No. 06-1500

In the Supreme Court of the United States

ANTON M. MARKU ET AL., PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
BRYAN S. BEIER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in denying petitioners' motion to reopen removal proceedings based on a claim of ineffective assistance of counsel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B19) is not published in the *Federal Reporter* but is reprinted in 200 Fed. Appx. 454. The decision of the Board of Immigration Appeals denying petitioners' motion to reopen (Pet. App. C1-C5) is unreported. The decision of the Board of Immigration Appeals dismissing petitioners' appeal and denying their motion to remand (Pet. App. D1-D7) is unreported. The decision of the immigration judge (Pet. App. E1-E19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2006. A petition for rehearing was denied on February 15, 2007 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on May 9, 2007. The jurisdic-

tion of this Court is invoked under Sup. Ct. R. 10(a) but rests on 28 U.S.C. 1254(1).

STATEMENT

1. The Attorney General and the Secretary of Homeland Security may grant asylum to an alien who is a "refugee," 8 U.S.C. 1158(b)(1)(A) (Supp. V 2005)—*i.e.*, a person who is unable or unwilling to return to his country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. 1101(a)(42)(A). Similarly, an alien is entitled to withholding of removal to a country if the alien's life or freedom would be threatened in that country "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A).

2. Petitioners are natives and citizens of Albania who entered the United States in late 1996. In May 1997, petitioner Anton Marku filed an application for asylum through counsel, with his wife, petitioner Roze Marku, and their children, petitioners Elde and Areta Marku, as derivative applicants. The application alleged persecution based on Anton Marku's political opinions and membership in a particular social group. In July 1997, the Immigration and Naturalization Service (INS)[1] commenced removal proceedings against petitioners, alleging that Anton and Roze Marku were present in the United States without having been admitted or paroled (in violation of 8 U.S.C. 1182(a)(6)(A)(i)) and that Elde

[1] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. V 2005).

and Areta Marku had been admitted to the United States without proper documentation (in violation of 8 U.S.C. 1227(a)(1)(A)). Pet. App. B2-B3, E2-E3.

3. a. At the hearing before the immigration judge (IJ), petitioners were represented by Valerie Lisiecki and Noel Lippman. Counsel did not bring a copy of petitioner Anton Marku's asylum statement and had to borrow one from the INS attorney. Counsel also asked the IJ to consider a supplemental asylum statement, which had been prepared because the initial statement was incomplete, but the IJ declined to do so, because the supplemental statement had not been timely submitted. The IJ ruled, however, that Anton Marku would be allowed to testify to what was in the supplemental statement and that the supplemental statement would be admissible if the government raised a claim of recent fabrication. The IJ also allowed Anton Marku to make corrections to the initial statement. Pet. App. B3-B4.

At the conclusion of the hearing, the IJ found that petitioners were removable; denied their applications for asylum; construed their applications to be seeking withholding of deportation in the alternative and denied that form of relief as well; denied their requests for voluntary departure; and ordered them removed to Albania. Pet. App. E1-E19. In finding petitioners removable, the IJ relied on their concession that they were present in the United States in violation of the immigration laws. *Id.* at E2-E3. In denying their applications for asylum, the IJ found that petitioner Anton Marku's claim of mistreatment under the former Communist regime was not a basis for relief because of fundamental intervening changes in Albania, and that Marku had failed to establish that other mistreatment in that country was motivated, as he claimed, by his political opin-

ions. *Id.* at E13-E18. In denying withholding of removal, the IJ reasoned that there is a higher burden for withholding of removal than for asylum, and that, because petitioners had failed to establish an entitlement to asylum, they had necessarily failed to establish an entitlement to withholding of removal. *Id.* at E18-E19; see *id.* at E11-E13 (discussing legal standards). Finally, in denying voluntary departure, the IJ relied on the fact that petitioners were not physically present in the United States for at least one year between the time of entry and the time of service of the charging document, a prerequisite for voluntary departure. *Id.* at E19.

b. Petitioners, through Lisiecki, filed a notice of appeal with the BIA, asserting that the IJ had committed several errors in denying their applications for asylum.[2]

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[2] The notice of appeal included the following detailed statement of the grounds for appeal:

> 1. The Immigration Judge erred in finding that the Respondent did not qualify as a Refugee and that he did not show that he had a Well-Founded of Persecution [*sic*], despite the fact that Respondent presented substantial testimonial and documentary evidence that he did qualify as a Refugee and that he had a Well-Founded Fear of Persecution.
>
> 2. The Immigration Judge erred in determined [*sic*] that the Respondent had not demonstrated that he and his family had suffered past persecution and that he feared future persecution, even though at trail [*sic*] the Respondent presented substantial testimony and documentary evidence that he and his family has [*sic*] suffered past persecution and that He had a Well-Founded Fear of future persecution.
>
> 3. The Immigration Judge erred in finding that the Respondent's testimony, Demeanor and the documentation submitted was [*sic*] not credible even though at trial the Respondents [*sic*] testimony, demenor [*sic*] and documentation was credible, and that it was

Through Lisiecki, petitioners also filed a motion for a remand to the IJ for further proceedings, to allow them to apply for relief from removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess., 1465 U.N.T.S. 85. Although Lisiecki had indicated that she would file a brief in support of petitioners' appeal to the BIA, she failed to do so. While the appeal and the motion to remand were pending, the State of Michigan suspended Lisiecki from the practice of law and the BIA suspended her from

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believable, consistant [*sic*] and sufficiently, detailed to be found credible.

4. The Immigration Judge erred by placed [*sic*] undue weight on the opion [*sic*] issued by the State Department, and Judge [*sic*] ignored the testimonial and documentary evidence of the political problems, unrest, turmoil and persecution that still continues in Albania.

5. The Immigration Judge erred in finding that the Respondent and his family had no political activity despite the fact that the Respondent presented substantial testimonial and documentary evidence that he and his family were involved in political activilty [*sic*] and they had experinced [*sic*] past persecution and feared future persecution.

6. The Immigration Judge erred in finding that the documents were not credible and in questioning how the documents were obtained, despite the fact that the documents were legitimate, credible and could be obtained by family members or friends after the respondent had left Albania.

7. The Immigration Judge erred in finding that the Respondent did not merit the granting of asylum in the exercise of dicretion [*sic*].

Admin. R. 233.

practicing before the agency. The BIA sent suspended-attorney notices and briefing schedules to petitioners several times at the last address on file, but petitioners had moved and the documents were returned as undeliverable. A few months later, petitioner Anton Marku went to Lisiecki's office. Lippman told Marku that Lippman would be handling the appeal to the BIA, but did not tell Marku about Lisiecki's suspensions. Pet. App. B5-B6, D5; Admin. R. 221-223, 231-233.

The BIA dismissed petitioners' appeal and denied their motion to remand. Pet. App. D1-D7. In dismissing the appeal, the BIA agreed with the IJ's finding that petitioners had not left Albania "due to any political opinion, express or implied." *Id.* at D5. In denying the motion to remand, the BIA found that petitioners had failed to make a *prima facie* case that they would be tortured if they returned to Albania. *Id.* at D6 (citing 8 C.F.R. 1208.16(c)). The BIA's decision was mailed to petitioners, but it was returned as undeliverable. *Id.* at B6, D3 n.1.

4. According to petitioner Anton Marku, attempts were made to contact Lippman to check on the status of the case a number of times, both in the months before the BIA's decision and in the months after, but Lippman did not respond. Marku became aware of the BIA's decision in January 2005, 13 months after it was issued, when his children, petitioners Elde and Areta Marku, received notices to appear for their removal. At that point, Anton Marku contacted another lawyer, who filed a motion to reopen with the BIA, asserting that prior counsel had rendered ineffective assistance. Pet. App. B6, C3.

The BIA denied petitioners' motion to reopen. Pet. App. C1-C5. As an initial matter, the BIA stated that

petitioners' motion was untimely, "inasmuch as it was not submitted within 90 days of the Board's December 11, 2003, final administrative order." *Id.* at C3-C4 (citing 8 C.F.R. 1003.2(c)). The BIA then held that, even if it were to conclude that the limitation period should be equitably tolled, petitioners "have failed to establish that reopening is warranted," because they "have failed to demonstrate the requisite prejudice stemming from their former counsels' actions or inactions." *Id.* at C4 (citing *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A.), review denied, 857 F.2d 10 (1st Cir. 1988), and *In re Assaad*, 23 I. &. N. Dec. 553 (B.I.A. 2003), review dismissed, 378 F.3d 471 (5th Cir. 2004)). In particular, the BIA explained, petitioners "have failed to establish that they would or might have been granted relief from removal had their prior counsels more diligently pursued their applications or kept them informed of developments in their case." *Ibid.* The BIA noted that petitioners had not "alleged specific errors in their prior counsels' presentation and development of their asylum claim before the Immigration Judge or the Board that would have affected the outcome of their case." *Ibid.* The BIA also noted that petitioners' "prior counsel submitted a detailed attachment to the Notice of Appeal * * * providing the reasons for [petitioners'] appeal, which was considered by the Board in reviewing the merits of [petitioners'] appeal." *Id.* at C5.

5. The court of appeals denied petitioners' petition for review in an unpublished opinion. Pet. App. B1-B19.

The court of appeals explained that it "reviews the BIA's denial of a motion to reopen for abuse of discretion"; that "motions to reopen, especially in deportation proceedings, are disfavored"; and that "the BIA has broad discretion to deny such motions." Pet. App. B7-

B8. The court then explained that, to prevail on their claim of ineffective assistance of counsel, which was based on the Due Process Clause of the Fifth Amendment, petitioners must show prejudice, which in this context means that, "but for the errors made by prior counsel," petitioners would be "entitled to the underlying relief requested"—*i.e.*, they would be "entitled to remain in the United States." *Id.* at B8-B9 (citing *Sako* v. *Gonzales*, 434 F.3d 857, 864-865 (6th Cir. 2006)). The court held that petitioners "cannot show that the actions or inactions of former counsel prejudiced [them]"; that "[their] claim of ineffective assistance of counsel [therefore] fails"; and that the BIA accordingly "did not abuse its discretion in denying the motion to reopen." *Id.* at B8.

The court of appeals rejected four specific claims of prejudice. Pet. App. B11-B19. First, the court rejected the claim that petitioners were prejudiced by "prior counsel's failure to file a brief in the appeal to the BIA." *Id.* at B11. The court explained that, "[a]lthough the government moved for summary dismissal for failure to file a brief, the BIA considered [the] grounds for appeal [in the notice of appeal] and agreed with the IJ's determinations on the merits," and petitioners "ha[ve] not established that the outcome of the appeal to the BIA would have been different had a brief been filed." *Id.* at B12. Second, the court rejected the claim that petitioners were prejudiced when, "because of [their] previous attorneys' failure to notify the BIA of Marku's new address and their failure to notify him of the decision of the BIA, [they were] foreclosed from appealing the decision of the BIA to this court." *Id.* at B14-B15. The court explained that the IJ denied the asylum application; that "[t]he BIA agreed with the IJ's determination

in the initial appeal"; and that petitioners "ha[ve] not introduced any evidence or made any argument suggesting how or why the outcome of [the] case would have been different after a substantial evidence review" by the court of appeals. *Id.* at B15-B16. Third, the court rejected the claim that petitioners were prejudiced by their attorneys' failure to notify them of the BIA's decision because they "accrued more than one year of unlawful presence, triggering a ten-year ban on readmission." *Id.* at B16. The court explained that "the prejudice inquiry in the context of ineffective assistance of counsel focuses on the effect of any errors on [petitioners'] right to remain in the United States," not on their ability to be readmitted after removal. *Id.* at B17. Finally, the court rejected the claim that petitioners were prejudiced by "errors committed by prior counsel at the merits hearing" before the IJ, *id.* at B18—in particular, counsel's failure to bring a copy of the asylum application to the hearing, counsel's assertedly incorrect translation of the initial asylum statement, and counsel's failure to file the supplemental asylum statement, *id.* at B9. The court explained that petitioners had "not shown how these errors had an impact on the outcome of [the] case." *Id.* at B18.

ARGUMENT

Petitioners renew their contention (Pet. 11-23) that the BIA abused its discretion in denying their motion to reopen the removal proceedings based on their claim of ineffective assistance of counsel. The court of appeals correctly rejected that contention, and its unpublished decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. As an initial matter, there is no basis in this Court's decisions for the proposition that aliens in removal proceedings have a due process right to the effective assistance of privately retained counsel. An alien in removal proceedings has a statutory right to be represented by counsel of the alien's choice at no expense to the Government. 8 U.S.C. 1229a(b)(4)(A). This Court has never held, however, that the Constitution requires the government to appoint counsel for aliens in removal proceedings. And in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), a habeas corpus case, the Court held that, when the Constitution does *not* require the government to provide counsel, the ineffectiveness of privately retained counsel does not violate the Constitution, because counsel's ineffectiveness can be "imputed to the State" only when the Constitution itself requires the provision of counsel. *Id*. at 754; see also *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1085-1086 (2007) (counsel's miscalculation of limitations period did not support equitable tolling, particularly in post-conviction context, where there is no constitutional right to counsel, even though State had appointed counsel for prisoner in that case); *Wainwright* v. *Torna*, 455 U.S. 586 (1982) (per curiam) (no basis for constitutional claim of ineffective assistance of counsel in seeking discretionary state supreme court review of affirmance of conviction, because there is no constitutional right to counsel in that setting).

There is no obvious reason why the result should be different in the removal context. As Judge Easterbrook has explained:

> The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering. Every litigant in every suit and every administrative proceeding is entitled to due process, but it

> has long been understood that lawyers' mistakes in civil litigation are imputed to their clients and do not justify upsetting the outcome. The civil remedy is damages for malpractice, not a re-run of the original litigation.

Magala v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir. 2005) (citations omitted); accord *Stroe* v. *INS*, 256 F.3d 498, 499-501 (7th Cir. 2001) (Posner, J.). Indeed, this Court has repeatedly held in other contexts that a party is bound by counsel's errors in civil proceedings. See *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-397 (1993); *United States* v. *Boyle*, 469 U.S. 241, 249-250 (1985); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962); see also *Lawrence* v. *Florida*, *supra*.[3]

2. Even if aliens in removal proceedings do have a due process right to the effective assistance of privately retained counsel, as the BIA and the court of appeals assumed here, petitioners' right to the effective assistance of counsel was not violated. Petitioners contend (Pet. 11-20) that they were prejudiced by their prior counsel's performance—a universally recognized element of an ineffective-assistance claim in removal

[3] In *In re Assaad*, 23 I. & N. Dec. 553 (B.I.A. 2003), review dismissed, 378 F.3d 471 (5th Cir. 2004), the INS argued that, in light of *Coleman*, aliens have no due process right to the effective assistance of counsel. The BIA declined to adopt that position, however, because of precedent in the courts of appeals that recognizes such a right. *Id*. at 558-560.

cases[4]—but the BIA and the court of appeals correctly held otherwise.

The court of appeals explained that prejudice in this context means that counsel's deficient performance affected the outcome of the proceedings—that, "but for the errors made by prior counsel," petitioners would have been "entitled to the underlying relief requested." Pet. App. B9. The BIA concluded that petitioners' motion to reopen did not "allege[] specific errors in their prior counsels' presentation and development of their asylum claim before the Immigration Judge or the Board that would have affected the outcome of their case." *Id.* at C4. The court of appeals likewise concluded that petitioners' brief in that court "d[id] not point to a failure to introduce or develop evidence at the merits hearing," *id.* at B18, and "fail[ed] to specify how the alleged errors of prior counsel prejudiced [them]," *id*. at B10. The same is true of petitioners' petition for a writ of certiorari in this Court. The petition makes no attempt to identify any evidence that counsel failed to introduce or develop. And it makes no attempt to explain how or why petitioners would have been granted asylum (or withholding of removal) if their prior counsel had done things differently in the removal hearing before the IJ; if their prior counsel had filed a brief (in

[4] See, *e.g.*, *Zeng* v. *Gonzales*, 436 F.3d 26, 31 n.8 (1st Cir. 2006); *Cekic* v. *INS*, 435 F.3d 167, 171 (2d Cir. 2006); *Fadiga* v. *Attorney Gen. USA*, 488 F.3d 142, 155 (3d Cir. 2007); *Farrokhi* v. *United States INS*, 900 F.2d 697, 703 n.7 (4th Cir. 1990); *Goonsuwan* v. *Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001); *Sako* v. *Gonzales*, 434 F.3d 857, 863 (6th Cir. 2006); *Pavlyk* v. *Gonzales*, 469 F.3d 1082, 1091 (7th Cir. 2006); *Desna* v. *Gonzales*, 454 F.3d 896, 899 (8th Cir. 2006); *Serrano* v. *Gonzales*, 469 F.3d 1317, 1318-1319 (9th Cir. 2006); *Brue* v. *Gonzales*, 464 F.3d 1227, 1233-1234 (10th Cir. 2006); *Dakane* v. *United States Att'y Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2005).

addition to a notice of appeal setting forth the grounds for appeal) before the BIA; or if their prior counsel had filed a petition in the court of appeals for review of the BIA's decision. See Pet. 11-20. Under these circumstances, petitioners cannot establish prejudice, and thus cannot establish ineffective assistance of counsel. In any event, the question whether prejudice has been shown on the particular record of this case involves only the fact-bound application of settled law, and "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Petitioners offer no reason for treating theirs as one of the rare such petitions.

3. Petitioners contend (Pet. 21-22) that the court of appeals' decision conflicts with the Ninth Circuit's decisions in *Singh* v. *Ashcroft*, 367 F.3d 1182 (2004), and *Granados-Oseguera* v. *Gonzales*, 464 F.3d 993 (2006). That contention is mistaken.

In *Singh*, the Ninth Circuit found prejudice where counsel filed a notice of appeal in the BIA, indicated that he would file a brief, and then failed to do so in a timely manner. 367 F.3d at 1184. Counsel's failure to file a brief in that case, however, had resulted in the summary dismissal of the appeal. *Id.* at 1187-1188 (citing 8 C.F.R. 3.1(d)(2)(i)(D) (2002)). The Ninth Circuit held that, "[b]ecause the BIA summarily dismissed Singh's appeal for failure to file a brief, counsel's failure to file a timely brief deprived Singh of any meaningful review of the IJ's decision," and "[a] presumption of prejudice is thus warranted." *Id.* at 1189. The Ninth Circuit then held that the presumption of prejudice had not been rebutted. *Id.* at 1189-1190.

In this case, by contrast, counsel's failure to file a brief in the BIA did not result in the summary dismissal of petitioners' appeal. As the court of appeals explained, "[r]ather than summarily dismissing the appeal, the BIA stated in its opinion that [petitioners] failed to establish entitlement to asylum." Pet. App. B5. Unlike in *Singh*, therefore, the failure of petitioners' counsel to file a brief did not deprive petitioners of "any meaningful review of the IJ's decision," *Singh*, 367 F.3d at 1189; the BIA reviewed the IJ's decision and determined that it was correct, see Pet. App. D4-D5. For that reason, had this case arisen in the Ninth Circuit, *Singh*'s presumption of prejudice would have been inapplicable, and there is no reason to think that the result would have been any different.

The Ninth Circuit's decision in *Granados-Oseguera* has even less in common with this case. In that case, the IJ ordered the alien removed, the alien's counsel appealed the IJ's decision to the BIA, and the BIA affirmed the IJ's decision and gave the alien 30 days to depart voluntarily. 464 F.3d at 995-996. Counsel then filed a motion to reopen so that the alien could seek adjustment of status. *Id.* at 996. The BIA denied the motion because it had not been filed within the 30-day period for voluntary departure. *Ibid.* The Ninth Circuit found that counsel's inadequate performance prejudiced the alien because the BIA might have found that the alien was eligible to seek adjustment of status and thus might have granted the motion to reopen if it had not been untimely. *Id.* at 999. *Granados-Oseguera* provides no basis for a conclusion that the Ninth Circuit would have found prejudice on the very different facts of this case.

Petitioners contend that the decision below conflicts with *Singh* and *Granados-Oseguera* because the Ninth Circuit in those cases required that the alien show only a "plausible" basis for relief, whereas the court of appeals in this case applied a "but for" test. Pet. 21-22 (citing *Singh*, 367 F.3d at 1189, and *Granados-Oseguera*, 464 F.3d at 999). That contention confuses apples and oranges. Courts undertaking the prejudice inquiry *always* ask whether, "but for" counsel's deficient performance, there is some degree of probability that the alien would have been granted relief. In requiring a "plausible" basis for relief, the Ninth Circuit was addressing the requisite degree of probability—*i.e.*, it required the alien to show that, but for counsel's deficient performance, the alien could "plausibly" have been granted relief. See *Granados-Oseguera*, 464 F.3d at 998-999; *Singh*, 367 F.3d at 1189. The court below did not address the standard of probability.

As petitioners acknowledge (Pet. 21-22), moreover, in both *Singh* and *Granados-Oseguera* the Ninth Circuit held that counsel's error had caused the BIA to reject the alien's claim for procedural reasons without considering the merits. See *Singh*, 367 F.3d at 1187-1188, 1189; *Granados-Oseguera*, 464 F.3d at 999. It was in that context that the Ninth Circuit referred to a "plausible" basis for relief. In this case, by contrast, the BIA considered the merits of petitioners' claims on their appeal. Petitioners therefore were not prevented from having their claims heard on the merits. In any event, there is no reason to think that the result would have been different if, like the Ninth Circuit in *Singh* and *Granados-Oseguera*, the court below had explicitly asked whether there was a "plausible" basis for relief but for counsel's deficient performance, because peti-

tioners have not identified any basis for concluding that the result would have been different under any conceivable standard of probability (*e.g.*, plausible basis, reasonable probability, or more likely than not).

Petitioners also suggest (Pet. 22-23) that the court of appeals' decision conflicts with the Second Circuit's decision in *Yang* v. *Gonzales*, 478 F.3d 133 (2007), and the Fifth Circuit's decision in *Mai* v. *Gonzales*, 473 F.3d 162 (2006). That contention is likewise mistaken, because neither case addressed the question of prejudice. In *Yang*, the Second Circuit reversed the BIA's finding that the alien had not complied with the procedural requirements for raising a claim of ineffective assistance of counsel, 478 F.3d at 142-143, and "le[ft] the question of prejudice for determination by the BIA" on remand, *id.* at 143. In *Mai*, the Fifth Circuit reversed the BIA's finding that counsel's performance was not deficient, 473 F.3d at 166-167, and "remand[ed] the case to the BIA for consideration of whether * * * [the alien] was prejudiced," *id.* at 167.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
BRYAN S. BEIER
Attorneys

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