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

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONER

MICHAEL J. O'NEILL
Counsel of Record
MATTHEW C. FORYS
LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176
703-554-6100
703-554-6119 (Facsimile)
mike@landmarklegal.org

RICHARD P. HUTCHISON
LANDMARK LEGAL FOUNDATION
3100 Broadway
Suite 1210
Kansas City, MO 64111
816-931-5559

Attorneys for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioner State of Arizona's Petition for a Writ of Certiorari. For reasons stated below, Landmark asks the Court to grant certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Arizona Supreme Court has joined the Iowa and Massachusetts Supreme Courts in applying the Court's erroneous decision in *Lee v. United States* to grant preferential treatment under the Sixth Amendment to criminal defendants who have no legal justification for being in the United States. The result is a

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *Amicus Curiae* provided notice to counsel for parties of its intent to file this brief on December 8, 2019. No person other than *Amicus Curiae, its members or its counsel* made a monetary contribution to its preparation or submission.

bizarre super Sixth Amendment right to counsel greater than that enjoyed by U.S. citizens.

The questions before the Court come down to: (1) Can an individual who is not a U.S. citizen and who is not authorized to be in this country assert an ineffective assistance of counsel claim when his attorney fails to adequately inform him of deportation consequences if he pleads guilty to a felony; (2) Is this claim valid even when the evidence overwhelmingly points to the illegal immigrant's guilt?

The Arizona Supreme Court, interpreting the Court's recent decision in *Lee v. United States*, has joined the state supreme courts of Iowa and Massachusetts in answering these questions "yes." Other state courts, as well as federal appellate courts, however, have ruled differently, concluding that an illegal immigrant has no underlying right to remain in the country and therefore cannot show undue prejudice.

Certiorari is necessary to resolve these questions and prevent confusion in the lower courts. If left unaddressed, the Arizona court's decision will have serious consequences that will affect the validity of thousands of guilty pleas by noncitizens. Finally, the Arizona court's decision will lead to an undue burden for courts as they seek to adjudicate this newly discovered right.

ARGUMENT

I. The Arizona Supreme Court's decision demonstrates Lee's fallacy of creating preferential Sixth Amendment status for noncitizen criminal defendants illegally present in the United States.

The Sixth Amendment guarantees a defendant's right to counsel. U.S. Const. Amend. VI. This guarantee extends to aliens. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). And this right includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Ineffective assistance of counsel arises when a court finds that: (1) counsel's representation falls below an "objective standard of reasonableness"; and (2) the deficiency prejudiced the defense. Id. at 688.

In plea agreements, a defendant satisfies *Strickland's* "prejudice" prong when he shows that he would not have pleaded guilty and would have insisted on going to trial but for the improper advice of counsel. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In these situations, a defendant must show a substantial likelihood that he would have succeeded at trial but for the attorney's inadequate counsel. Id. Such predictions of success should be made "objectively." Id. at 60.

An attorney's representation is objectively unreasonable when he fails to inform a noncitizen that deportation will or might result if a defendant pleads guilty. *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010). *Padilla* did not specify what exact conditions were

necessary for a noncitizen to establish prejudice. Id. at 369. It did, however, direct courts to look to whether a noncitizen subject to deportation is provided information sufficient to make a rational decision. *Padilla*, at 372.

In a decision pertaining only to a set of "usual circumstances" the Court fleshed out what would constitute a "rational" decision to reject a plea deal and pursue trial. A noncitizen establishes "a reasonable probability that he would have rejected a plea had he known that [the plea] would lead to mandatory deportation." *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017). A noncitizen meets the standard of showing a "reasonable probability" when he shows that deportation was the determinative issue in accepting a plea deal. Id.

Satisfying this test, however, is not enough. A noncitizen defendant must also show significant ties and "strong connections" to the United States and establish that "the consequences of taking a chance at trial were not markedly higher." Id. at 1969. Notably, *Lee* involved a noncitizen present in the country legally. Left unaddressed was whether an illegal immigrant can make a similar claim. The Arizona court, however, ruled that defendant's legal status did not bar this claim as those facing automatic deportation could still establish prejudice. *State of Arizona v. Nunez-Diaz*, 247 Ariz. 1, 444 P.3d 250, 255 (2019).

II. The Court should grant certiorari to reverse or, at a minimum, limit its decision in *Lee*.

Now, even when the evidence overwhelmingly shows guilt, illegal immigrants can now claim ineffective assistance of counsel if counsel fails to properly inform the accused of deportation. The Arizona court extended the Court's holding in *Lee* to illegal aliens, and in so doing, established a dangerous precedent that could significantly affect the pleas of thousands of illegal aliens who commit crimes and plead guilty.

Lee disregarded the previous requirement that a defendant establish prejudice by showing that but for the attorney's improper advice, the defendant would have a reasonable likelihood of success at trial. Instead, *Lee* established an unjust two-tier system for criminal defendants who claim ineffective assistance of counsel: one more rigorous standard for noncitizens subject to deportations and one less rigorous standard for other defendants who are U.S. citizens. This "highly unbalanced two-tiered system" has now been extended by the Supreme Court of Arizona to noncitizens present in the country illegally and should be addressed by the Court.

Lee is inconsistent with the Court's earlier decisions. To satisfy *Strickland's* second prong—improper prejudice, a "defendant 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. This requires a consideration of "the totality of the evidence."

Strickland, 466 U.S. at 695. Although the Court, in *Hill v. Lockhart*, extended the right to effective assistance of counsel to the plea stage, it retained "the same two-part standard" from *Strickland*. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). Thus, to establish prejudice, a defendant must show a reasonable probability that he would have succeeded at trial and without the improper advice from counsel.

In *Lee*, the Court misapplied this standard. Now, if a defendant faces deportation and his attorney failed to properly advise the defendant of deportation consequences of a guilty plea, the defendant can have the plea set aside even when he has not shown the outcome at trial would be different. *Lee*, 137 S. Ct. at 1966. This differs from *Strickland*. The finding of improper prejudice established in *Strickland* turns "on 'a prediction whether,' in the absence of counsel's error, 'the evidence' of the defendant's innocence or guilt 'likely would have changed the outcome' of the proceeding." *Lee*, 137 S. Ct. at 1970 (Thomas, J., dissenting, quoting *Hill v. Lockhart*, 474 U.S. at 59). So, the proper analysis "requires a defendant to show both that he would have rejected his plea and gone to trial and that he would have likely obtained a more favorable result in the end." *Lee*, 137 S. Ct. at 1970-71 (Thomas, J., dissenting).

Lee thus allows defendants facing deportation to attempt the "Hail Mary" pass for acquittal even when evidence overwhelmingly proves their guilt. Under *Strickland*, typical defendants need to show that a different outcome was likely. The lesser burden in deportation cases violates this mandate by removing the

requirement that a defendant show a "reasonable probability" of success. Now, two standards exist—defendants facing deportation can assert ineffective assistance of counsel even when there a slim chance of acquittal. Defendants who do not face deportation, however, must meet the "reasonable probability of success" standard. Individuals who have committed a crime by entering and remaining in the country illegally therefore receive a benefit as a result of their criminal violations.

Mr. Nunez-Diaz does not meet the "reasonable probability of success" standard. No evidence exists in the record suggesting he would have had a viable defense to the narcotics charges. In fact, the record shows he had practically zero chance of succeeding at trial. App. 51a-58a. Applying the standard in *Strickland* and *Hill* would lead to a denial of Mr. Nunez-Diaz's claim of ineffective assistance of counsel. Instead, the Arizona court authorized Mr. Nunez-Diaz's use of the "Hail Mary" standard for noncitizens facing deportation. *Nunez-Diaz*, 444 P.3d 254. The overwhelming evidence of Mr. Nunez-Diaz's guilt meant nothing—he simply had to assert that he would have rejected any plea agreement had he known the plea would lead to deportation.

And *Lee* involved a legal resident who lived most of his life in the United States. *Lee*, 137 S. Ct. at 1968. This individual also had extensive ties, having served in the military and started two small business. Id. Now, according to the Arizona court, illegal immigrants may successfully assert ineffective assistance of counsel

using the *Lee* standard. The Arizona court considered the legal status of a noncitizen irrelevant.

Ideally, the Court will accept certiorari and reverse its improper holding. At a minimum, revisiting *Lee* will allow the Court to limit its finding in Lee and rule that illegal aliens are not eligible to use the lower standard when showing "prejudice" in the context of an ineffective assistance of counsel claim.

III. *Lee's* narrow set of unusual circumstances do not apply to defendants illegally present in the United States.

Certiorari will give the Court the opportunity to remedy the erroneous analysis performed by the Arizona court. Under *Lee*, to successfully satisfy the "prejudice prong" in an ineffective assistance of counsel claim, a noncitizen needs to show: (1) counsel erroneously misadvised the defendant about deportation; (2) avoiding deportation was the determinative issue in the plea negotiations; (3) the record unambiguously supports this contention; (4) strong connections to the United States and no other countries; and (5) the consequences of taking a chance at trial were not markedly harsher than pleading guilty. *Lee*, 137 S. Ct. at 1968-69, Zachary Segal*, Lee v. United States: The Unusual Circumstances Test for Strickland Relief*, 34 Touro L. Rev. 823, 827 (2018).

The Arizona Supreme Court erred by failing to properly apply all of these factors. Although the Court held that *Lee* "controls the resolution of this case," it

failed to adequately satisfy the totality of the "unusual circumstances" of *Lee*.

Mr. Nunez-Diaz was present in the country illegally and faced deportation regardless of any guilty plea. *Nunez-Diaz*, 444 P.3d at 255. His removal therefore could not have been the determinative issue when accepting the plea agreement. The Arizona court did not look at the defendant's connections to the United States. And it did not look to whether the difference between pleading guilty and the maximum sentence at trial were grossly disproportionate.

First, consider the extensive connections to the United States in *Lee* versus the limited connections of Mr. Nunez-Diaz. In *Lee*, the defendant lived his entire life in the United States, served honorably in the military and had established a small business. *Lee*, 137 S. Ct. at 1968. He was the sole caregiver for his elderly parents who were naturalized U.S. citizens. Id. The defendant was also legally present in the United States—he had completed the necessary steps to obtaining a green card. In contrast, the Arizona court did not consider whether Mr. Nunez-Diaz had any significant ties to the United States nor does the record reflect any meritorious contribution to the nation or substantial ties like those in *Lee*.

Second, Mr. Nunez-Diaz's maximum sentence in pleading guilty and the maximum sentence at trial, unlike in *Lee*, were grossly disproportionate. Mr. Nunez-Diaz pleaded guilty to a class 6 "Undesignated Felony" for possession of drug paraphernalia. The court suspended

imposition of sentence and placed Mr. Nunez-Diaz on unsupervised probation for 18 months. App. 37a. He originally faced two charges of possession of two different narcotics, cocaine and methamphetamine, both class four felonies. App. 51a. Prison times for violating class four felonies range from one year to 3.75 years under Arizona law. Ariz. Rev. Stat. § 13-702(d) (2019).

Finally, in *Lee* and *Padilla*, the defendants showed prejudice because "their decision to proceed to trial was rational because they would never have been subject to deportation but for their convictions." *State v. Nunez-Diaz*, 444 P.3d at 257. Avoiding deportation could not have been determinative in any plea negotiations because Mr. Nunez-Diaz was already subject to deportation under 8 U.S.C. § 1227(a)(1)(B). Id. It did not matter whether he believed deportation was determinative—he was subject to deportation even if he were acquitted at trial.

Despite noting its controlling authority, the Arizona court failed to consider all of *Lee's* factors when determining whether a noncitizen can effectively assert ineffective assistance of counsel. The Arizona court looked only to whether avoiding deportation was determinative in a narrow context—it dismissed the fact that Mr. Nunez-Diaz was subject to deportation despite his narcotics charges. Id. at 255. The Arizona court did look to whether defense counsel sufficiently explained deportation consequences to Mr. Nunez-Diaz, but it did not address Mr. Nunez-Diaz's connections to the United States. Id. at 254. Nor did it compare the maximum sentences of pleading guilty to the

maximum sentence of going to trial. In short, it failed to properly apply the test established in *Lee* and, in so doing, extended the lower prejudice threshold to illegal aliens.

IV. Certiorari will resolve the split in courts on whether individuals present in the country illegally can establish prejudice under *Strickland* and *Hill v. Lockhart*.

As individuals present in the United States illegally do not have a right to be present in the country, their claims of ineffective assistance of counsel related to deportation consequences as a result of guilty pleas should be rejected by courts. The Supreme Court of Arizona departed from current rulings in U.S. Circuit Courts of Appeals for the Fifth, Fourth and Eleventh Circuits respectively. *United States v. Batamula*, 823 F.3d 237 (5th Cir. 2016) (en banc); *United States v. Sinclair*, 409 F. App'x 674 (4th Cir. 2011); *Gutierrez v. United States*, 560 F. App'x 924, 927 (11th. Cir. 2014).

These decisions bar illegal immigrants from successfully arguing that a guilty plea led to prejudice because the defendant has no underlying right to remain in the country. The Arizona decision also departs from state courts in Texas and Tennessee. *State v. Guerrero*, 400 S.W.3d 576, 588-89 (Tex. Crim. App. 2013); *Garcia v. State*, 425 S.W.3d 248, 261 (Tenn. 2013). In contrast, the Iowa Supreme Court and federal district courts in Washington and Maryland have all ruled that an illegal alien can establish the necessary prejudice to

assert ineffective assistance of counsel. *Diaz v. State*, 896 N.W. 2d 723 (Iowa 2017); *United States v. Arce-Flores*, No. CR15-0386JLR, 2017 WL 4586326 (W.D. Wash. Oct. 16, 2017); *United States v. Yansane*, 370 F. Supp. 3d. 580 (D. Md. 2019).

Admittedly, the Arizona court appeared to believe that the Court's holding in *Lee* superseded these decisions and it was thus bound by that decision. This only highlights the urgency that the Court clarify the state of the law.

V. Failing to grant certiorari will foster confusion and create an undue burden for courts.

Finally, extending *Lee* to illegal aliens deported based on their guilty pleas casts doubt on the validity of all similar types of pleas. Neither the Arizona court's decision nor *Lee* provide "assurance that plea deals negotiated in good faith with guilty defendants will remain final." *Lee*, at 1974 (Thomas, J., dissenting). At a minimum, the Arizona court's decision will permit any illegal alien who has pleaded guilty to criminal charges (and was later deported) in Arizona state courts to assert an ineffective assistance of counsel claim. It does not matter whether these individuals stood little chance at obtaining a not guilty verdict at trial—the low standard established in Lee and extended to illegal aliens by the Arizona court will entice defendants.

Lee imposed a "significant costs on courts and prosecutors" because its standard is a "highly fact-intensive,

defendant-specific undertaking." *Lee*, at 1975 (Thomas, J., dissenting). This standard now extends to the thousands of illegal aliens deported annually who have pleaded guilty to underlying criminal charges. In fiscal year 2018, Immigration and Customs Enforcement (ICE) removed 145,262 individuals based on criminal history. U.S. Immigration and Customs Enforcement, *Fiscal Year 2018 ICE Enforcement and Removal Operations Report*. Any of these individuals who pleaded guilty could, conceivably, assert ineffective assistance of counsel under the *Lee* standard.

CONCLUSION

For these reasons Landmark respectfully urges the Court to grant Petitioner's Writ of Certiorari.

Respectfully submitted,

MICHAEL J. O'NEILL
Counsel of Record
MATTHEW C. FORYS
LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176
703-554-6100
703-554-6119 (Facsimile)
mike@landmarklegal.org

RICHARD P. HUTCHISON
LANDMARK LEGAL FOUNDATION
3100 Broadway
Suite 1210
Kansas City, MO 64111
816-931-5559

Attorneys for Amicus Curiae