No. 16-327

IN THE

Supreme Court of the United States

JAE LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC works to defend constitutional protections for non-citizen immigrants as well as for citizens, and it has a strong interest in ensuring that the Constitution applies as robustly as its text and history require. Accordingly, CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Sixth Amendment guarantees that every person charged with a crime is entitled to the effective assistance of counsel. When that right is denied, a conviction or sentence that results from the denial must be vacated. The court below has subverted these long-established standards. Instead of examining whether the petitioner here, Jae Lee, would have rejected a harmful plea bargain if not for his attorney's mistakes—as precedent requires—the court denied relief based on a categorical rule about when it is "rational" for clients to reject plea bargains. In the court's words,

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* state that 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. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

"no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence." Pet. App. 4a (quotation marks omitted).

In other words, according to the court below, *every* noncitizen defendant facing slim prospects at trial would take a plea deal that shortens his sentence but dashes all hope of remaining in this country—no matter how strong his personal, familial, or financial ties to the United States, and no matter how clear it is that maintaining those ties was his primary goal during plea negotiations. This *per se* rule conflicts with this Court's precedents, defies reason, and leads to profound injustices in cases like this one. This Court should reject it and reverse the decision below.

Jae Lee is a lawful permanent resident of this country who was brought here by his parents thirty-five years ago when he was just thirteen. He was educated here and has never returned to his birth country of Korea. He owns two restaurants in Memphis, Tennessee, where he lived for twenty years before his incarceration. His elderly parents, now U.S. citizens, live in New York, and Lee is the only child left to take care of them. Pet. App. 54a.

In 2009, law enforcement officers searched Lee's home pursuant to a federal warrant, based on an informant's tip. They found 88 ecstasy pills, and Lee was charged with possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1). *Id*. at 53a. Lee had never previously been convicted of a crime. Pet'r Br. 6. After he pleaded not guilty in his initial court appearance, Lee and his newly retained attorney began plea negotiations with the government. Lee's attorney, Larry Fitzgerald, later testified that he viewed Lee's case as "a bad case

to try," because, among other things, he could find no basis for suppressing the results of the search, and the circumstances made it difficult to argue that the drugs were only for personal use. *Id*. at 54a. Fitzgerald testified that it would have been "difficult, let's put it that way, not impossible but it would [have been] difficult" to succeed at trial. *Id*. at 45a.

Fitzgerald also testified that "Lee repeatedly raised the question of deportation and indicated that it was his main concern in deciding how to proceed." *Id*. at 54a. After a proffer session with the government, "Fitzgerald discussed with Lee the risk of going to trial versus the benefits of pleading guilty," advising Lee that "he would likely face between three and five years of imprisonment if he went to trial and were convicted whereas if he accepted the plea agreement he would be looking at a much shorter term of imprisonment or possibly even just probation." *Id*. at 55a. Fitzgerald told Lee that "the government" was not seeking to deport him as part of the proposed plea agreement, *id*., and, according to Lee, also said: "'[Y]ou have been in the United States so long they cannot deport you. Even if they want to deport you, it's not in the plea agreement,'" *id*. at 56a (quoting hearing transcript). Fitzgerald testified that "Lee believed he would not be deported if he pled guilty" and that this was "'the key to [Lee's] decision'" to accept the plea deal. *Id*. (quoting hearing transcript) (alteration in original).

Upon accepting the deal and pleading guilty, Lee was sentenced to a term of one year and a day. Only after beginning his incarceration did he learn that Fitzgerald's advice was wrong: conviction on the charge to which he pleaded guilty requires automatic deportation, and removal proceedings against him were imminent. *Id*. at 54a, 58a. Lee then filed a mo-

tion to vacate his sentence under 28 U.S.C. § 2255, arguing that he was deprived of his Sixth Amendment right to the effective assistance of counsel. *Id*. at 18a-20a.

Despite an evidentiary hearing before a magistrate judge during which "[t]he testimonies of Lee and Fitzgerald were consistent that deportation was the determinative issue in Lee's decision whether to accept the plea deal," *id*. at 56a, and despite the magistrate's recommendation that Lee's motion be granted because "it would have been rational for him to choose to go to trial" if he had known that his plea deal would result in mandatory, automatic deportation, *id.* at 76a; *see id.* ("under the circumstances, deportation was, objectively, at least as undesirable as any prison sentence"), both the district court and the Sixth Circuit concluded that Lee was not prejudiced by his counsel's assurances that he would not be deported if he pleaded guilty. Even though the district court adopted the magistrate judge's factual findings, and even though the Sixth Circuit acknowledged "[a]s a factual matter" that "many defendants in [Lee's] position, had they received accurate advice from counsel, would have decided to risk a longer prison sentence in order to take their chances at trial, slim though they were," *id.* at 4a, both courts concluded that such a finding was insufficient.

Rather, as the Sixth Circuit explained, it could grant relief to Lee only by reaching the additional conclusion that rejecting the plea bargain would have been "'rational under the circumstances.'" Pet. App. 3a (quoting *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012)); *see id.* at 46a (district court concluding that "[t]he proper focus under an objective standard is on whether *a reasonable defendant* in Lee's situation would have accepted the plea offer and changed his

plea to guilty" (emphasis added)). On this additional question the panel viewed itself as bound by circuit precedent, which had established a *per se* rule for situations like Lee's: "no rational defendant charged with a deportable offense and facing 'overwhelming evidence' of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence." *Id.* at 4a (quoting *Pilla*, 668 F.3d at 373). As the panel concluded, "Lee finds himself in precisely this position, and he must therefore lose." *Id.*

The Sixth Circuit has strayed from this Court's holdings, and its decision here should be reversed. Under *Strickland v. Washington*, 466 U.S. 668 (1984), defendants who show prejudice from their counsel's errors are entitled to relief. In the context of plea bargains, the touchstone of the prejudice inquiry is whether "the outcome of the plea process would have been different with competent advice." *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The answer to that question "will turn on the facts of the particular case." *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000). A court must therefore consider, among other things, the goals and priorities that motivated a particular defendant during plea negotiations—whether, for instance, "he placed particular emphasis on" any special factor, like deportation, "in deciding whether or not to plead guilty." *Hill*, 474 U.S. at 60.

Gauging whether a defendant would have gone to trial but for counsel's errors often requires assessing the likelihood that he would have prevailed at trial, because this can be expected to have influenced his decision. But the likelihood of victory at trial is not significant in its own right, much less dispositive of the prejudice inquiry—its relevance lies in how it might have affected the defendant's choice. *See Hill*, 474 U.S.

at 59-60; *cf. Flores-Ortega*, 528 U.S. at 486. Thus, other relevant factors bearing on that choice must also be taken into account.

At no time is this more important than when a defendant faced collateral consequences for a conviction that required balancing the risk of a longer sentence with a desire to avoid those consequences. In this case, for instance, Lee had to balance the risk that proceeding to trial and losing would increase his prison sentence by a few years with the fact that accepting the plea bargain meant eliminating virtually any chance of remaining in this country. The choice of how to balance those competing demands will be a personal one, resting on factors that include a defendant's ties to the United States, his connections (or lack thereof) to his birth country, the length of his potential sentence if convicted at trial, his prospects at trial, and his own temperamental willingness to accept high risk in exchange for high reward. Only by taking into account the various circumstances that confronted a particular defendant can a court determine whether, "but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

Alone among the courts of appeals, the Sixth Circuit has adopted a categorical rule that frustrates the application of these standards. According to the Sixth Circuit, a single sentence of *Padilla v. Kentucky*, 559 U.S. 356 (2010), a decision that did not involve the prejudice inquiry, somehow imposed a new burden on defendants who challenge their guilty pleas. Thus, in the Sixth Circuit's view, a defendant must do more than show a reasonable probability that he would have rejected his plea bargain with competent advice. He also must also show that a "rational" person would have done the same thing. Pet. App. 4a. But *Padilla*

imposed no such burden. The statement on which the Sixth Circuit has placed so much weight—a passing reference made in the context of a discussion focused on other matters—is a shorthand summary of existing doctrine, not an attempt to establish new doctrine. *Padilla* does not, as the Sixth Circuit would have it, instruct lower courts to eschew the question of whether a specific defendant would have rejected his plea deal, in favor of an abstract inquiry into whether that choice would have been "rational."

Moreover, by shifting the focus of the prejudice inquiry toward how a "rational" person would have acted, the Sixth Circuit inevitably relies on broad, categorical rules to decide what choices rational persons would make. Thus, the Circuit has decreed that *every* defendant facing "overwhelming evidence" of guilt would take a plea deal, even though doing so eliminates any chance of remaining in this country. *Id.* Such *per se* rules, this Court has insisted, are inimical to the prejudice analysis under *Strickland*, which requires considering all of the circumstances in each individual case.

Finally, the categorical rule adopted by the Sixth Circuit fails to reckon with the drastic nature of deportation. In declaring that no defendant facing slim prospects at trial would decide that a small chance of remaining in the United States is worth the risk of more time in prison, the Circuit ignores what this Court has emphasized time and again—few penalties are more "drastic" and "severe" than deportation, "the equivalent of banishment or exile." *Padilla*, 559 U.S. at 360, 365, 373. The severity of banishment from one's adopted homeland makes it entirely predictable that some defendants would seek to avoid it at all costs, and thus they would, like Lee, risk a longer jail sentence for even a glimmer of hope to remain in this country.

ARGUMENT

I. Under this Court's Precedents, the Question Is Whether the Petitioner Himself Would Have Rejected the Plea Bargain if Not for Counsel's Errors.

The Sixth Amendment's guarantee of counsel is meant to "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland*, 466 U.S. at 691-92. An attorney's deficient performance prejudices the defendant—justifying relief from a conviction or sentence—when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

As this Court has recognized, "[t]he governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors." *Id.* at 695. Thus, courts reviewing a claim of ineffective assistance "do not view counsel's performance in the abstract." *United States v. Cronic*, 466 U.S. 648, 658 n.22 (1984). Instead, they attempt to gauge the "impact" of any deficiency on the proceeding that took place. *Id*. A defendant's burden is to "show how specific errors of counsel undermined the reliability" of the proceeding. *Id.* at 659 n.26.

Some attorney errors, however, lead "not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself," such as a jury trial or an appeal. *Flores-Ortega*, 528 U.S. at 483. Where this is the allegation, a defendant must demonstrate that but for counsel's errors he would have availed himself of the proceeding in question—in other words, that it was counsel's deficiency, not some other factor, that "caused the defendant to forfeit a judicial proceeding

to which he was otherwise entitled." *Flores-Ortega*, 528 U.S. at 485.

If an attorney neglects to file an appeal or consult with his client about it, for example, the client must show that "but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id*. at 484. Similarly, when an attorney fails to relay a plea offer to his client, who subsequently pleads guilty on less favorable terms, the client must show that, if properly informed, he "would have accepted the offer to plead pursuant to the terms earlier proposed." *Missouri v. Frye*, 132 S. Ct. 1399, 1410 (2012); *see Lafler*, 132 S. Ct. at 1385. Finally, the same is true when a defendant accepts a plea bargain after receiving incorrect advice about its consequences; in that case, he must show that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59; *Padilla*, 559 U.S. at 359 (defendant must show that he "would have insisted on going to trial if he had not received incorrect advice from his attorney").

What sets these cases apart from those in which a court proceeding took place is that the key decision alleged to have been compromised by counsel's errors "rested with the defendant," *Flores-Ortega*, 528 U.S. at 485, not with a judge or jury. Thus, whether the defendant was prejudiced by counsel's errors hinges on the choice that *the defendant* would have made if he had received constitutionally adequate assistance.

This principle has been clear since *Hill v. Lockhart*, which established the framework for claims that ineffective assistance resulted in an unfavorable plea bargain. In such cases, the Court explained, the focus of the prejudice inquiry is on what the defendant himself would have done if properly assisted—whether, "but for counsel's errors, he would not have pleaded

guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

The inquiry thus requires examining a number of factors to discern the goals and priorities that might have motivated the defendant during plea negotiations—whether, for instance, "he placed particular emphasis on" any special considerations "in deciding whether or not to plead guilty." *Id.* at 60. Only by considering all the surrounding factors and inferences fairly drawn from those factors can a court decide what that particular defendant would have done, and thus, whether "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.[2]

In gauging whether a defendant would have gone to trial but for counsel's errors, courts generally will need to assess the likelihood that he would have prevailed at trial, because this can be expected to have influenced his decision. When, for instance, "in connection with a guilty plea, counsel gives deficient advice

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[2] To illustrate, the defendant in *Hill* failed to make the necessary showing because he offered no reason to believe that he actually would have made a different choice had he received proper advice from counsel. Although the basis of his claim was that counsel failed to advise him about when he would be eligible for parole, he did not assert that "had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial." *Id.* at 60. Nor did he cite any "special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." *Id.* And it was difficult to imagine how counsel's mistake possibly *could* have swayed him to reject the plea, because the mistake "would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted." *Id.*

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regarding a potentially valid affirmative defense, the prejudice inquiry depends largely on whether that affirmative defense might have succeeded, leading a rational defendant to insist on going to trial." *Flores-Ortega*, 528 U.S. at 486 (citing *Hill*, 474 U.S. at 59).

Importantly, however, the likelihood of victory at trial is relevant only because of how it might have affected the defendant's choices. *See id.*; *Hill*, 474 U.S. at 59 ("[W]hether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. *This assessment, in turn, will depend in large part* on a prediction whether the evidence likely would have changed the outcome of a trial." (emphasis added)); *see, e.g.*, *id.* at 60 (rejecting contention that accurate information about parole eligibility would have prompted defendant to decline the plea bargain, because that information "would seem to have affected [equally] his calculation of the time he likely would serve if he went to trial and were convicted"); *Premo v. Moore*, 562 U.S. 115, 129 (2011) (agreeing that defendant might have accepted the plea bargain even if counsel succeeded in excluding his confession, because "the State's case was already formidable" and "might well have become stronger" with further investigation, while the plea bargain "allowed him to avoid a possible sentence of life without parole or death").

That courts will often need to consider whether a choice would have been "rational" should not obscure a fundamental point: the ultimate, dispositive question is what the defendant before the court would have done, and considering the rationality of various choices simply helps answer that question. It is not part of a separate inquiry. This is made clear by *Hill*, which

recognizes that during plea negotiations some defendants might place "particular emphasis" on a factor not prioritized by other defendants, making it rational for the choices of the former to differ from those of the latter. *Hill*, 474 U.S. at 60. In short, because the prejudice inquiry requires assessing the likely outcome of a counterfactual reality, courts will often need to consider how a defendant's prospects at trial, along with other factors, would likely have influenced his choices—enabling a decision about whether "the outcome of the plea process would have been different with competent advice." *Lafler*, 132 S. Ct. at 1384.

This Court applies the same standards when counsel's deficiency allegedly caused a defendant to forfeit an appeal. Here, too, whether a defendant was prejudiced by the deficiency hinges on what he himself would have chosen to do if he had received competent aid. "If the defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything, and he is not entitled to relief." *Flores-Ortega*, 528 U.S. at 484. But if the defendant can show that he actually would have appealed but for counsel's mistakes, he can prevail. In *Rodriquez v. United States*, 395 U.S. 327 (1969), for instance, where counsel disregarded a defendant's instruction to appeal his conviction, the defendant's request "objectively indicated his intent to appeal," demonstrating prejudice and entitling him to relief. *Flores-Ortega*, 528 U.S. at 485. In other situations, where contemporaneous evidence indicating a defendant's intentions cannot be found, the defendant may rely instead on reasons that appealing the conviction would have been the logical thing for him to do. *See id.* ("evidence that there were nonfrivolous grounds for appeal *or* that the defendant in question promptly expressed a desire to

appeal will often be highly relevant in making [the prejudice] determination" (emphasis added)).

Likewise, where counsel withholds a plea bargain offer from a defendant who later pleads guilty on less favorable terms, prejudice can be demonstrated if the defendant offers persuasive reasons to believe that he would have accepted the earlier plea offer if properly informed. *See, e.g.*, *Frye*, 132 S. Ct. at 1411 ("Frye's acceptance of the less favorable plea offer indicated that he would have accepted the earlier (and more favorable) offer had he been apprised of it."). The same standards apply in other contexts where vacating a conviction or sentence requires demonstrating prejudice from an error. Thus, if a district court fails to advise a defendant at sentencing of his right to appeal—as required by the Federal Rules of Criminal Procedure—the mere fact of the error does not entitle him to relief "if he knew of his right and hence suffered no prejudice from the omission." *Peguero v. United States*, 526 U.S. 23, 24 (1999). The knowledge held by the specific defendant before the court is significant because what ultimately matters is what *he* would have done absent the error. *See id.* at 25 (denying relief based on finding that "petitioner knew of his right to appeal when the sentencing hearing occurred").

In sum, when counsel's deficient performance allegedly affected a decision that "rested with the defendant" rather than with a judge or jury, *Flores-Ortega*, 528 U.S. at 485, the prejudice inquiry must ask what *that defendant* would have done if he had received constitutionally adequate assistance. There is no requirement to show that a hypothetical "rational" defendant—who might not place "particular emphasis" on the same factors, *Hill*, 474 U.S. at 60—would have made the same choice.

II. Misinterpreting *Padilla*, the Sixth Circuit Changed the Prejudice Inquiry by Asking Whether a "Rational" Person Would Have Rejected the Plea Bargain Instead of Whether the Petitioner Would Have Done So.

Padilla changed none of the standards set forth above. The Sixth Circuit, however, has misinterpreted one sentence in that opinion—a brief summary of existing doctrine—as imposing a new burden on defendants who challenge their guilty pleas. According to the Circuit, a defendant must do more than show a reasonable probability that he would have rejected his plea bargain with competent advice. He also must show that a "rational" person would have done the same thing. *Padilla* imposed no such burden.

To start, it bears emphasis that *Padilla*'s holding addressed only the performance prong of the *Strickland* test. It did not involve the prejudice prong, as the Court noted three times. *See Padilla*, 559 U.S. at 360 ("Whether [Padilla] is entitled to relief depends on whether he has been prejudiced, a matter that we do not address."); *id.* at 369 (same); *id.* at 374 (same).

The Court's opinion did, however, briefly refer to the prejudice prong while discussing the likely effects of its holding. Acknowledging concerns about "protecting the finality of convictions obtained through guilty pleas," the Court sought to assuage fears that its holding would lead to a wholesale unraveling of such pleas. It first noted that a similar "floodgates" concern was raised in *Hill* but "[a] flood did not follow in that decision's wake." *Id.* at 371. "Surmounting *Strickland*'s high bar is never an easy task," *id.*, the Court observed, before continuing as follows:

> Moreover, 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. See *Roe* v. *Flores-Ortega,* 528 U.S. 470, 480, 486 (2000). There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit.

Id. at 372. The Court then cited two more reasons it was "unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains." *Id*.

Misinterpreting the import of this discussion, the Sixth Circuit has seized on this Court's passing reference to *Strickland* prejudice and made that statement the basis of a new rule: "The test is objective, not subjective; and thus, '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.'" *Pilla*, 668 F.3d at 373 (quoting *Padilla*, 559 U.S. at 372); *see* Pet. App. 3a (same). But the context in which this Court made that statement leaves no doubt that it was intended to summarize existing standards, not establish a new one. Indeed, the citations the Court provided to support this statement made clear that it was simply a shorthand description of a more complex doctrine—as one would expect from a passing reference found in the midst of a discussion focused on other concerns. There is no basis, therefore, to strip this sentence from its context, ignore the passages it was meant to summarize, and elevate the isolated text into a harsh new standard that is at odds with this Court's holdings.

Yet that is precisely what the Sixth Circuit has done. And it denied relief to Lee based on his perceived inability to satisfy this new test. The court acknowledged that "[a]s a factual matter, . . . many defendants in [Lee's] position, had they received accurate advice from counsel, would have decided to risk a longer prison sentence in order to take their chances at trial, slim though they were." Pet. App. 4a. But the court never decided whether it was reasonably probable that Lee himself would have taken this risk. Resolving that question was unnecessary, in the court's view, because Lee could not meet his additional burden of showing that going to trial under these circumstances would have been "rational." *Id.*

In declaring the prejudice test to be "objective," the Sixth Circuit has not simply made the point that successful defendants must offer more than their own word about what they would have done if advised differently by counsel. Instead, the Circuit has declared that what matters is not the choice that the defendant himself would have made—based on his own personal priorities, tolerance for risk, and subjective weighing of the various factors at play—but rather the choice that a hypothetical "rational" person would have made in the same circumstances. That is why the court dispensed with assessing whether Lee himself, "[a]s a factual matter," would have decided to reject the plea bargain if competently advised, and instead moved on to what it saw as the real question: "would such a decision be 'rational'?" *Id.*

Before *Padilla*, this Court had never used the formulation on which Sixth Circuit based its new test. The sentence in *Padilla* on which the Circuit relied cited two passages from *Flores-Ortega*, and those passages both run counter to the new rule that the Circuit has devised.

In the first of those cited passages, this Court discussed the *performance* prong of *Strickland*—specifically, the question of when attorneys are obligated to consult with their clients regarding an appeal: "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Flores-Ortega*, 528 U.S. at 480. This framework bears some similarity to the prejudice analysis, because the attorney (and a court later reviewing the attorney's performance) must gauge the defendant's interest in appealing. And just as in the prejudice analysis, the defendant's interest can be shown either by direct, contemporaneous evidence of what he actually wanted to do, "or" by inferences regarding what a rational defendant in his situation would want to do. There is no requirement that *both* criteria be satisfied: "Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal *or* that the particular defendant sufficiently demonstrated to counsel an interest in an appeal." *Id.* (emphasis added).

The second passage, which simply recapitulates a point made in *Hill*, is consistent: "when, in connection with a guilty plea, counsel gives deficient advice regarding a potentially valid affirmative defense, the prejudice inquiry depends largely on whether that affirmative defense might have succeeded, leading a rational defendant to insist on going to trial." *Id.* at 486 (citing *Hill*, 474 U.S. at 59). This passage indicates that while the prejudice inquiry "depends largely" on the defendant's likely prospects at the proceeding he

forfeited, it does so only because of how those prospects would have affected his choice. The prejudice inquiry thus does not depend *entirely* on those prospects. *See id.* at 485 ("The question whether a defendant has made the requisite showing will turn on the facts of the particular case. Nonetheless, evidence that there were nonfrivolous grounds for appeal *or that the defendant in question promptly expressed a desire to appeal* will often be highly relevant in making this determination" (emphasis added)).

In sum, the very passages on which *Padilla* relied in its brief reference to the prejudice standard belie the Sixth Circuit's interpretation—that this Court meant to establish a distinction between what the defendant would have done and what a hypothetical "rational" person would have done in the same situation.

To be clear, a defendant must show that his choice would have been "rational" in the following sense: his claim that he would have acted differently if competently advised must be credible, enough so to establish a reasonable probability of a different result. In *Hill*, for instance, the defendant failed this test because the mistake of counsel he complained of "would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted." *Hill*, 474 U.S. at 60. This is the type of "specious claim[]" that the prejudice inquiry, properly applied, separates from those "with substantial merit." *Padilla*, 559 U.S. at 372.

But when a defendant faces collateral consequences for a conviction, such as deportation, he must balance considerations that directly compete with one another—such as the risk of a longer prison sentence versus the chance to remain in the United States. The

choice of how to balance those competing demands will be a personal one, resting on factors that include a defendant's ties to the United States, his connections (or lack thereof) to his birth country, the length of his potential sentence if convicted at trial, his prospects at trial, and his own temperamental willingness to accept high risk in exchange for high reward. Neither *Padilla* nor any other decision of this Court calls for judges to impose a one-size-fits-all rule, based on a single factor, that dictates what would be "rational" for every defendant.

III. The Sixth Circuit's Approach Ignores this Court's Rejection of *Per Se* Rules in the Prejudice Inquiry.

Because the Sixth Circuit has shifted the focus of the prejudice inquiry away from the defendant before the court, toward consideration of how a "rational" person would have acted, the Circuit inevitably must rely on broad, *per se* rules to decide what choices rational persons would make. Thus, instead of deciding whether Lee would have rejected his plea bargain, the Circuit rejected his claim based on its categorical rule that "no rational defendant charged with a deportable offense and facing 'overwhelming evidence' of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence." Pet. App. 4a. Such *per se* rules, however, are inimical to the prejudice analysis under *Strickland*, which requires considering all of the circumstances in each individual case.

As this Court has stressed, the *Strickland* analysis is not meant to "establish mechanical rules" but rather to "guide the process" of deciding whether "the result *of the particular proceeding* is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466

U.S. at 696 (emphasis added). Thus, in "all applications" of *Strickland*'s prejudice test, "the question whether a given defendant has made the requisite showing will turn on the facts of a particular case." *Flores-Ortega*, 528 U.S. at 485; *see Williams v. Taylor*, 529 U.S. 362, 391 (2000) ("the *Strickland* test of necessity requires a case-by-case examination of the evidence" (quotation marks omitted)); *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) (referencing "the case-by-case prejudice inquiry that has always been built into the *Strickland* test").

The prejudice inquiry is therefore not susceptible to *per se* rules or to sweeping, categorical approaches. To the contrary, this Court has always emphasized that courts "must consider the totality of the evidence" in making the prejudice determination. *Strickland*, 466 U.S. at 695. So firmly entrenched is this principle that failure to heed it renders a court's decision an unreasonable application of clearly established federal law. *See Williams*, 529 U.S. at 397 ("the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence").

Given the importance of considering all the circumstances of a particular case when evaluating prejudice, this Court has not hesitated to rebuff lower courts when they attempt to establish categorical shortcuts.[3] In *Premo*, for instance, this Court observed that the lower court appeared to have accepted "a *per se* rule of prejudice, or something close to it, in all cases involving suppressible confessions." *Premo*, 562

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[3] In special situations, prejudice from a denial of effective assistance is presumed, meaning that courts do not conduct a prejudice inquiry. *See Williams*, 529 U.S. at 391.

U.S. at 130. Disclaiming any such rule, the Court reiterated the need for a case-by-case inquiry into "whether [the defendant] established the reasonable probability that he would not have entered his plea but for his counsel's deficiency." *Id.* (citing *Hill*, 474 U.S. at 59). Similarly, in *Flores-Ortega* this Court explained: "The Court of Appeals below applied a *per se* prejudice rule, and granted habeas relief based solely upon a showing that counsel had performed deficiently under its standard. Unfortunately, this *per se* prejudice rule ignores the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal." *Flores-Ortega*, 528 U.S. at 484 (citation omitted). And in *Peguero*, this Court clarified that the "limited and fact-specific conclusion" of one of its earlier opinions "does not support *a general rule* that a court's failure to advise a defendant of the right to appeal automatically requires resentencing to allow an appeal." *Peguero*, 526 U.S. at 28-29 (1999) (emphasis added) (citing *Rodriquez*, 395 U.S. at 329-30).

Each time, this Court rejected categorical approaches that obviated the need for a "case-by-case" inquiry, *Fretwell*, 506 U.S. at 369 n.2, into whether "the result of the proceeding would have been different" but for counsel's errors. *Strickland*, 466 U.S. at 694-95.

The rule adopted by the Sixth Circuit represents just such a categorical approach—discounting evidence that Lee himself placed a premium on remaining in the United States and prioritized this concern during plea negotiations over "any potential jail sentence." *Padilla*, 559 U.S. at 368. More generally, the Sixth Circuit's rule leaves no room to consider the nature and strength of a defendant's ties to the United States and unfamiliarity with his birth country. Although the Sixth Circuit purports to recognize that "a

claimant's ties to the United States should be taken into account," Pet. App. 10a, it made Lee's slim prospects at trial wholly determinative of the prejudice inquiry. The Circuit thus transformed a single, albeit important, factor that must be considered as part of the prejudice inquiry into the *only* factor considered. As a result, no matter how deep a defendant's ties to the United States, or how clear it is that maintaining those ties was his primary goal in plea negotiations, the Circuit applies the same unyielding rule: *every* defendant facing strong evidence of guilt would take a plea deal instead of risking a longer sentence by going to trial.

That rigid doctrine simply defies reality in a case like this one. Consulting with his lawyer during plea negotiations, "Lee repeatedly raised the question of deportation and indicated that it was his main concern in deciding how to proceed." *Id*. at 54a. His lawyer has testified that "deportation was the determinative issue in Lee's decision whether to accept the plea deal," *id*. at 56a, and this testimony is entirely credible given Lee's long life in the United States, his strong familial ties here, and his lack of any connection whatsoever to Korea, *id*. at 75a. One could scarcely find a better case to illustrate the folly of the Sixth Circuit's *per se* rule.

No other circuit has made this mistake. Other courts give due weight to evidence that a defendant was particularly motivated by immigration consequences during plea negotiations. *See, e.g.*, *Kovacs v. United States*, 744 F.3d 44, 53 (2d Cir. 2014) (relying on evidence that defendant's "single-minded focus in the plea negotiations was the risk of immigration consequences"); *United States v. Rodriguez-Vega*, 797 F.3d 781, 789 (9th Cir. 2015) (relying on evidence that defendant sought "to limit her chances of removal"). These courts also take into account the full range of

circumstances that can be expected to have influenced a petitioner's choices during plea negotiations, including not only the prospects of victory at trial, but also the petitioner's length of time in the United States, family ties here, age, familiarity (or lack thereof) with his birth country, length of potential sentence if convicted at trial, chances of negotiating a plea that would avoid deportation, and any judicial admonishment received at sentencing regarding immigration consequences. *See DeBartolo v. United States*, 790 F.3d 775, 778-80 (7th Cir. 2015); *Hernandez v. United States*, 778 F.3d 1230, 1234 (11th Cir. 2015); *Rodriguez-Vega*, 797 F.3d at 788-90; *United States v. Kayode*, 777 F.3d 719, 725-29 (5th Cir. 2014); *Kovacs*, 744 F.3d at 51-53; *United States v. Akinsade*, 686 F.3d 248, 255-56 (4th Cir. 2012); *United States v. Orocio*, 645 F.3d 630, 643-45 (3d Cir. 2011), *abrogated on other grounds by Chaidez v. United States*, 133 S. Ct. 1103 (2013).

While these courts acknowledge *Padilla*'s statement that defendants must show that rejecting the plea bargain would have been rational under the circumstances, they all interpret and apply that statement in a manner consistent with this Court's holdings. Only the Sixth Circuit has transformed it into a *per se* rule that sidesteps the true question—whether "the result of the particular proceeding" is unreliable because of a breakdown in the adversarial process. *Strickland*, 466 U.S. at 696.

IV. The Sixth Circuit's Approach Ignores the Severity of Deportation, Long Recognized as a Harsh Penalty Akin to Banishment.

The rule adopted by the Sixth Circuit has yet another fatal flaw: it fails to adequately account for the drastic nature of deportation. Under the Sixth Circuit's rule, no defendant facing slim prospects at trial would decide that a small chance of remaining in the

United States is worth the risk of more time in prison. But that broad pronouncement simply ignores what this Court has emphasized time and again—few penalties are more extreme than permanent banishment from one's adopted homeland. The severity of this penalty makes it entirely understandable that some defendants would try to avoid it at all costs and thus, like Lee, would risk a longer jail sentence for even a glimmer of hope of remaining in this country.

As this Court has long recognized, "deportation is a particularly severe penalty," *Padilla*, 559 U.S. at 365 (citing *Fong Yue Ting v. United States,* 149 U.S. 698, 740 (1893) (quotation marks omitted)), a "drastic measure" that is "'the equivalent of banishment or exile,'" *id*. at 373 (quoting *Delgadillo v. Carmichael,* 332 U.S. 388, 390-91 (1947)). For many defendants, therefore, preserving the right to remain in the United States "may be more important . . . than any potential jail sentence." *Id*. at 368 (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 322 (2001)); *cf*. Pet. App. 54a, 56a (testimony indicating that this was true for Lee).

Indeed, banishment has been recognized throughout history as a harsh and drastic fate. *See generally Stogner v. California*, 539 U.S. 607, 643 (2003) (Kennedy, J., dissenting) (explaining that historically banishment was considered to be punishment for severe offenses and was "'the highest punishment next to death'" (quoting *Edward Earl of Clarendon's Trial*, 6 How. St. Tr. 292, 386 (1667))). Banishment has been acknowledged as a particularly harsh penalty for centuries, and was recognized as such both at the time of our nation's Founding and at its Reconstruction. *See Stogner*, 539 U.S. at 642, 644-45 (Kennedy, J., dissenting); *see also id.* at 644-45 (quoting William F. Craies, *Compulsion of Subjects to Leave the Realm*, 6 L.Q. Rev. 388, 392 (1890)

("[B]anishment, perpetual or temporary, was well known to the common law")); An Act for Punishment of Rogues, 39 Eliz. 1, c. 4, s. 4 (1597); Roman Catholic Relief Act, 10 Geo. 4, c. 7, s. 28 (1829) (providing for the banishment of Jesuits). In 1798, this Court in *Calder v. Bull* cited the banishments of Lord Clarendon in 1667 and Bishop Francis Atterbury in 1723 as examples of improper, increased punishments exacted by British parliamentary enactments. 3 Dall. 386, 389 (1798); *see Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n.23 (1963) ("[F]orfeiture of citizenship and the related devices of banishment and exile have throughout history been used as a punishment. . . . Banishment was a weapon in the English arsenal for centuries, but it was always adjudged a harsh punishment even by men accustomed to brutality in the administration of criminal justice." (citations and quotation marks omitted)).

Recognizing that removal of a resident alien can be as severe a punishment as criminal banishment, James Madison argued in opposition to the Alien and Sedition Acts:

> If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness, a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the moveable and temporary, kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; . . . if a banishment of this sort be not a punishment, and among

> the severest of punishments, it will be difficult to imagine a doom to which the names can be applied.

James Madison, *Report on the Virginia Resolutions*, *in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 555 (Jonathan Elliot ed., 1836). Thomas Jefferson similarly described the expulsion of aliens as a "grievous punishment." *Kentucky Resolutions of 1798*, *in* 4 *id.* at 543.[4] This Court has echoed these sentiments, explaining:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Bridges v. Wixon, 326 U.S. 135, 154 (1945); *see id.* at 164 (Murphy, J., concurring) ("The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence.").

Deportation is a particularly serious penalty for longtime lawful permanent residents, like Lee, who

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[4] The Alien and Sedition Acts passed over Madison and Jefferson's objections and expired in 1800. Madison and Jefferson's views were more enduring, however, and, "by 1832, Vice President John C. Calhoun asserted that the unconstitutionality of the Alien and Sedition laws was 'settled.'" Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 Tex. L. Rev. 1, 98 (2002).

have "establish[ed] a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen." *Demore v. Kim*, 538 U.S. 510, 544 (2003) (Souter, J., concurring in part and dissenting in part); *see Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (noting that, "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly"). Lee has lived his entire life in the United States since coming here as a child in 1982. He has never returned to Korea. He has resided for two decades in the same city, where he has built a successful restaurant business. He has elderly parents living here, with no other children to help care for them. This Court has characterized the interests of lawful permanent resident aliens like Lee as undeniably "weighty," *Landon*, 459 U.S. at 34, given that such individuals stand to "lose the right 'to stay and live and work in this land of freedom,'" *id*. (quoting *Bridges*, 326 U.S. at 154), as well as "the right to rejoin [their] immediate family, a right that ranks high among the interests of the individual," *id.* (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

In sum, historical tradition and this Court's jurisprudence recognize the severity of banishment from one's country. This Court has further recognized the importance of being properly informed about whether deportation is a likely consequence of a guilty plea, and that preserving the right to remain in the United States may be the primary concern of many noncitizens charged with deportable crimes. These principles are incompatible with a judicial decree that "no rational defendant charged with a deportable offense and facing 'overwhelming evidence' of guilt

would proceed to trial rather than take a plea deal with a shorter prison sentence." Pet. App. 4a.

When deciding whether to plead guilty, Lee should have been able to make an informed choice about whether a potential reduction in his sentence of a few years was worth a virtual certainty of deportation. Lee has testified that "he absolutely would have accepted the risk of litigation had he known that deportation was a consequence of his guilty plea," *id.* at 56a, and his attorney has corroborated this claim, *id.* (testimony that "had Lee known he would be deported for pleading guilty, it is probable Lee would have chosen to proceed to trial and indeed Fitzgerald would have advised him to do so"). As Lee has explained, his "life-bonding ties are in the United States," and he "had nothing to lose by going to trial if the alternative was to be deported" to Korea, because he has no connections of any sort in that country. *Id*. at 75a.

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In light of the *per se* rule imposed by the Sixth Circuit, the question in this case is whether there is *any* person, facing exile from the land that has long been his home, who would try to avoid this harsh fate by risking a longer jail sentence even if the chance of prevailing was slim. The court below decided that no person would make that choice, declaring that *every* defendant facing "overwhelming evidence" of guilt would take a plea deal, even though doing so would remove all hope of remaining in this country. That artificial rule not only defies reason, but is at odds with this Court's precedent. This Court should reject it.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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