20-1666

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ABDERRAHMANE FARHANE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FEDERAL DEFENDERS OF NEW YORK, INC., FEDERAL PUBLIC DEFENDER'S OFFICE FOR THE WESTERN DISTRICT OF NEW YORK, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF CONNECTICUT, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF VERMONT, AND OFFICE OF THE PUBLIC DEFENDER FOR THE NORTHERN DISTRICT OF NEW YORK, IN SUPPORT OF PETITIONER-APPELLANT ABDERRAHMANE FARHANE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), counsel for *amici curiae* certify that they are not owned by a parent corporation, and no publicly held corporation owns more than ten percent of stock in *amici*.

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STATEMENT OF INTEREST

Amicus curiae the National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal legal system as a whole.[1]

Amicus curiae the New York State Association of Criminal Defense Lawyers is a not-for-profit corporation with a subscribed membership of more than 1,000 attorneys, including private practitioners, public defenders, and law professors, and is the largest private criminal bar association in New York. It is a recognized affiliate of NACDL and, like that organization, works on behalf of the criminal defense bar to ensure justice and due process for those accused and convicted of crimes.

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[1] No party or its counsel authored this brief in whole or part. No party or its counsel nor any other person contributed money to fund its preparation or submission.

Amici curiae Federal Defenders of New York, Inc.; Federal Public Defender's Office for the Western District of New York; Office of the Federal Public Defender for the District of Connecticut; Office of the Federal Public Defender for the District of Vermont; and Office of the Public Defender for the Northern District of New York are the institutional public defenders for each of the district courts within the United States Court of Appeals for the Second Circuit. They advocate on behalf of the criminally accused in federal court, with a core mission of protecting the rights of their clients and safeguarding the integrity of the federal criminal justice system. As part of this mission, the federal defender offices take seriously their obligation under *Padilla v. Kentucky* to advise clients on, and to seek to mitigate, the immigration consequences of criminal convictions.

Amici's interest in this case stems from their dedication to defending the rights of their clients, and their members' and employees' need for a clear rule about the scope of their professional responsibilities. *Amici* have an ethical and a constitutional obligation to advise their clients, non-citizens and naturalized citizens alike, of the immigration consequences of a guilty plea, and need to know the scope of this duty.

Amici urge the en banc Court to hold that the Sixth Amendment right to counsel extends to advice about a wide range of serious immigration consequences such as denaturalization, rather than the risk of deportation only, thereby providing a clear rule to defense counsel and protecting the rights of their clients.

INTRODUCTION

In a criminal legal system that revolves around pleas, not trials, a core responsibility of criminal defense attorneys is advising their clients about the myriad consequences of a guilty plea. As *amici* can attest, for many people accused of crimes the most important consideration in deciding whether to plead guilty is whether a conviction will affect their ability to remain in this country. Being forced to leave may mean living somewhere where they don't speak the language, no longer have family or friends, have no means of supporting themselves, or even may be in grave danger. "Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *I.N.S. v. St. Cyr*, 533 U.S. 289, 322 (2001) (quoting 3 Bender, *Criminal Defense Techniques* §§ 60A.01, 60A.02[2] (1999)).

Recognizing this reality, the Supreme Court has held that defense counsel has not only an ethical but also a constitutional duty to advise their clients whether a plea "carries a risk of deportation." *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010). This is because deportation is "intimately related to the criminal process," *id.* at 365, and "an integral part—indeed, sometimes the most important part—of the penalty," *id.* at 364.

The same can be said of a whole host of immigration consequences. A criminal conviction can render a person ineligible for asylum, bar them from reentering the country if they leave, and even—as in this case—result in their denaturalization (and subsequent deportation). In each instance, the effect is the same as deportation:

banishment. And in each instance, the immigration consequence results from the conviction. *Padilla*'s logic, then, extends to a wide range of immigration consequences.

In reaching the contrary conclusion, the panel majority relied on a distinction between direct and collateral consequences that the Supreme Court has never adopted, and that the *Padilla* Court specifically disavowed as "ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation." 559 U.S. at 366. It is equally "ill suited" to the analysis of whether defense counsel has a constitutional duty to advise clients about denaturalization and other immigration consequences. This Court should reject the panel majority's cramped interpretation of *Padilla* and, instead of cabining it to the context of deportation, faithfully follow *Padilla*'s reasoning: The Sixth Amendment requires defense attorneys to advise their clients of all serious, clear immigration consequences of a conviction—including denaturalization.

Requiring attorneys to advise their clients about a wide range of immigration consequences, not just deportation, is preferable not only as a matter of precedent, but also as a matter of policy. This is already the approach taken by the better part of the criminal defense bar. And such a rule would provide both clear guidance to practitioners and protection to their clients. The panel majority's rule, on the other hand, would not only lower the bar for effective representation; it would also be a recipe for confusion. Courts and counsel would be left to guess whether a given consequence of a conviction is more like deportation (in which case there would be a duty to advise) or more like denaturalization (in which no duty would attach).

ARGUMENT

A. The criminal defense bar has long recognized that it has an ethical and constitutional duty to advise clients of all serious, clear immigration consequences of a conviction.

Deportation and denaturalization are but two of the possible immigration consequences of a criminal conviction. Across this circuit and country, criminal defense attorneys regularly advise their clients on a slew of serious immigration consequences. *Amici*'s members and staff advise their clients whether a conviction will make them inadmissible, and thus unable to reenter if they leave the country.[2] They advise their clients whether a conviction will affect their ability to become citizens.[3] They advise their clients whether a conviction will make them ineligible for asylum.[4] They advise their clients whether a conviction will block cancellation of removal.[5] And they advise their clients whether a conviction will bar them from benefitting from Temporary Protected Status or Deferred Action for Childhood Arrivals.[6]

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[2] *See* 8 U.S.C. § 1182(a)(2) (specifying the kinds of convictions that make a non-citizen "inadmissible," which are distinct from the rules for removability).
[3] *See* 8 C.F.R. § 316.10 (requiring applicants for citizenship to prove their "good moral character," and providing that certain kinds of convictions are a bar to naturalization).
[4] *See* 8 U.S.C. § 1158(b)(2) (providing that a conviction for a "particularly serious crime," which includes aggravated felonies, is a bar to receiving asylum).
[5] *See* 8 U.S.C. § 1229b (setting out the rules for discretionary cancellation of removal for both legal permanent residents and non-permanent residents).
[6] *See* 8 U.S.C. § 1254a(c)(2) (providing that a non-citizen is ineligible for TPS if they have been convicted of a felony or two misdemeanors in the United States); 8 C.F.R. § 236.22(b)(6) (specifying the convictions that make someone ineligible for DACA).

Amici do so because such immigration consequences are the most important part of a potential conviction for many of *amici*'s non-citizen and naturalized clients. They are seeking asylum because they fled their native countries after agents of the ruling political party broke their bones and shot up their house. They need to preserve their eligibility for cancellation of removal because their two-year-old daughter was born here. They fear inadmissibility because they regularly fly from New York back to the Dominican Republic to help take care of their ailing mother. And so on.[7]

Though each of these possible immigration consequences has different rules, they implicate a shared concern: the right to remain in this country. The Supreme Court's seminal decision in *Padilla v. Kentucky* shared this concern. The *Padilla* Court "recognized that '[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" 559 U.S. 356, 368 (2010) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 322 (2001)); *see also id.* at 363 (relying on this Court's decision in *Janvier v. United States*, 793 F.2d 449 (1986), that "the impact of a conviction on a noncitizen's ability to remain in the country was a central issue to be resolved during the sentencing process"—and thus the Sixth Amendment right to counsel attached to a request for a judicial recommendation against deportation).

Accordingly, although *Padilla* dealt with deportation, courts have understood it to mean that attorneys have a Sixth Amendment duty to advise about "immigration

[7] Each of these anonymized examples is based on the authors' former clients.

consequences" more broadly. *See, e.g.*, *Chaidez v. United States*, 568 U.S. 342, 353 (2013) (stating that *Padilla* "made the *Strickland* test operative . . . when a criminal lawyer gives (or fails to give) advice about immigration consequences"); *Missouri v. Frye*, 566 U.S. 134, 141 (2012) (*"Padilla* held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction."); *Sutherland v. Holder*, 769 F.3d 144, 147 (2d Cir. 2014) (describing *Padilla* as holding "that an attorney is ineffective for failing to advise a client of the immigration consequences of a guilty plea"); *cf. Kovacs v. United States*, 744 F.3d 44, 51, 53 (2d Cir. 2014) (holding that petitioner was deprived of the effective assistance of counsel when his attorney affirmatively misadvised him about the immigration consequences of a plea that made him inadmissible, and noting that "no reasonable jurist could find a defense counsel's affirmative misadvice as to the *immigration consequences* of a guilty plea to be objectively reasonable" (emphasis added)).[8]

Practitioners and academics, too, have read *Padilla* as imposing a constitutional duty to advise about a wide range of "clear" immigration consequences. *See* 559 U.S.

[8] Though some of the discussion in *Kovacs* is phrased in terms of deportation, it appears to actually be a case about inadmissibility. The holding is framed in terms of counsel "giving erroneous advice concerning the deportation consequences" of a plea. 744 F.3d at 48. But Kovacs was a legal permanent resident convicted of a single crime involving moral turpitude, *id.* at 48–49, which is a ground for inadmissibility but not removal. *Compare* 8 U.S.C. § 1227(a)(2)(A)(ii) (providing that conviction of two or more CIMTs makes a legal permanent resident removable) *with* 8 U.S.C. § 1182(a)(2) (providing that conviction of a single CIMT can make a legal permanent resident inadmissible). And he was not being allowed to reenter rather than being removed. *See* 744 F.3d at 49 ("[I]mmigration officials questioned Kovac's eligibility for reentry.").

at 369. When the American Bar Association revised its criminal justice standards after *Padilla*, for instance, it required defense counsel to "investigate and identify particular immigration consequences that might follow possible criminal dispositions . . . , including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family," and then advise clients about "*all* such potential consequences." *ABA Criminal Justice Standards for the Defense Function* (4th ed. 2017), Standard 4-5.5 (emphasis added), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/. This is because the better view among the criminal defense bar is that, if *Padilla*'s logic is followed faithfully, "the advisal duty cannot be limited to advice about only the consequence of deportation." Lindsay C. Nash, *Considering the Scope of Advisal Duties Under Padilla*, 33 Cardozo L. Rev. 549, 566 (2011). Accordingly, criminal defense organizations, such as *amici*, have trained their members and staff on a wide range of immigration consequences—including denaturalization.[9] Many defender offices, including some of *amici*, employ immigration specialists. And immigration lawyers have published guides to the various consequences of convictions for the use of criminal defense attorneys. *See, e.g.*, Kara Hartzler, *Surviving Padilla: A Defender's Guide to Advising Noncitizens on the Immigration Consequences of Criminal Convictions* (2011).

[9] The slides from one such webinar *amicus* NACDL sponsored are available at: https://www.nacdl.org/Media/ImmigrationConseqCrimCaseConceptsEmergIssues013112.

In fact, even prior to *Padilla* the criminal defense bar recognized that they had an ethical duty to advise their clients about the immigration consequences of a conviction. As early as 1999, the ABA instructed attorneys that "many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client." *ABA Standards for Criminal Justice: Pleas of Guilty*, *Commentary to Standard 14-3.2(F)*, at 127 (3d ed. 1999), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.pdf. Similarly, at the time of the plea in this case, the New York State Bar Association tasked defense counsel with "[o]btaining all available information concerning the client's background and circumstances for purposes of . . . avoiding, if at all possible, collateral consequences including but not limited to deportation." New York State Bar Ass'n, *Standards for Providing Mandated Representation*, Standard I-7(a) (2005), https://nysba.org/app/uploads/2020/02/Standards.pdf.

B. The panel majority relies on a distinction between collateral and direct consequences that *Padilla* rejected as "ill suited" to the context of deportation, and which is just as ill suited to analyzing claims about other kinds of serious immigration consequences.

Up until *Padilla*, the seeming consensus among courts was that defense counsel had no affirmative duty to advise clients about immigration consequences because they were merely "collateral consequences" of a conviction. *See, e.g., Broomes v. Ashcroft*,

358 F.3d 1251, 1257 (10th Cir. 2004). Since these consequences were collateral, the Sixth Amendment right to counsel did not attach and there could be no *Strickland* claim for failure to advise about them. But *Padilla* "breach[ed] the previously chink-free wall between direct and collateral consequences." *Chaidez*, 568 U.S. at 352–53.

Indeed, *Padilla* rejected the Government's proffered distinction between the collateral and direct consequences of a conviction, at least in the immigration context. In an *amicus* brief in *Padilla*, the Government had argued that "the Sixth Amendment does not require counsel to provide advice on immigration and other consequences of conviction that are beyond the scope of the criminal proceeding." Brief for the United States as *Amicus Curiae* Supporting Affirmance, 2009 WL 2509223, at *8. It also argued that "counsel need not affirmatively advise defendants about collateral consequences." *Id.* at *24. The *Padilla* Court, however, declined to adopt the Government's suggested distinction, noting that it "ha[d] never applied a distinction between direct and collateral consequences in defining the scope of constitutionally 'reasonable professional assistance.'" 559 U.S. at 365. The Court continued: "Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation. . . . Although removal proceedings are civil in nature, . . . deportation is nevertheless intimately related to the criminal process." *Id.* (citation omitted). Moreover, "because of its close connection to the criminal process," deportation "is uniquely difficult to classify as a direct or collateral

consequence. The collateral versus direct distinction is thus ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation." *Id.* at 366.

But despite *Padilla*'s holding that the collateral-direct distinction breaks down in the context of deportation, the panel majority determined that this distinction remains tenable in the closely related context of denaturalization. Though it accepted that denaturalization is "serious"—like deportation—the panel majority held that denaturalization should be classified as a collateral consequence and thus falls outside the Sixth Amendment's scope because it "lacks [deportation's] 'automatic' relationship to the guilty plea." *Farhane v. United States*, 77 F.4th 123, 130 (2d Cir. 2023).

This supposed distinction between deportation and denaturalization does not stand up to scrutiny. To begin with, denaturalization falls squarely within *Padilla*'s holding. The *Padilla* Court "h[e]ld that counsel must inform her client whether his plea carries a *risk of deportation*." 559 U.S. at 374 (emphasis added). And "[t]here is no reasonable dispute that Mr. Farhane's guilty plea exposed him to a risk of deportation." Farhane En Banc Br. at 18. After all, "[t]he government only seeks denaturalization as the first step toward deportation, the guilty plea obviates any potential defense in those denaturalization proceedings, and deportation following denaturalization is inevitable where, as here, the crime of conviction makes noncitizens automatically deportable." *Id.* It makes little sense to hold that *Padilla* protects clients facing a risk of deportation, but not clients at risk of denaturalization followed by deportation, simply because there is an intermediate step. It also "seems

paradoxical to construe *Padilla* to provide stronger protection to a *noncitizen* at risk of deportation (like Padilla) than to a *U.S. citizen* at risk of denaturalization followed by deportation (like Farhane)." *Farhane*, 77 F.4th at 151 (Carney, J., dissenting).

Even if denaturalization did not inherently involve a risk of deportation, denaturalization—like other serious immigration consequences—still cannot be classified as a "collateral consequence" under *Padilla*'s framework. As the panel majority explained, "[t]he *Padilla* Court emphasized two factors when concluding that the [direct-collateral] distinction did not apply to deportation: deportation's severity and its automatic character." *Farhane v. United States*, 77 F.4th 123, 130 & n.33 (2d Cir. 2023). Each factor applies equally to a whole host of immigration consequences.

Start with severity. "[D]enaturalization, like deportation, may result in the loss of all that makes life worth living." *Knauer v. United States*, 328 U.S. 654, 659 (1946) (cleaned up). Inadmissibility means that a person cannot leave the United States to travel or visit loved ones, even if sick or dying, without fear of being unable to return. Ineligibility for naturalization means forever being a stranger in one's chosen home, unable to fully participate in political and civic life—and at risk of deportation. Ineligibility for asylum means a person fleeing political or ethnic or religious violence or persecution may be forced to return to danger. And ineligibility for cancellation of removal means deportation may be a certainty, not a mere possibility.

The same goes for the question of what constitutes automatic character. A guilty plea to pre-naturalization conduct can automatically make a person subject to

denaturalization. Farhane En Banc Br. at 22. Though the grounds for inadmissibility and removability are distinct, a conviction can make a person inadmissible in the same automatic way it makes them removable. *See* n.2, *supra*. Similarly, certain convictions—especially for an "aggravated felony"—can serve as an automatic bar to eligibility for asylum, cancellation of removal, and naturalization. *See* nn.3–6, *supra*. Each of these consequences flows no less automatically from a conviction than deportation.

Although a conviction that makes one subject to denaturalization may not inexorably result in denaturalization proceedings, the same is true of deportation; that a conviction makes a person deportable does not guarantee deportation. Just like civil denaturalization hinges on a decision to file and pursue a civil action, separate from the criminal case, deportation depends on the government's decision to issue a notice to appear and then prosecute removal proceedings. Given the limited resources for immigration enforcement, there will inevitably be people who are removable because of past convictions yet never removed. "A principal feature of the removal system is the broad [prosecutorial] discretion exercised by immigration officials. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Arizona v. United States*, 567 U.S. 387, 396 (2012).

Padilla's concern was with the "risk of deportation," not the fact of deportation. *See* 559 U.S. at 366, 367, 374. In other words, the question is "whether a guilty plea would make the client automatically *deportable*, not whether it would unavoidably lead to actual deportation." Farhane En Banc Br. at 19. The same logic applies when a

conviction makes a person (like Farhane) automatically subject to denaturalization—or inadmissible or ineligible for asylum or cancellation of removal. It is the clear legal consequences of a conviction, not the enforcement actions of immigration officials, that controls the analysis of whether counsel has a duty to advise under *Padilla*.

Padilla therefore offers little reason to distinguish between deportation and denaturalization—or other kinds of serious immigration consequences. Because of the tight enmeshing of the criminal legal system with the immigration system, the direct-collateral distinction is "ill suited" to analyzing claims about the failure to advise about the serious immigration consequences of a conviction. *See* 559 U.S. at 366.

C. The panel majority's resurrection of the collateral-direct distinction in the immigration context creates uncertainty and confusion for defense counsel, and puts their clients' rights at risk.

The panel majority's holding is wrong not only as a matter of precedent, but also as a matter of policy. In holding that denaturalization is a collateral consequence, and thus outside the ambit of the right to counsel, the panel majority created a potential morass when it comes to other kinds of immigration consequences.

If the en banc Court takes the same tack, judges and defense attorneys will have to evaluate each possible immigration consequence to weigh whether it is more like deportation (in which case the Sixth Amendment attaches) or denaturalization (in which case there is no duty to advise). Consider advising a non-citizen about whether they will be eligible for Temporary Protected Status (TPS) if they plead guilty. Is TPS like deportation because certain convictions automatically make non-citizens

ineligible? *See* 8 U.S.C. § 1254a(c)(2). Or is it more like denaturalization because it relies on the Attorney General's discretionary decision to designate certain non-citizens as eligible for such a status? *See id.* § 1254a(1)(A); *Matter of D-A-C-*, 27 I. & N. Dec. 575, 575-76 (B.I.A. 2019) (holding that immigration judge had the discretion to deny TPS to a non-citizen who was "statutorily eligible," and deem them deportable). Adopting the panel majority's approach will likely lead to conflicting results among trial courts—and require this Court to step in again to clarify if petitioners can raise *Strickland* claims about the failure to advise about various immigration consequences.

A straightforward interpretation of *Padilla* provides a simpler and more administrable rule: Because of their "close connection to the criminal process" and severity, a wide range of immigration consequences cannot be classified as collateral. The Sixth Amendment thus requires attorneys to advise their clients of all serious, clear immigration consequences of a conviction, including denaturalization. Such a holding would provide predictability and clarity to courts and counsel—and reflect the understanding that the better part of the defense bar has already embraced.

Such a rule would also better protect the interests of people accused of crimes. Although voluntary bar associations like NACDL may ask more of their members, and organizations like the ABA may promulgate non-binding guidelines, the Sixth Amendment effectively sets the floor for professional responsibility. Since the rules of professional conduct have no provisions specific to criminal defense attorneys, court rulings on ineffective assistance of counsel claims put the defense bar on notice about

the minimum they must do to meet their ethical and constitutional obligations. Exempting denaturalization—and possibly other immigration consequences—from the Sixth Amendment's scope means that people accused of crimes may not receive the individualized advice about adverse immigration consequences they need.

CONCLUSION

This Court should hold that the Sixth Amendment requires defense counsel to advise their clients about a wide range of clear immigration consequences of a plea, including denaturalization, and overrule the panel majority's contrary decision. Though this Court can resolve whether the Sixth Amendment requires counsel to advise about denaturalization by holding that a conviction that involves a risk of denaturalization followed by deportation inherently involves a risk of deportation, *amici* urge the en banc Court to embrace its role to say what the law is and provide guidance about when counsel has a duty to advise about immigration consequences.

Respectfully submitted,

/s/ Matthew A. Wasserman

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), as well as the word-limit requirements of Rule 29(a)(5). It was prepared in a proportionally spaced typeface using Microsoft Word and 14-point Garamond font. According to that software, this brief contains 4,102 words, not including the cover page, corporate disclosure statement, table of contents, table of authorities, signature block, or this certificate.

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