No. 13-1406

In the Supreme Court of the United States

LOUIS CASTRO PEREZ, PETITIONER,

v.

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

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

BRIEF FOR TEXAS APPLESEED, HAWAII APPLESEED, NEW JERSEY APPLESEED, NEW MEXICO APPLESEED, SOUTH CAROLINA APPLESEED, AND THE APPLESEED FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Appleseed Foundation is a nonprofit network of 17 public interest justice centers in the United States and Mexico dedicated to building a society in which opportunities are genuine, access to the law is universal and equal, and government advances the public interest. The national office of Appleseed furthers the policy and legal work of the local Appleseed Centers to advance justice, good government and the fair administration of the law on behalf of vulnerable persons. Appleseed has local centers in Hawaii, New Jersey, New Mexico, South Carolina, and Texas, among others.

Texas Appleseed is a non-profit, public interest law organization that focuses on systemic reform regarding broad-based social issues and has been a leader in the effort to ensure that all citizens, regardless of race or income, receive adequate representation and a fair trial before a jury of their peers. Texas Appleseed's mission is to further the public interest in the development and application of the law and public policy by courts, agencies, legislative bodies, and others in Texas; to advance and improve the administration of justice; and to advance the cause of social, political, and economic justice in Texas.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, and their counsel made any monetary contribution to the preparation and submission of this brief. The parties received timely notice and have consented to this filing.

Appleseed centers regularly file briefs *amici curiae* in state and federal courts to address issues relating to adequate representation and the fair-trial guarantee for indigent criminal defendants, including the Sixth Amendment right to counsel, sentencing, and issues particular to capital cases. Appleseed centers have a strong interest in this case because federal habeas proceedings—in both the district court and court of appeals—serve as a critical safeguard for indigent criminal defendants' fair-trial and other constitutional rights. Petitioner's lawyer violated fundamental ethical and agency obligations and abandoned him at a critical stage of habeas proceedings. Her misconduct deprived petitioner of *any* federal appellate review of his apparently meritorious constitutional claims, including a challenge to the prosecutor's unwarranted attack on Perez's exercise of his Fifth Amendment right against self-incrimination at the time of arrest. This Court's review is urgently needed to ensure uniformity of federal habeas administration in the lower courts and avoid unjust and unnecessary consequences when attorney misconduct rises to the level of abandonment.

BACKGROUND

The district court explicitly found that Perez missed his deadline to file a notice of appeal because his lawyer abandoned him during a critical phase of federal habeas proceedings. The Fifth Circuit declined to disturb that finding, and instead held, in direct conflict with the Ninth Circuit, that such attorney abandonment can never be a ground for relief under Federal Rule of Civil Procedure 60(b)(6) to allow an appeal to be filed. Under this Court's Rule 10, that holding and the resulting conflict of authority are sufficient grounds to warrant granting certiorari.

Amici file this brief to underscore the egregious nature of the attorney abandonment that the Fifth Circuit's rule here allows to go unremedied. (The petition sets forth other pertinent facts in detail. Pet. 4-8.)

Petitioner was previously represented by Sadaf Khan, a solo practitioner appointed to represent him *pro bono* in what would be her first habeas case and first death penalty case. R. 608. The district court granted a motion substituting Khan as petitioner's counsel of record in March 2011, when Perez's federal petition for a writ of habeas corpus had been pending for several years. R. 4, 504-505. In December 2011, a magistrate judge issued a Report and Recommendations ("R&R"), recommending that the district court deny all relief. *Id.* at 572. Khan filed objections in early March 2012, which the district court rejected on March 27, 2012, adopting the R&R and entering a final judgment denying Perez's amended habeas petition and denying a certificate of appealability. *Id.* at 598-603.

Khan received notice of the judgment, but "did not notify Mr. Perez of the orders rendered by the Court" or notify resource counsel Richard Burr of the Texas Habeas Assistance and Training ("TX HAT") Project. R. 677-678, 768-769. Burr was available to consult with Khan if she had questions but was never appointed to represent Mr. Perez. *Id.* at 678.[2] Khan

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[2] "The TX HAT [P]roject is comprised of experienced attorneys" who, in addition to "maintain[ing] private practices," work "as part-time contractors through the Office of Defender Services of the Administrative Office of the United States Courts." R. 680. TX HAT attorneys consult on "approximately 150 cases at any one point in time" and, as a result, "cannot consult meaningfully in every one of these cases, * * * cannot force counsel to consult

remained silent and had no communication whatsoever with Perez or Burr until Burr initiated contact on June 11, 2012 (R. 678)—well after the expiration of the April 26, 2012 deadline to file a notice of appeal, and the May 29, 2012 deadline for seeking an extension of that time. See Fed. R. App. P. 4(a)(1)(A)-(B).

Khan later explained that her failure to pursue an appeal, or even consult Perez about the judgment and possibility of appeal, resulted from several factors that reflected "no fault of Mr. Perez." R. 609. Primary among these was a "complete lack of resources for th[e] case," which presented particular difficulties for her, as a solo practitioner. *Id.* at 766, 768. Khan explained that she was initially informed she would be paid $180 per hour, but later understood she would receive no compensation because Perez's previous lawyer had exhausted the funds. She incurred significant unreimbursed personal expenses, such as hotels and travel. *Id.* at 765; *id.* at 768 ("I did not have the resources to prepare the motion and brief necessary to appeal"). Khan also experienced "an unexpected personal medical issue related to [her] [then-]current pregnancy," *id.* at 609, and "an abrupt loss of childcare for [her] then 10 month old infant," *id.* at 770. "Absent those circumstances," Khan averred, "I

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with [them], [and must] focus [their] consultation on the subset of cases in which counsel want [their] services." *Ibid.* "Because of the demands of consulting on so many cases, and [its] dependence on counsel to seek [its] assistance, [TX HAT] has never considered subscribing to ECF notification services in [its] consultation cases." *Id.* at 680-681. Consistent with TX HAT's "usual procedures," Burr did not "subscrib[e] to ECF notification[s]" in Mr. Perez's case, and instead "relied on Ms. Khan"—Perez's counsel of record—"to notify [him] of events such as the issuance of a judgment." *Id.* at 681.

would have forwarded the Court's orders [denying relief] to Mr. Perez and to Mr. Burr." *Ibid.* "Had [she] notified Mr. Perez of the orders during that time," Khan explained, "[she] would have learned that he wanted to prosecute an appeal." *Id.* at 769.

The record is devoid of any indication that Khan would *ever* have informed Perez of the adverse judgment, the deadline to appeal, or the fact that the deadline had expired without a timely notice being filed. Consulting counsel Burr independently learned of the district court's judgment through a TX HAT staff member's routine check of dockets on June 11, 2012. R. 678. Burr "immediately emailed Ms. Khan letting her know about the missed deadline and inquiring as to whether she knew about the Court's ruling." *Ibid.* Upon "learn[ing] from Ms. Khan that she did know about the ruling," Burr "expressed concern about the waiver of Mr. Perez's right to appeal." *Ibid.*

Two weeks after Burr's email, on June 25, 2012, Khan finally took some action, sending a copy of the district court's judgment to Perez, and moving to reopen the time to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(6). R. 604-606. Khan's motion did not allege or argue abandonment. The district court denied the motion, finding that Khan had received notice of the judgment when it was entered and had missed the May 29, 2012 deadline to seek an extension of time to notice an appeal. *Id.* at 617-618. Several months later, the district court appointed new counsel, who promptly filed, among other things, a motion under Federal Rule of Civil Procedure 60(b)(6), arguing that Khan had abandoned Perez. R. 645-673.

The district court granted the Rule 60(b)(6) motion, directed the clerk to reenter the March 27, 2012

judgment, and made an express finding that Khan had abandoned Perez. R. 793-794. In vacating the district court's judgment, the divided Fifth Circuit panel did not disturb the district court's finding of abandonment. Pet. App. 5a n.5.

SUMMARY OF ARGUMENT

This case does not require the Court to address what circumstances constitute attorney abandonment. The Fifth Circuit expressly declined to reach that issue or to disturb the district court's explicit finding of abandonment. Instead, the panel held that attorney abandonment leading to the failure to appeal a judgment can *never* justify relief under Federal Rule of Civil Procedure 60(b)(6) to allow a timely appeal. As the petition explains, that holding squarely conflicts with *Mackey* v. *Hoffman*, 682 F.3d 1247 (9th Cir. 2012), departs from this Court's precedents, and is incorrect. Pet. 13-27.

Amici file this brief to provide broader perspective about the serious adverse consequences of the Fifth Circuit's rule, which allows what the district court found to be a clear-cut case of attorney abandonment to foreclose *any* federal appellate review of Perez's meritorious constitutional claims—and does little to deter similar attorney misconduct in future habeas proceedings. This Court should not allow the Fifth Circuit's legal rule to stand, as it inflicts on Perez the harsh consequences of attorney abandonment in a capital habeas case.

In addition to being undisturbed by the Fifth Circuit on appeal, the district court's explicit and specific abandonment finding is supported by the numerous ethical violations that occurred when Khan "silently, autonomously, and independently," Pet. App. 16a

(Dennis, J., dissenting), remained mute and took no relevant action while the time period for seeking an appeal expired.

First, Khan failed to communicate to her client even the most basic details about the representation, in particular the fact of an adverse ruling denying habeas relief. That failure deprived Perez of the ability to make an informed decision regarding the possibility of an appeal, contrary to the Texas Disciplinary Rules of Professional Conduct. As numerous courts and authorities recognize, a lawyer's obligation to communicate extends specifically to the fact of an adverse decision and the client's choice whether to appeal. Khan undisputedly failed to satisfy that obligation.

Second, Khan's failure to take action on Perez's behalf during the critical phase of federal habeas proceedings violated numerous ethical obligations and agency principles related to withdrawal, conflicts of interest, and the termination of a principal-agent relationship. During that period, Khan faced challenging financial and personal circumstances that, by her own admission, caused her failure to notify Perez of the decision—and thus impaired her ability to provide effective representation. Instead of seeking leave to withdraw in a manner consistent with ethical obligations, Khan simply went mute and took no further action. In so doing, she denied Perez the numerous protections that accompany a proper withdrawal, including a lawyer's obligation to take "reasonably practicable" steps to protect Perez's interests (e.g., a letter to Perez attaching a copy of the judgment and explaining his options). Khan's inaction also gave rise to a disabling conflict of interest, pitting her interest in avoiding professional sanctions

against Perez's interest in obtaining relief from the default, thus severing the agency relationship and preventing Khan from taking effective steps to remedy the default.

Finally, Khan's inaction effectively deprived Perez of his right to decide whether to take an appeal, a choice uniformly understood as reserved to the client, not the attorney. These and other violations of core ethical obligations support the district court's undisturbed finding of attorney abandonment—a finding this Court has treated as sufficient to trigger relief from time limits governing habeas proceedings. By inflicting on Perez the harsh consequences of attorney abandonment, the Fifth Circuit created a division of authority in the lower courts and contravened this Court's precedents.

ARGUMENT

An attorney who "abandons his client without notice * * * sever[s] the principal-agent relationship" and "no longer acts, or fails to act, as the client's representative." *Maples* v. *Thomas*, 132 S. Ct. 912, 922-923 (2012). "His acts or omissions therefore 'cannot fairly be attributed to [the client].'" *Id.* at 923 (alteration in original) (quoting *Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991)). In assessing whether attorney misconduct rises to the level of an "extraordinary" circumstance warranting relief from the ordinary time limits governing a habeas petition, this Court has looked to "fundamental canons of professional responsibility," including attorneys' obligations "to communicate with their clients, to implement clients' reasonable requests, to keep their clients informed of key developments in their cases, and never to abandon a client." *Holland* v. *Florida*, 130 S. Ct. 2549,

2564-2565 (2010) (analyzing "ethical rules set forth in case law, the Restatements of Agency, the Restatement (Third) of the Law Governing Lawyers (1998), and in the ABA Model Rules of Professional Conduct").

Here, the district court expressly found that Khan abandoned her client, through her failure to inform Perez that the district court had denied his habeas petition, and her lengthy inaction during the critical period in which the time to file a notice of appeal (or seek an extension) expired. Pet. App. 43a. The Fifth Circuit declined to disturb that finding. See Pet. App. 5a n.5 ("we have no occasion to address what the parameters of 'attorney abandonment' are"). As a result, this Court should treat it as established. Cf. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980) (noting this Court's "settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred").

In any event, the abandonment finding has a strong basis in governing ethical principles, including the Texas Disciplinary Rules of Professional Conduct, the Restatement, the ABA Model Rules of Professional Conduct, case law, and background rules of agency law. In abandoning her death-row client, Khan violated ethical obligations in several related ways, including (1) by failing to communicate to her client even the most basic details of the representation, such as the fact of an adverse ruling; (2) by failing to take action on his behalf during the critical phase of proceedings during which she knew the time to appeal or seek an extension was running and ultimately expired; and (3) by depriving Perez of his right to decide whether to take an appeal. These violations

support the district court's undisturbed finding of attorney abandonment.

I. Khan Violated Basic Ethical And Agency Obligations By Failing To Inform Perez That The District Court Denied Habeas Relief

1. Few requirements are more fundamental to a functioning attorney-client relationship than a lawyer's obligation to keep her client reasonably informed about his case. The Texas Disciplinary Rules of Professional Conduct provide that "[a] lawyer shall keep a client reasonably informed about the status of a matter," and "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Tex. Disciplinary R. Prof'l Conduct ("Tex. R.") 1.03.[3] These Rules "define proper [attorney] conduct" and "are imperatives, [when] cast in the terms shall or shall not," subjecting an attorney to disciplinary sanctions. *Id.* pmbl. ¶ 10. The obligation to communicate reflects the client's need to have "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." *Id.* 1.03 cmt. 1; accord Charles F. Herring, Jr., *Texas Legal Malpractice & Lawyer Discipline* § 4.37 (13th ed. 2014) (lawyer's duty includes informing the client about "the dismissal of a claim").

Because "in order 'for an unknowing defendant to learn of his appellate rights someone must advise

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[3] As an attorney admitted to practice in Texas, Khan was subject to the Texas Disciplinary Rules of Professional Conduct. See Tex. R. 8.05. The rules cited in this brief were in effect at all times relevant to this case.

him of them,'" and because "trial counsel is * * * the best source of such advice," "it is [trial counsel's] duty as an attorney to give it[.]" *Jones* v. *State*, 98 S.W.3d 700, 702 (Tex. Crim. App. 2003) (quoting *Ex parte Axel*, 757 S.W.2d 369, 373 (Tex. Crim. App. 1988)). "[T]he lawyer generally should explain the meaning and consequences of the judgment, the client's right to appeal, and the lawyer's professional judgment on the relative advantages and disadvantages of an appeal." 48 Robert P. Schuwerk & Lillian B. Hardwick, *Handbook of Texas Lawyer & Judicial Ethics* § 6:3, at 754 (2014 ed.) ("Schuwerk & Hardwick"); see also Am. Bar Ass'n Model Rule of Prof'l Conduct 1.3 cmt. ("[I]f a lawyer has handled a judicial * * * proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter."). Proof of what decision a client *would have made* if a lawyer had properly communicated information is not necessary (or relevant) to whether a lawyer violated the predicate obligation to communicate. See *Bellino* v. *Comm'n for Lawyer Discipline*, 124 S.W.3d 380, 386 (Tex. Ct. App. 2003).[4]

The Restatement is to the same effect, explaining that "[a] lawyer *must* keep a client reasonably in-

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[4] Other states take the same approach. *E.g.*, *In re Disciplinary Action Against Letourneau*, 792 N.W.2d 444, 451 (Minn. 2011) (discipline for failure to inform client of significant negative developments in litigation); *People* v. *Elliott*, 39 P.3d. 551, 553 (Colo. 2000) (disbarment for misconduct including failure to provide professional services or communicate with clients); *Fla. Bar* v. *King*, 664 So. 2d 925, 926 (Fla. 1995) (suspending lawyers for misconduct that included ceasing communication with a client without proper withdrawal).

formed about the matter," "*must* notify a client of decisions to be made by the client," and "*must* explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Restatement (Third) of the Law Governing Lawyers § 20 (2000) ("Restatement") (emphases added). A lawyer must communicate information "about the status of a matter," its "progress, prospects, [and] problems," and must "infor[m] the client of important developments in a timely fashion." *Id.* cmt. c.

"When a client is to make a decision," the Restatement explains, "a lawyer must bring to the client's attention the need for the decision to be made" and "explain the pros and cons" of different alternatives. Restatement § 20 cmt. e. The fact of an adverse court judgment, and a client's decision whether to appeal, fall squarely within this obligation to communicate. See *id.* Rptr.'s Note (collecting cases).[5] These requirements align with, and build upon, the essential elements of a principal-agent relationship. See Restatement (Second) of Agency § 381 (1958) ("Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.").

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[5] Among cases cited in the Restatement, see, *e.g.*, *State ex rel. Okla. Bar Ass'n* v. *O'Brien*, 611 P.2d 650 (Okla. 1980) (failure to tell client about adverse result at trial); *In re Craven*, 390 N.E.2d 163 (Ind. 1979) (civil case involving duty to inform a client of an adverse decision so client could decide whether to appeal); *Pires* v. *Commonwealth*, 370 N.E.2d 1365 (Mass. 1977) (same, in criminal case).

This Court has recognized that a lawyer's failure to communicate can rise to the level of "extraordinary circumstances" justifying relief from otherwise-applicable timeframes for prosecuting a federal habeas petition. In explaining why an attorney's alleged conduct might ultimately be found to "constitute[] far more than 'garden variety' or 'excusable neglect,'" this Court in *Holland* v. *Florida*, 560 U.S. 631, 652 (2010), relied on the fact that "[the attorney] failed to inform [his client] in a timely manner about the crucial fact that the [court] had decided his case [against him]" and "failed to communicate with [his client]" during the relevant period. Accord *id.* at 654-655, 659 (Alito, J., concurring) (allegations of attorney misconduct, including "near-total failure to communicate," "go well beyond any form of attorney negligence").

2. It can hardly be disputed that Khan violated her ethical duty to communicate when she completely failed to inform Perez that the district court had denied his petition for a writ of habeas corpus. Although she received notice of the judgment, Khan inexplicably failed to share that information with Perez, even though the time for filing an appeal had begun to run. It was impossible for Perez "to make informed decisions regarding [the possibility of an appeal]," Tex. R. 1.03, when he was unaware of even the basic fact that there was an adverse judgment to be appealed. No less than for a criminal defendant, Perez could not "learn of his appellate [options]" without "someone [to] advise him of them." *Jones*, 98 S.W.3d at 702.[6]

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[6] Accord *Ex parte Owens*, 206 S.W.3d 670, 673 (Tex. Crim. App. 2006) (defendant is entitled to more lenient standard for show-

Failing to inform Perez about the district court's judgment violated Khan's ethical obligation to communicate. Restatement § 20, Rptr.'s Note (collecting cases). Here, as in *Holland*, the lack of communication affected a client's rights during a critical period, as defined by the statutory timeframes for pursuing federal habeas relief. See 560 U.S. at 634 (discussing one-year statute of limitations); accord *Maples*, 132 S. Ct. at 922 (lack of communication during 42-day period for filing notice of appeal from denial of state habeas relief). And there is no need to speculate about what choice Perez would have made if he knew about the denial of relief, cf. *Bellino*, 124 S.W.3d at 386; it is undisputed that if Khan had "notified Mr. Perez of the orders during th[e] [relevant] time, [she] would have learned that he wanted to prosecute an appeal," R. 769.

II. Khan's Inaction Violated Ethical And Agency Principles Governing Attorney Withdrawal

1. By failing to inform Perez of the adverse judgment and taking no relevant action while the time to notice an appeal (or seek an extension) expired, Khan effectively terminated her representation without notice to Perez, leave from the district court, or assurance of alternate counsel to protect Perez's rights. In so doing, Khan again violated numerous minimum standards of professional conduct, supporting the district court's finding that she abandoned Perez.

In Texas, and subject to exceptions not relevant here, "a lawyer shall not withdraw from representing

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ing prejudice when "deficient [attorney] conduct * * * results in the deprivation of an entire judicial proceeding, such as an appeal").

a client unless * * * withdrawal can be accomplished without material adverse effect on the interests of the client." Tex. R. 1.15(b); accord Restatement § 32(3). When a lawyer withdraws from a case or terminates representation, she must "take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to [her] client," and "allowing time for employment of other counsel." Tex. R. 1.15(d); accord *id.* cmt. 9 ("In *every instance* of withdrawal * * * a lawyer must take all reasonable steps to mitigate the consequences to the client." (emphasis added)); Restatement § 33 (same). In particular, "[i]f the client is threatened with an imminent deadline that will expire before new counsel can act, the [withdrawing] lawyer must take reasonable steps either to extend the deadline or comply with it." Restatement § 33 cmt. b.

"When a lawyer has been appointed to represent a client[,] * * * withdrawal ordinarily requires approval of the appointing authority or presiding judge." Tex. R. 1.15 cmt. 3; accord *Ward* v. *State*, 740 S.W.2d 794, 797 (Tex. Crim. App. 1987) (en banc); Restatement § 32(5). Conversely, a lawyer "*shall* withdraw * * * from the representation of a client" if "the lawyer's physical, mental or psychological condition materially impairs the lawyer's fitness to represent the client." Tex. R. 1.15(a)(2); accord Restatement § 32(2) (lawyer must withdraw if her "physical or mental condition materially impairs [her] * * * ability to represent the client").

To similar effect, this Court in *Maples* sharply criticized the attorneys' failure to seek permission to withdraw from a capital representation when they left their law firm and accepted new employment that prohibited them from continuing the representation.

132 S. Ct. at 922-923. In so doing, the attorneys "sever[ed] the principal-agent relationship" by "abandon[ing] [the] client without notice, and thereby occasion[ing] [a] [procedural] default." *Ibid.*; accord *King*, 664 So. 2d at 927 (failure to follow procedures for withdrawal); *Myers* v. *Miss. State Bar*, 480 So. 2d 1080, 1092-1093 (Miss. 1985) (same).

2. Khan's inaction during the critical period between filing objections to the magistrate's R&R on March 5, 2012, and finally sending a copy of the adverse judgment to Perez on June 25, long after the time for seeking appeal had passed, violated numerous professional obligations related to withdrawal. First, while the time for noticing an appeal was running, Khan faced challenging personal circumstances that "impair[ed] [her] fitness to represent the client." Tex. R. 1.15(a)(2); Restatement § 32(2). Khan has explained that, as a solo practitioner laboring under the impression that she would receive *no* compensation for her work on this complex and time-consuming matter, she simply "did not have the resources to prepare the motion and brief necessary to appeal." R. 768; accord *id.* at 766, 768 ("complete lack of resources for th[e] case"). And she has averred that, but for an "unexpected personal medical issue" and "abrupt loss of childcare," she "would have forwarded the Court's orders [denying relief] to Mr. Perez." *Id.* at 609, 770. In other words, she experienced circumstances that "impair[ed]" her ability to execute basic professional obligations.

Instead of seeking leave to withdraw in a manner consistent with governing ethical rules, see Tex. R. 1.15, Khan simply went mute, taking no action and attempting no communication with Perez or the court during the relevant period. Steps to protect Perez's

interests and mitigate any consequence of her withdrawal were more than "reasonably practicable," *id.* 1.15(d); as events after Burr discovered the default demonstrate, Khan could have protected her client's interests by mailing Perez a copy of the judgment and an explanation of his options. A notice of appeal is a simple document that can be prepared by an attorney or *pro se* litigant. See Fed. R. App. P. 3(c)(1) (notice need only "specify the party or parties taking the appeal," the "judgment, order, or part thereof being appealed" and "the court to which the appeal is taken"); accord *id.* 3(c)(4) ("[a]n appeal must not be dismissed for informality of form or title of the notice of appeal"). Khan knew (or should have known) that the time for noticing an appeal was passing—and thus that Perez was "threatened with an imminent deadline that [would likely] expire before [a] new counsel [could] act," Restatement § 33 cmt. b. Yet she took no "reasonable steps either to extend the deadline or comply with it" or even to inform Perez of the judgment so he could protect his own rights. *Ibid.* Instead, she remained mute until Burr independently discovered that the deadline had passed and spurred her to belated and ineffective action.

Khan's disregard for professional obligations related to withdrawal had the "further irony" that Perez's status as a nominally represented party likely impeded his ability to receive personal notice. See Pet. App. 29a (Dennis, J., dissenting); cf. *Maples*, 132 S. Ct. at 925 ("By failing to seek permission to withdraw, [a defendant's lawyers] allowed the court's records to convey that they represented [him]."). To similar effect, applicable rules likely would have prohibited Perez from proceeding pro se, absent Khan's withdrawal. See *United States* v. *Polidore*, 690 F.3d

705, 721 n.19 (5th Cir. 2012) (refusing to consider pro se motion filed by represented defendant) (cited at Pet. App. 29a (Dennis, J., dissenting)).

That Khan eventually filed a belated and unsuccessful motion to reopen the time for appeal under Federal Rule of Appellate Procedure 4(a)(6) does not show a lack of abandonment or mitigate ethical violations related to withdrawal. As in *Maples*, "a significant conflict of interest arose for [Khan] once the crucial deadline passed," because "[f]ollowing the default, [Khan's] interest * * * was at odds with [Perez's] strongest argument—i.e., that his attorney[] had abandoned him." 132 S. Ct. at 925 n.8. Indeed, Khan's Rule 4(a)(6) motion did not raise attorney abandonment as a ground for relief. R. 604-605; Pet. App. 28a (Dennis, J., dissenting) ("Why would an attorney argue that she had abandoned Perez when to do so would expose her to significant professional and ethical consequences?"). "Given [Khan's] conflict of interest," the Rule 4(a)(6) motion "is not persuasive evidence" of continued representation or compliance with ethical obligations. *Maples*, 132 S. Ct. at 925 n.8.

To the contrary, the existence of the conflict of interest here supports a conclusion of abandonment. Absent proper client consent, "[a] lawyer shall not represent a person if the representation of that person * * * reasonably appears to be or become adversely limited by * * * the lawyer's or law firm's own interests." Tex. R. 1.06(b). "Unless otherwise agreed, the authority of an agent terminates if, without knowledge of the principal, he acquires adverse interests or if he is otherwise guilty of a serious breach of loyalty to the principal." Restatement (Second) of Agency § 112 (1958); cf. Restatement (Third) of the

Law Governing Lawyers § 20 cmt. c ("A lawyer who fails to file suit for a client within the limitations period must so inform the client, pointing out the possibility of a malpractice suit and the resulting conflict of interest that may require the lawyer to withdraw."); accord Pet. App. 28a (Dennis, J., dissenting).

In short, "the facts of this case unquestionably indicate that Khan abandoned Perez right when he needed her most." Pet. App. 20a (Dennis, J., dissenting). And she did so in a manner contrary to basic professional obligations governing withdrawal and conflicts of interest. Yet the Fifth Circuit held that the district court was powerless to use its broad equitable authority under Rule 60(b)(6) to shield Perez from the harsh consequences of that abandonment.

III. Khan's Inaction Deprived Her Client Of The Right To Decide Whether To Appeal

1. Khan's inaction effectively deprived Perez of the right to make a decision uniformly understood as reserved to her client—i.e., whether to appeal the denial of federal habeas relief.

"[W]hether to appeal in a civil proceeding or criminal prosecution" is a decision "reserved to the client except when the client has validly authorized the lawyer to make the particular decision." Restatement § 22. As commentary explains, "some decisions are so vital to a client that a reasonable client would not agree to abandon irrevocably the right to make the decisions with the help of the lawyer's advice." *Id.* cmt. 6; accord Ronald Rotunda & John Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* § 1.2-2(a), at 110 (2013-14 ed.) ("On these significant and central issues, such as the ques-

tion of * * * whether to appeal, the client should have the final say.").

Texas ethical rules confirm that "a lawyer shall abide by a client's decisions * * * concerning the objectives and general methods of representation." Tex. R. 1.02(a)(1). Where a lawyer "has not been specifically instructed concerning pursuit of an appeal," she "should advise the client of the possibility of appeal before relinquishing responsibility for the matter." *Id.* at 1.02 cmt. 6. Indeed, even the panel majority here acknowledged Khan's misconduct, conceding that "[t]he decision to waive an appeal is for the client" under applicable Texas rules and discussing the possibility of disciplinary sanctions against Khan. Pet. App. 13a-14a n.12; accord Schuwerk & Hardwick § 6:2, at 723. "The decision to appeal lies solely with the defendant, and the attorney's duty is to advise him" on matters such as the "'meaning and effect of the judgment rendered,'" the "'necessity of giving notice of appeal,'" and the lawyer's "'professional judgment as to possible grounds for appeal and their merit.'" *Jones*, 98 S.W.3d at 702-703 (quoting *Ex parte Axel*, 757 S.W.2d at 374). "If the defendant decides to appeal, the attorney must ensure that written notice of appeal is filed with the trial court." *Ibid.*

This Court has similarly made clear that the decision whether to appeal is sufficiently fundamental that it is reserved to the defendant. *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983), explained that "the accused has the ultimate authority to make certain fundamental decisions regarding the case," including "whether to * * * take an appeal." Similarly, *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004), explained that "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot

be made for the defendant by a surrogate. * * * Concerning those decisions an attorney must both consult with the defendant and obtain consent to the recommended course of action." Accord *Roe* v. *Flores-Ortega*, 528 U.S. 470, 479 (2000) ("the decision to appeal rests with the defendant"); *Wainwright* v. *Sykes*, 433 U.S. 72, 92 (1977) (Burger, C.J., concurring) (describing "whether to take a criminal appeal" as a "critical procedural decision * * * entrusted to a convicted defendant," with "the role of the attorney * * * limited to giving advice and counsel").

2. Khan's failure to notify Perez of the district court's judgment and her persistent inaction while the time period for filing a notice of appeal expired were "an egregious breach of the duties an attorney owes her client," and support a finding of "abandonment, not mere negligence." Pet. App. 26a (Dennis, J., dissenting). Without the knowledge that the time period for seeking an appeal had begun to run, Perez had no chance to make a decision "reserved to the client," Restatement § 22; Tex. R. 1.02(a)(1). Absent any evidence that Khan had "been specifically instructed concerning pursuit of an appeal," she at a minimum was required to "advise [Perez] of the possibility of appeal" before going mute during the critical period for appeal. Tex. R. 1.02 cmt. 6. Because Khan failed to communicate even the fact of the adverse judgment, she plainly failed to "advise" Perez on the "'meaning and effect of the judgment rendered,'" the "'necessity of giving notice of appeal'" or her "'professional judgment as to possible grounds for appeal and their merit.'" *Jones*, 98 S.W.3d at 702-703 (quoting *Ex parte Axel*, 757 S.W.2d at 374). Instead, Khan "silently, autonomously, and inde-

pendently chose to take no further action in Perez's case." Pet. App. 16a (Dennis, J., dissenting).

* * *

These violations of core ethical obligations strongly support the district court's undisturbed finding of attorney abandonment—and emphasize the importance of the legal issue presented in the petition. Perez should not be held accountable for a missed deadline in the extraordinary circumstance of attorney abandonment, which is sufficient to justify relief under Federal Rule of Civil Procedure 60(b)(6).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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