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 AND FEDERAL DEFENDERS OF NEW YORK, INC., IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC*

Joel B. Rudin
Vice Chair, Amicus Curiae Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
152 West 57th Street, 8th Floor
New York, New York 10019
(212) 752-7600
jbrudin@rudinlaw.com

Matthew A. Wasserman
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
360 East 161st Street
Bronx, NY 10451
(347) 926-7452
mawasserman@gmail.com
Counsel of Record

S. Isaac Wheeler
FEDERAL DEFENDERS OF NEW YORK, INC.
52 Duane Street 10th Fl.
New York, NY 10007
(212) 417-8717
isaac_wheeler@fd.org

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 justice system as a whole.[1]

Amicus curiae Federal Defenders of New York, Inc., is the institutional public defender in the United States District Courts for the Southern and Eastern Districts of New York, and the United States Court of Appeals for the Second Circuit. It advocates on behalf of the criminally accused in federal court, with a core mission of protecting the rights of its clients and safeguarding the integrity of the federal criminal justice system. As part of this mission, the Federal Defenders of New York employs a

[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.

full-time immigration specialist attorney to advise clients and defense counsel on the immigration consequences of contemplated dispositions of criminal cases.

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. NACDL's members and the Federal Defenders of New York's staff attorneys 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 this Court to grant *en banc* rehearing to clarify that the Sixth Amendment right to counsel extends to advice about all immigration consequences, providing a clear rule to defense counsel and protecting the rights of their clients.

ARGUMENT

A. Since *Padilla*, the criminal defense bar has recognized that it has an ethical and constitutional duty to advise clients of *all* reasonably foreseeable immigration consequences.

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 host of 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 be an obstacle to cancellation of removal.[5] They advise their clients whether a conviction will bar them from benefitting from Temporary Protected Status or Deferred Action for Childhood Arrivals.[6] And so on.

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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-legal 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).

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 'preserving 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 consequences," period. *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)).

Practitioners and academics, too, have read *Padilla* as imposing a duty to advise about *all* reasonably foreseeable immigration consequences—and not just deportation. When the American Bar Association revised its criminal justice standards after *Padilla*, it specifically 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, including *amici*, have trained their members and staff on a wide

range of immigration consequences.[7] 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).

B. The panel opinion's resurrection of the collateral-direct distinction in the immigration context creates uncertainty and confusion for *amici* and their members, and puts their clients' rights at risk.

Prior to *Padilla*, of course, the consensus among courts was that defense counsel had no affirmative duty to advise clients about immigration consequences because they were "collateral consequences." But *Padilla* "breach[ed] the previously chink-free wall between direct and collateral consequences." *Chaidez*, 568 U.S. at 352–53. *Padilla* held that "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." 559 U.S. at 366. "The *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 slew of immigration consequences—including denaturalization.

[7] The slides from one such webinar NACDL sponsored in 2012 are available at: https://www.nacdl.org/Media/ImmigrationConseqCrimCaseConceptsEmergIssues013112.

Start with severity. 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 that a person fleeing political or ethnic or religious violence or persecution may be forced to return to danger. Ineligibility for cancellation of removal means that deportation is a certainty, not a mere possibility. And, of course, "denaturalization, 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).

The same goes for automatic character. Though the grounds for inadmissibility and removability are distinct, a criminal conviction can make a person inadmissible in exactly the same automatic way it makes them removable. *See* n. 2, *supra*. Similarly, 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*. And, as counsel for Farhane explains, a guilty plea to pre-naturalization conduct can automatically make a person subject to denaturalization. Although denaturalization proceedings may not inexorably flow from a conviction, this is true of deportation too; that a conviction makes a person deportable does not guarantee deportation.

In holding that denaturalization is a collateral consequence, and thus outside the scope of the Sixth Amendment right to counsel, the panel majority creates a recipe for confusion. Though conceding that denaturalization is "serious"—like

deportation—the panel majority held that denaturalization was nonetheless a collateral consequence because it "lacks [deportation's] automatic relationship to the guilty plea." *Farhane*, 77 F.4th at 130. This revival of the collateral-direct distinction creates a morass when it comes to the context of immigration consequences.

If the panel opinion stands, courts and 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). Take, for instance, 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, 576 (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).

A straightforward interpretation of *Padilla* provides a simpler and more administrable rule: Because of their "close connection to the criminal process," immigration consequences should never be classified as collateral. Regardless of whether the collateral-direct distinction still applies to civil penalties like the loss of benefits after *Padilla*, it is "ill suited" to immigration consequences as a category. The

Sixth Amendment requires attorneys to advise their clients of *all* reasonably foreseeable immigration consequences of a conviction, including denaturalization.

Such a rule would also better protect the interests of criminal defendants. Though voluntary bar associations like NACDL may ask more of their members, the Sixth Amendment effectively sets the floor for professional responsibility. Exempting denaturalization—and possibly other immigration consequences—from the scope of the Sixth Amendment duty means that people accused of crimes may not receive the individualized advice about adverse immigration consequences they need.

CONCLUSION

This Court should grant rehearing *en banc* to clarify that the Sixth Amendment requires criminal defense attorneys to advise their clients about all kinds of adverse immigration consequences, including denaturalization.

Respectfully submitted,

/s/ Matthew A. Wasserman

Matthew A. Wasserman
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
360 East 161st Street
Bronx, New York 10451
(347) 926-7452
mawasserman@gmail.com
Counsel of record

Joel B. Rudin
Vice Chair, Amicus Curiae Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
152 West 57th Street, 8th Floor
New York, New York 10019
(212) 752-7600
jbrudin@rudinlaw.com

S. Isaac Wheeler
FEDERAL DEFENDERS OF NEW YORK, INC.
52 Duane Street 10th Fl.
New York, NY 10007
(212) 417-8717
isaac_wheeler@fd.org

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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(b)(4). It was prepared in a proportionally spaced typeface using Microsoft Word and 14-point Garamond font. According to that software, this brief contains 2,052 words, not including the cover page, corporate disclosure statement, table of contents, table of authorities, signature block, or this certificate.

/s/ Matthew A. Wasserman
Matthew A. Wasserman
360 East 161st Street
Bronx, New York 10451
(347) 926-7452
mawasserman@gmail.com

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