitated *successive* Hail Marys—is obvious error. That is particularly true because while *Lee* recognizes a right to have a jury decide a defendant's fate, this Court has never recognized a corresponding right to seek nullification in civil deportation proceedings.

More generally, this case shows the limits of the "Hail Mary" analogy. Football teams typically engage in that strategy because the consequences of a failed pass and not attempting one are precisely the same: loss of that particular game. The consequences of the gamble are thus tightly contained and it is *entirely rational* to take the risk. But that is not true here: by insisting on trial, Nunez-Diaz would have risked virtually certain conviction on charges carrying presumptive 2.5-year sentences, all for the slimmest of probabilities (at best) of prevailing on successive, desperate gambles.

Ultimately, this Court in *Padilla* explained that "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain *would have been rational* under the circumstances." *Padilla*, 559 U.S. at 372 (emphasis added). Gambling on two successive "Hail Mary" proceedings in the face of multiple years in prison without any viable defense in *either of them* is the definition of an objectively *ir*rational decision. Indeed, if such a decision is not irrational here given the starkest possible absence of evidence of viable

defenses and a pre-existing immigration hold, it is doubtful it could ever be irrational under *any* circumstances.

Under the Arizona Supreme Court's reasoning, *Strickland* is now essentially a one-prong, deficient-performance-only standard for immigration advice about guilty pleas.

B. THE ARIZONA COURT'S DECISION SPLITS WITH THE HIGHEST COURTS OF IOWA AND MASSACHUSETTS

The Arizona Supreme Court's conclusion that *Strickland* prejudice was established despite the complete absence of evidence of a viable defense to deportation creates yet another clear split of authority. Although some other courts have rejected the majority categorical bar on *Strickland* prejudice, *supra* Section I.B, those courts have largely demanded actual *evidence* of an immigration defense. The Arizona Supreme Court's decision creates a second square split with these courts.

The Supreme Court of Iowa notably only found *Strickland* prejudice where "the evidence of guilt [was] not overwhelming" and "[c]ancellation of removal … was available to [defendant]—until he pled guilty," given that the defendant had been present in the United States for more than ten years and had a citizen daughter for whom he was the primary caregiver. *Diaz*, 896 N.W.2d at 725-27, 733-34. The Iowa high court thus concluded that "*the record* supports the finding of prejudice." *Id.* at 734 (emphasis added).

Diaz thus stands in stark contrast with the decision below, both because (1) the defendant had

actual defenses to the criminal charges and deportation, and (2) the Iowa Supreme Court grounded its holding in specific record evidence, rather than (as here) naked speculation about possible deportation defenses.

The Supreme Judicial Court of Massachusetts, although disclaiming any categorical bar to *Strickland* prejudice, similarly demanded actual "proof of prejudice" and rejected a *Padilla*/*Strickland* claim for failure to supply it. *Marinho*, 464 Mass. at 128. Indeed, *Marinho* expressly rejected a *Padilla*/*Strickland* claim supported only by defendant's "own affidavit, as well as affidavits from his counsel, the codefendant's counsel, and the assistant district attorney." *Id.* at 128-29. In sharp contrast, the Arizona Supreme Court accepted little more than Nunez-Diaz's self-serving testimony as sufficient to establish *Strickland* prejudice. App.8a-11a.

The split between Arizona and Massachusetts is further underscored by the *Marinho* majority's rejection of the position advanced by the *Marinho* dissent—*i.e.*, that a *Padilla* violation in this context is "per se ineffective assistance of counsel for which no specific showing of prejudice is required." 464 Mass. at 129 n.20. But that is effectively the position that the Arizona Supreme Court actually adopted, requiring no evidence supporting the rationality of Nunez-Diaz's purported desire to go to trial at all.

The Arizona Supreme Court also splits with the Western District of Washington. That court found *Strickland* prejudice where there was evidence that the defendant "should qualify for cancellation of

removal." *Arce-Flores*, 2017 WL 4586326, at *3-11, *3 n.2.

In contrast, the District of Maryland, like the Arizona Supreme Court, has found *Strickland* prejudice based on the bare existence of possible defenses to deportation, without requiring any evidence of defendant's eligibility. *See Yansane*, 370 F. Supp. 3d at 587 (finding prejudice because a "person convicted of an aggravated felony … is ineligible to apply for certain discretionary forms of relief from removal, such as asylum and cancellation of removal" without analyzing whether Yansane offered any evidence that he was eligible for either).

These splits of authority warrant this Court's review on this second question as well.

III. THE IMPORTANT ISSUES PRESENTED MERIT REVIEW

The issues presented here are both exceptionally important and highly recurrent—and likely to become far more so, given how severely the court below diluted the burden of proving *Strickland* prejudice. The dangers presented by the decision below are thus severe. The need for review is particularly heightened given the immigration context, since the importance of uniformity in federal immigration law is paramount and the burdens fall disproportionately on Arizona as a border state. Nor is there any genuine need to allow further percolation: with the decision below, federal circuit courts and state high courts have effectively occupied all major possible positions on the questions presented.

A. THESE ISSUES ARE HIGHLY RECURRENT—AND LIKELY TO BECOME MORE SO

The issues presented here have, and continue to, come before courts frequently—a frequency likely to increase if the severely diluted burden adopted below is not reversed. Indeed, *Padilla* is notably one of the most-cited decisions of all time, despite its relative youth.[5] These heavily recurrent issues are thus of pressing importance to both federal and state courts.

This heavy volume of citation is unsurprising given the sheer volume of deportations based on criminal convictions. The federal government deported 145,262 convicted criminals in 2018 alone.[6] The vast majority of those convictions were undoubtedly from guilty pleas, since "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012). The pool of alien convicts that could potentially avail themselves of the *Nunez-Diaz* decision could thus be vast, particularly if any other courts follow Arizona's lead.

The incentive for unauthorized aliens to assert *Nunez-Diaz* claims is likely substantial given the watered-down prejudice standard: they need not

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[5] Westlaw shows *Padilla* has been cited by courts in over 7,900 decisions released since *Padilla* was decided 9 years ago, or roughly 875 per year. By comparison, this Court's seminal decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)—which governs in *all* diversity cases in federal court—has been cited in only 22,287 decisions, or about 275 decisions per year.

[6] U.S. Immigrations and Customs Enforcement, *Fiscal Year 2018 Ice Enforcement and Removal Operations Report* at 11 (2019), *available at* https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf.

show any objective evidence that they had a viable defense in criminal or immigration court. Instead, they apparently need only testify that they received deficient immigration-law advice and pled guilty as a result.

With such a minimal burden, many defendants may rightfully ask: "What do I have to lose?" And those incentives are particularly dangerous in this context, where courts have recognized that aliens facing deportation have powerful incentives to prevaricate. *See, e.g., Martinez v. Holder*, 557 F.3d 1059, 1065 (9th Cir. 2009); *Weng v. Ashcroft*, 104 F. App'x 194, 197 (1st Cir. 2004) (noting "tremendous incentive to lie"). Moreover, the he-said-she-said nature of these claims—one in which an attorney is perhaps ambivalent given that a loss actually serves the client's interests—further increases this incentive.

This Court implicitly recognized the temptation to lie in *Lee*, and therefore demanded "contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee*, 137 S. Ct. at 1967. This Court therefore only found prejudice where Lee presented "substantial and uncontroverted evidence." *Id.* at 1969. The decision below vitiates these important restrictions, and effectively lowers the bar all the way to the ground—*i.e.*, no evidence supporting a defense for either trial or deportation proceedings, and in spite of a pre-conviction ICE hold.

The dangers of the *Nunez-Diaz* decision, as well as its fundamental unjustness, were notably made clear by the Arizona Justices themselves below. All seven (wrongly) felt bound by *Lee*. But the discomfort of

five of them with their judgment is palpable, and they believed that *Lee* so construed was wrongly decided. Justices Bolick and Pelander, for example, faulted *Lee* for "creat[ing] a highly unbalanced two-tiered system for criminal defendants seeking relief from convictions for ineffective assistance of counsel: one for aliens subject to deportation and one for most other defendants." App.11a (Bolick, J., concurring). In their view, "*Lee* grossly diverges from *Strickland*, and thus was wrongly decided" and they "hope[d] the Supreme Court will reconsider that decision." App.14a. Justices Lopez, Brutinel and Gould agreed. App.18a.

The State obviously disagrees that *Lee* is controlling for unauthorized aliens, *supra* Section I. Indeed, the opinion below directly contravenes *Lee* as to the applicable burden, *supra* at 22-28, and sharply diverges from this Court's other *Strickland* precedents that strongly support the categorical bar recognized by other courts, *supra* at 12-15. Those five Justices thus should have distinguished *Lee*, rather than feeling bound by it and its so-construed inequities. But they at least made clear the severe problems of the result they viewed as compelled by *Lee*. In doing so, they left no doubt as to the enormous importance of the issues presented here and the desirability of this Court granting review.

This Court has similarly recognized the importance of preventing dilution of *Strickland*'s prejudice requirement, which it has done by repeatedly granting review of courts that have done so. *See, e.g., Harrington*, 562 U.S. at 111-13; *Wong*, 558 U.S. at 26-28.

The Fifth Circuit has also recognized the importance of these issues by granting en banc review *sua sponte* in *Batamula*, and reversing a panel decision that bore strong resemblance to the decision below. *Batamula*, 805 F.3d 611. And the Arizona Supreme Court itself noted this case involved "recurring issue[s] of statewide importance." App.6a.

B. THE IMMIGRATION CONTEXT FURTHER MILITATES IN FAVOR OF REVIEW

Courts have widely recognized that uniformity of federal law is uniquely important in the immigration context. *See, e.g., Texas v. United States*, 809 F.3d 134, 157-59 (5th Cir. 2015), *aff'd by equally divided court* 136 S. Ct. 2271 (2016); *Gerbier v. Holmes*, 280 F.3d 297, 311 (3d Cir. 2002); *Aguirre v. I.N.S.*, 79 F.3d 315, 317-18 (2d Cir. 1996); *Ye v. I.N.S.*, 214 F.3d 1128, 1132 (9th Cir. 2000).

It is therefore particularly important to resolve the splits presented here before they proliferate further and create greater divergences in immigration law. The lack of uniformity is made particularly obvious by comparing Arizona to Texas, another border state. Because the Fifth Circuit and Texas Court of Criminal Appeals both apply the majority categorical bar, *supra* at 16-17, *Strickland* claims of unauthorized aliens will be treated in a radically different manner in Texas than those in Arizona state courts. Similarly, the Tenth Circuit—which includes neighboring border state New Mexico—has rejected the proposition that *Padilla* applies equally to unauthorized aliens, *Donjuan*, 720 F. App'x at 490, which was the central premise for the decision below.

Arizona's position as a border state further increases the importance of the questions presented. The State already suffers a decidedly disproportionate share of the burdens from the country's broken immigration system. Requiring Arizona to shoulder the additional burden of an erroneous Sixth Amendment decision that greatly increases the risk of a large number of its criminal convictions being set aside is plainly unwarranted—and thoroughly preventable by granting certiorari.

C. THERE IS NO NEED TO PERMIT FURTHER PERCOLATION

Notably, lower courts have now effectively occupied *every* conceivable major position at issue here. As to whether unauthorized aliens can demonstrate *Strickland* prejudice for deficient immigration-law advice:

A substantial majority of courts—including three circuits and two state high courts—have answered **"never";**

The highest courts of Iowa and Massachusetts and the Western District of Washington have answered "**sometimes"** (*i.e.*, depends on the facts presented); and

The Supreme Court of Arizona and the District of Maryland have effectively answered **"always"** (including where there is no evidence of a viable defense to either conviction or deportation).

Although additional lower courts may further populate these three broad categories, there is simply no major ground left to fill. Because the field is now fully occupied, this Court should grant review and settle these issues now.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THESE IMPORTANT QUESTIONS

This case presents an ideal vehicle to resolve the questions presented here. This case is effectively bereft of factual complexity: there is no evidence supporting a viable defense to either the criminal charges or deportation. Indeed, Nunez-Diaz's own amici repeatedly admitted there was "no evidence" of any colorable deportation defense. *Supra* at 4-5.

The legal issues are also dispositive here. If the categorical bar recognized by the Fifth Circuit and other courts is correct, that will alone require reversal and fully dispose of this case. Similarly, if this Court insists upon meaningful record evidence supporting the *Strickland* prejudice claim, that too would be dispositive given the near-complete absence of supporting evidence offered by Nunez-Diaz.

Given the lack of factual complexity and the case-dispositive nature of both questions presented, this case presents an ideal vehicle to resolve those questions.

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Ultimately it is virtually inevitable that this Court will need to grant certiorari on these issues at some point: they are exceptionally important and highly recurrent, and it is exceedingly unlikely that the lower courts will resolve the splits themselves. The real questions are thus timing and vehicle. And because this case presents an ideal vehicle, and there is little benefit to be had from further percolation, *supra* Section III.C., this petition should be granted.

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.

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