No. 20-1666

IN THE 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, No. 18-cv-11973,
Before the Honorable Judge Loretta A. Preska

BRIEF OF *AMICUS CURIAE* IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER-APPELLANT

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February 2, 2021

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Immigrant Defense Project (IDP) is a nonprofit legal resource and training center that is a leading and longstanding authority on the immigration consequences of criminal convictions. IDP provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. Since 1998, IDP has published resource materials for criminal defense lawyers, including *Representing Immigrant Defendants in New York*. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes and therefore has a keen interest in ensuring that immigrants in the nation's criminal legal system receive competent legal counsel regarding the immigration consequences of criminal convictions, including the risk of naturalization and deportation. IDP appears regularly before the U.S. Supreme Court and the Courts of Appeals, including this Court, on questions regarding the duties of criminal defense counsel regarding immigration-related issues and the interplay of immigration and criminal law. *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Chaidez v. United States*, 568 U.S. 342 (2013); *Lee v. United States*, 137 S. Ct. 1958 (2017); *Pereida v. Barr*, No. 19-438 (pending); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

[1] The parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or any other person contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Longstanding professional standards and the Sixth Amendment right to counsel require defense counsel to advise clients regarding the risk of immigration consequences of a guilty plea. *See Padilla v. Kentucky*, 559 U.S. 356 (2010). As the Supreme Court has long recognized, both denaturalization and deportation are severe immigration consequences, "[f]or 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) (internal quotation marks and citation omitted); *see infra* Part I.B.

In this case, defense counsel's representation fell below long-recognized professional standards when counsel failed to advise Mr. Farhane, a naturalized citizen client, that his guilty plea would place him at risk of denaturalization and deportation. Instead of providing that obligatory advice, defense counsel advised Mr. Farhane to accept a plea, even though it included admission to charges that included alleged conduct pre-dating his naturalization and thus exposed him to denaturalization risk, *see infra* Part I.A., and even though it would result in an aggravated felony conviction under immigration law, thus triggering automatic deportation should he be denaturalized, *see infra* Part I.B.

Once counsel knew his client to be a naturalized citizen, the risk of denaturalization and deportation as a result of admitting pre-naturalization conduct

was clear, which counsel had an obligation to investigate and determine. *See infra* Parts I.A. and I.C. In Mr. Farhane's case, denaturalization leads to automatic deportation because his conviction—which is based on admission to conduct alleged to have occurred when he was a noncitizen—is considered an aggravated felony that triggers deportability under immigration law. *See infra* Part I.B. Mr. Farhane was entitled to advice about these significant immigration consequences before he accepted the plea in his case. *See infra* Part I.C.

In addition to long-established professional norms, the constitutional right to counsel as recognized by *Padilla* requires defense counsel to provide advice and to give warnings about a plea that carries risk of immigration consequences and thus threatens a client's ability to remain in the United States. This obligation must include warnings about a plea that creates risk of denaturalization, a severe immigration consequence that in many cases will lead to automatic deportation, *see infra* Parts I.B. and II, as well as potential additional criminal liability, *see infra* Part III. By failing to advise Mr. Farhane that his plea could result in loss of citizenship, additional criminal liability, and subsequent banishment from his country—despite his stated primary objective of reuniting with his family in Brooklyn—defense counsel's representation fell below objectively reasonable standards.

ARGUMENT

I. Representation by Defense Counsel that Fails To Provide Advice Regarding the Risk of Denaturalization and Deportation as a Result of a Plea Falls Below Long-Recognized Professional Standards.

Prevailing professional standards have long required defense counsel to advise clients regarding the immigration consequences of a plea. Consistent with this duty, defense counsel must advise a naturalized citizen client of the risk of denaturalization and deportation as a result of a plea offer, particularly where the plea includes admission to charges that included alleged conduct before his naturalization. Failure to provide such advice falls below well-established professional standards.

In this case, Mr. Farhane was charged with a conspiracy that spanned a period of time both before and after his naturalization in 2002. (Pet'r's Br. 5, ECF No. 58). Pursuant to a plea agreement, his 2006 guilty plea included admission to conduct that allegedly occurred prior to his 2002 naturalization. (Pet'r's Br. 5, 7-8). Mr. Farhane's defense counsel failed to advise him that he could face severe immigration consequences—including denaturalization and deportation—as a result of this plea. (Pet'r's Br. 7-8). Years later, the government initiated civil denaturalization proceedings against Mr. Farhane, claiming that the pre-naturalization conduct *that formed the factual basis of his 2006 guilty plea* established that he had not met the good moral character requirement at the time of

his naturalization in 2002 and thus that he had unlawfully procured his naturalization, *see* 8 U.S.C. § 1451. (Pet'r's Br. 11). If denaturalized, Mr. Farhane would be deportable, particularly as his conviction for conspiracy to violate 18 U.S.C. § 1956(a)(2)(A), a money laundering offense, is explicitly listed as an aggravated felony under immigration law. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (rendering deportable any noncitizen convicted of an aggravated felony); § 1101(a)(43)(D) (defining aggravated felony to include any offense listed in 18 U.S.C. § 1956); § 1101(a)(43)(U) (conspiracy to commit any offense listed in subsection (a)(43) is an aggravated felony).

Defense counsel should have advised and warned Mr. Farhane about the risk of denaturalization and deportation as a result of his plea to charges that included alleged conduct prior to naturalization. Failure to provide that advice fell below long-recognized professional standards regarding defense counsel's duty to advise a client of the risk of immigration consequences before accepting a plea offer.

A. The risk of denaturalization as a result of admitted conduct that occurred prior to naturalization was clear at the time of Mr. Farhane's criminal case.

At the time that Mr. Farhane was facing criminal charges, the government's authority to pursue denaturalization was long-established. *See, e.g.*, *Kungys v. United States*, 485 U.S. 759 (1988). In the years just preceding Mr. Farhane's guilty plea, several federal courts had denaturalized individuals based on

convictions for conduct that occurred prior to naturalization. *See, e.g.*, *United States v. Jean-Baptiste*, 395 F.3d 1190, 1193 (11th Cir. 2005) (revoking citizenship where defendant was convicted, after naturalization, of conspiracy to distribute crack cocaine based on incidents occurring before naturalization and where defendant had stated during naturalization interview that he had never committed a crime for which he had not been arrested); *United States v. Reve*, 241 F. Supp. 2d 470 (D.N.J. 2003) (civil denaturalization based on guilty plea admitting to conduct occurring before naturalization); *United States v. Samaei*, 260 F. Supp. 2d 1223 (M.D. Fla. 2003) (same); *United States v. Ekpin*, 214 F. Supp. 2d 707 (S.D. Tex. 2002) (same). The Second Circuit also issued numerous decisions dealing with denaturalization in those years. *See, e.g.*, *United States v. Wu*, 419 F.3d 142 (2d Cir. 2005); *United States v. Reimer*, 356 F.3d 456 (2d Cir. 2004); *United States v. Alameh*, 341 F.3d 167 (2d Cir. 2003). Such case law makes clear that, at the time that Mr. Farhane was facing charges, his defense counsel should have been aware that denaturalization was a possible consequence for naturalized citizens and that pleading guilty to pre-naturalization conduct places a naturalized citizen at heightened risk of denaturalization and deportation.

Moreover, defense counsel should have been particularly aware of the heightened risk of denaturalization and deportation resulting from the guilty plea in the case of Mr. Farhane, an individual who was born in a Muslim-majority country

and prosecuted in connection with a terrorism investigation shortly after September 11, 2001. It is long-recognized that the government historically has used its power to revoke citizenship against politically disfavored groups. *See* Open Society Justice Initiative, *Unmaking Americans: Insecure Citizenship in the United States* 62 (2019), https://bit.ly/3c4Tyo7 (hereinafter *Unmaking Americans*) ("For the first 50 years after the 1906 [Naturalization] Act, denaturalization policy and practice focused increasingly on naturalized citizens' political allegiance in the form of membership in suspect groups, especially those considered to espouse communism." (footnote omitted)). Following the events of September 11, 2001, individuals from majority-Muslim countries became a politically disfavored group vulnerable to denaturalization and deportation, and that increased risk was well known in 2006. *See, e.g.*, Peter Waldman, *A Muslim's Choice: Turn U.S. Informant or Risk Losing Visa*, Wall St. J., July 11, 2006, https://www.wsj.com/articles/SB115258258431002991 (describing the FBI's "aggressive" pursuit of Muslim informants after the events of September 11 that included threats of deportation); Diala Shamas, *A Nation of Informants Reining in Post-9/11 Coercion of Intelligence Informants*, 83 Brook. L. Rev. 1175, 1191 (2018) ("Since the rush to recruit informants in the aftermath of September 11, the immigration system has been among the most prominent pressure points for Muslim and Middle Eastern communities."). An above-average number of civil

denaturalization cases were filed in 2001 and 2002 and were attributable to prosecution trends in the wake of the events of September 11. *See Unmaking Americans* 45 n.161 (noting increase in denaturalization cases in 2001 and 2002 as a result of the events of September 11, 2001); Eoin Higgins, *How ICE Works to Strip Citizenship from Naturalized Americans*, The Intercept, Feb. 14, 2018, https://bit.ly/2Yzkd4D (noting that after September 11, one component of the government's national security strategy was denaturalization, "a tactic that has been used aggressively over the past two decades"). For this additional reason, the increased risk of denaturalization and deportation as a result of Mr. Farhane's plea should have been known to his defense counsel.

B. A plea that increases the risk that a naturalized citizen will face civil or criminal denaturalization and subsequent deportation presents negative immigration consequences.

A naturalized citizen may be deported if he is denaturalized—and thus returned to noncitizen status—and then found deportable under 8 U.S.C. § 1227(a). Denaturalization presents a severe immigration consequence: it is a necessary intermediate step to deportation and, as confirmed by the government's own publications, it is typically pursued precisely *for the purpose of deportation*.

1. Denaturalization is a necessary intermediate step to deportation, and the government frequently links denaturalization to deportation.

A naturalized citizen may lose citizenship only by final determination of a district court in a denaturalization proceeding brought pursuant to 8 U.S.C. § 1451, which can be either civil, *see id.* § 1451(a), or criminal, *see id.* § 1451(e) & 18 U.S.C. § 1425. Revocation of citizenship pursuant to 8 U.S.C. § 1451 voids naturalization, returning the individual to the status held prior to naturalization. *See id.* § 1451(f). No longer a citizen, the denaturalized individual is subject to deportability under 8 U.S.C. § 1227(a).

The government frequently links denaturalization to deportation, making clear that a principle purpose of pursuing denaturalization is deportation. As stated in one U.S. Attorneys' publication: "Typically the government does not expend resources on civil denaturalization actions unless the ultimate goal is the removal of the defendant from the United States. [Office of Immigration Litigation]-DCS attorneys confirm that goal before filing the complaint." Anthony D. Bianco et al., *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, 65 U.S. Att'ys' Bull. 5, 17 (July 2017), https://www.justice.gov/usao/page/file/984701/download. A 2008 handbook issued by Immigration and Customs Enforcement (ICE) also links denaturalization to deportation, noting that "[p]rosecution under 18 U.S.C. § 1425 [(criminal denaturalization provision)] . . . is an important consideration for subsequent removal proceedings because an attorney could argue that a conviction for this

offense is a crime involving moral turpitude or an aggravated felony." Dep't of Homeland Sec., ICE Office of Investigations, *Denaturalization Investigations Handbook* 14-15, Jan. 15, 2008, https://bit.ly/3j90Eta.

The government also explicitly links denaturalization to deportation in plea agreements and civil settlements drafted by U.S. Attorney's offices across the country. *See Unmaking Americans* 106, 108 (collecting excerpts from plea and settlement agreements in denaturalization cases that include waiver of potential relief from removal); Plea Agreement at 11, *United States v. Levashov*, No. 3:17-cr-00083, ECF No. 112 (D. Conn. Sept. 12, 2018) (providing that "if the defendant is a naturalized citizen of the United States, pleading guilty may result in denaturalization and removal"); Plea Agreement at 6, *United States v. Borgesano*, No. 8:16-cr-00353, ECF No. 380 (M.D. Fla. Nov. 4, 2017) (providing that "under certain circumstances, denaturalization may also be a consequences of pleading guilty to a crime. Removal, denaturalization, and other immigration consequences are the subject of a separate proceeding[.]").

2. Denaturalization and subsequent deportation as a result of a plea are severe consequences that are directly tied to the conviction, not indirect collateral consequences.

In denaturalization proceedings, the government may allege that an individual obtained citizenship improperly through concealment of a material fact or willful misrepresentation, *see* 8 U.S.C. § 1451(a). A common allegation is that

the immigrant committed a crime prior to naturalization that precluded the finding of good moral character that is required for naturalization. *See* 8 U.S.C. § 1427(a). Where a naturalized citizen has been convicted of an offense by a plea admitting to conduct that occurred prior to naturalization, the immigrant is unable to challenge the facts established by that plea in a subsequent denaturalization proceeding. *See, e.g.*, *Maietta v. Artuz*, 84 F.3d 100, 102 n.1 (2d Cir. 1996). Specifically, the government will argue in the denaturalization case that the individual is collaterally estopped from denying the facts established by the prior plea. *See, e.g.*, Bianco et al., 65 U.S. Att'ys' Bull. 16 (citing *Jean-Baptiste*, 395 F.3d at 1193); *United States v. Akamo*, 515 F. App'x 248, 249 (5th Cir. 2012) (finding that collateral estoppel applied in a denaturalization case because the issue of the defendant's involvement in a criminal conspiracy had been fully litigated in the criminal proceeding). Indeed, the government relies on such factual admissions in criminal cases in order to pursue denaturalization: "Because civil denaturalization cases often arise out of criminal investigations, many rely on factual admissions or determinations made in criminal proceedings." Bianco et al., 65 U.S. Att'ys' Bull. at 15. By contrast, without the underlying plea admitting to pre-naturalization conduct, the government would be required to establish the facts supporting its denaturalization case by "clear, unequivocal, and convincing" evidence, *Fedorenko v. United*

States, 449 U.S. 490, 505 (1981), and inferences would be made in favor of the defendant, *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

In this way, it is the guilty plea—particularly where pre-naturalization conduct forms the basis of that plea—that heightens the naturalized citizen's risk of denaturalization and subsequent deportation. This is because denaturalization automatically returns a naturalized citizen to noncitizen status, making the individual subject to deportability under 8 U.S.C. § 1227(a). Denaturalization leads to removal proceedings because, as explained in Part I.B.1, the government pursues denaturalization for the purpose of deportation. Moreover, a conviction that forms the basis for denaturalization can lead to automatic deportation where that conviction triggers deportability under 8 U.S.C. § 1227(a). For example, a conviction that qualifies as an aggravated felony—as Mr. Farhane's conviction does in this case—makes a denaturalized individual deportable with little to no possibility for relief from removal. Longstanding agency case law confirms that a denaturalized noncitizen who was convicted of a deportable offense while holding naturalized citizenship status may nevertheless be deported if the underlying conduct was committed before naturalization. *See Matter of Gonzalez-Muro*, 24 I. & N. Dec. 472 (BIA 2008) (reaffirming *Matter of Rossi*, 11 I. & N. Dec. 514 (BIA 1966)).

For these reasons, Mr. Farhane's plea presented a clear and significant risk of both denaturalization and deportation, and defense counsel had a duty to advise him of that risk in advance of his decision to plead guilty. "Denaturalization, like deportation, may result in the loss 'of all that makes life worth living.'" *Knauer*, 328 U.S. at 659 (internal quotation marks and citation omitted). These are not indirect collateral consequences; they are severe and punitive consequences that are "intimately related to the criminal process[.]" *Padilla*, 559 U.S. at 365.

C. Prevailing professional standards have long required defense counsel to provide clients with advice about immigration consequences, which include denaturalization and deportation.

At the time of Mr. Farhane's case, long-established professional norms required defense counsel to advise a client regarding the immigration consequences of a plea. *See Padilla*, 559 U.S. at 367-68 (finding that the "weight of prevailing professional norms" required such advice and citing numerous treatises dated 2006 or earlier) (citing, *inter alia*, ABA Standards for Criminal Justice, Pleas of Guilty 14–3.2(f), p. 116, 126 (3d ed.1999); Gabriel J. Chin and Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Plea*s, 87 Cornell L. Rev. 697, 713-718 (2002); Arthur W. Campbell, *Law of Sentencing* § 13:23, pp. 555, 560 (3d ed. 2004)). Commentary to the 1999 ABA Standard for Criminal Justice 14-3.2, for example, provided that defense counsel must advise a defendant as to the possible immigration consequences of a plea,

explaining that "it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." ABA Standards for Crim. Just. 126-27, Commentary to Standard 14-3.2(f) (1999), https://bit.ly/397y2xa. Reviewing these treatises, the *Padilla* Court concluded that, "[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." *Padilla*, 559 U.S. at 372.

To fulfill this obligation, defense counsel has an affirmative duty to investigate the immigration consequences of a criminal case for all clients who are not born in the United States. *See* ABA Standards for Crim. Just. 126-27 (stating that defense counsel "should interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances" and that immigration consequences may be the client's "greatest priority"). For this reason, IDP conducted trainings starting in 1998 (shortly after IDP was founded in 1997), as well as during the over two decades since then, that advised criminal defense lawyers in New York State and elsewhere that they should ask *every* client whether they were born outside the United States. Other organizations with criminal and immigration law expertise also trained and advised criminal defense lawyers; as a result, criminal defense organizations nationwide adopted a standard practice of identifying clients born outside the

United States as the primary method for determining the potential immigration consequences as a result of a criminal case. *See, e.g.*, Continuing Education of the Bar*, California Criminal Law Procedure and Practice* § 48.3, 1303 (5th ed. 2000), https://www.ilrc.org/sites/default/files/resources/ceb.2000.pdf (reprinting a "Basic Immigration Status Questionnaire" asking for "Country of birth"); Peter Markowitz, *Protocol for the Development of a Public Defender Immigration Service Plan* 20-21 (2009), https://www.immigrantdefenseproject.org/wp-content/uploads/2011/03/Protocol.pdf (reporting that most defender offices include in their initial immigration screening the question "Where were you born?"). The focus of this inquiry is the place of birth, and not the country of citizenship. *See, e.g.*, Dawn Seibert and Isaac Wheeler, *Representing Immigrant Clients: Ethics and Practice* 2, 6 (Apr. 3, 2014), https://www.nycourts.gov/courts/ad1/Committees&Programs/CLE/Materials%20-%204-3-14.pdf (noting that counsel must first "[a]sk defendant where s/he was born" to fulfill duties under *Padilla*, as part of a training for defense attorneys sponsored by the New York Appellate Division, First Department, and presented by IDP); Brittany Brown and Megan Hu, New York State Association of Criminal Defense Lawyers, *Immigration*, 29 Atticus 21, 24 (Summer 2017), https://bit.ly/36C39PD ("For this reason, it is critical to ask every single client, "Where were you born?"); *see also* IDP, *Immigration Consult*

Worksheet (Sept. 2019), https://bit.ly/3qUB6CK (instructing that the first question defense attorneys must ask a client to determine whether immigration consultation is needed is "Where were you born?," and that counsel should ask naturalized clients the date of their oath ceremony because naturalized citizens can suffer immigration consequences as a result of a plea). Once defense counsel knows a client to be born outside of the United States, counsel should investigate immigration status at the time of the charged or admitted conduct and ascertain whether the client may suffer immigration consequences as a result of the plea. *See* ABA Standards for Crim. Just. 126-27 (instructing defense counsel to "be active, rather than passive," in investigating possible consequences of a contemplated plea and to keep in mind immigration consequences when "investigating law and fact and advising the client").

Once counsel has fulfilled the duty to ascertain a client's country of birth and knows the client to be a naturalized citizen, any risk of denaturalization is ascertainable with minimum research. Here, once defense counsel knew Mr. Farhane was a naturalized citizen, the risk of denaturalization and deportation was ascertainable with minimal research of case law already in place prior to Mr. Farhane's plea. *See supra* Part I.A. Particularly because Mr. Farhane was accused of conduct pre-dating his 2002 naturalization, his defense counsel should have been aware of the increased risk of denaturalization and deportation as a result of a

plea that included admission to pre-naturalization conduct. *See supra* Part I.A. Prevailing professional standards at the time required that he advise Mr. Farhane regarding those immigration and deportation consequences. *See Padilla*, 559 U.S. at 367-68.

Trainings and resources for defense attorneys include warnings that even naturalized citizens may face immigration consequences if found to have made misrepresentations in the naturalization process or if found to have been ineligible at the time of naturalization. A well-known resource for defense attorneys has long noted the possibility of denaturalization for "persons who were born outside the United States, but naturalized," explaining that if denaturalized, "they are returned to the status they held before naturalization, and then removal proceedings can be commenced as with any other noncitizen if a ground of removal can be established." Norton Tooby, *Tooby's Guide to Criminal Immigration Law* § 2.2(A)(2) (2008) (citation omitted); *see also* Norton Tooby et al., *Criminal Defense of Immigrants* § 3.20 (4th ed. 2007) (warning criminal defense lawyers that naturalized clients may be deported if "naturalized citizenship is first revoked through the denaturalization process" and explaining that denaturalization can occur upon discovery of a fact that would have prevented naturalization had it been known at the time citizenship was granted). And all this should have been independently clear to counsel for Mr. Farhane well before his plea, and before his

conviction became final in 2011, given that there were several published federal court cases in the early 2000s of the government seeking to denaturalize individuals based on charges of pre-naturalization criminal conduct. *See supra* Part I.A.

Furthermore, in any case, defense counsel has a duty to investigate any additional criminal liability that may result from a guilty plea. *See* ABA Standards for Crim. Just. 125-26, Standard 14-3.2(j) (requiring defense counsel to "determine and advise the defendant" as to "possible collateral consequences," including "use of the conviction in a subsequent civil or criminal case"). This includes a duty to investigate potential criminal liability under 18 U.S.C. § 1425 (unlawful procurement of citizenship) with respect to a naturalized citizen client, where a plea includes admission to conduct alleged to have occurred *before naturalization* and could trigger liability under § 1425. A conviction under § 1425 results in mandatory revocation of citizenship and reverts the individual to lawful permanent resident status, 8 U.S.C. § 1451(e), thus newly subject to deportation grounds. Therefore, defense counsel's obligatory investigation into this possible additional criminal liability should have alerted him to the risks of both criminal and civil denaturalization and subsequent deportation as a result of a plea structure that required Mr. Farhane to explicitly admit to conduct that occurred before his naturalization.

In sum, long-established professional norms require defense counsel to provide advice regarding a client's future ability to remain in the United States and to give warnings about pleas that will result in negative immigration consequences or deportation. Such advisals must include warnings about pleas that carry risk of denaturalization, a severe immigration consequence that in many cases will lead to automatic deportation.

II. Defense Counsel's Failure to Advise About the Risk of Denaturalization and Deportation as a Consequence of a Plea Violates the Sixth Amendment Right to Counsel Recognized in *Padilla v. Kentucky*.

In addition to longstanding professional standards, the Sixth Amendment right to counsel as recognized in *Padilla v. Kentucky*, 559 U.S. 356 (2010), requires defense counsel to affirmatively advise clients regarding the risk of immigration consequences resulting from a guilty plea. Recognizing that "deportation is . . . intimately related to the criminal process," *Padilla* unequivocally held that a defendant's right to effective assistance of counsel includes the right to advice regarding the immigration consequences of a plea. 559 U.S. at 365-66. This essential holding makes clear that defense counsel must advise a client regarding the risk of denaturalization and deportation resulting from a plea and that failure to do so falls below an objective standard of reasonableness. *See id.*

A. *Padilla* recognizes the severe and automatic impact of criminal convictions on an individual's right to remain in the United States, which applies equally—if not more forcefully—to the denaturalization context.

At its core, *Padilla*'s holding that defense counsel must advise a client regarding the risk of deportation is premised on the notion 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. at 368 (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)) (alterations and quotation marks omitted); *see also Lee v. United States*, 137 S. Ct. 1958, 1968 (2017) (same). The Supreme Court recognized both the "severe" nature of deportation and the "enmeshed" nature of criminal convictions and the penalty of deportation. *Padilla*, 559 U.S. at 365-66. The Court concluded that "[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the Strickland analysis," *id.* at 371 (quoting *Hill v. Lockhart*, 474 U.S. 52, 62 (1985) (White, J., concurring)).

Denaturalization inherently implicates a naturalized citizen's right to remain in the United States. As a threshold matter, the most important right one acquires as a result of naturalization is the right not to be removed from the United States, as only noncitizens are subject to grounds of deportability. *See* 8 U.S.C. § 1227 (deportability grounds); *see also, e.g.*, *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) ("Jurisdiction . . . to order deportation exists only if the person arrested is [a

noncitizen]."); *cf. L. Xia v. Tillerson*, 865 F.3d 643, 650 (D.C. Cir. 2017) ("Citizenship is among the most momentous elements of an individual's legal status."). Accordingly, in practice, denaturalization is a necessary intermediate step to the deportation of a naturalized citizen, *see supra* Part I.B. Indeed, the federal government's stated objective in pursuing denaturalization—whether through civil or criminal proceedings—is to remove the individual. As explained in a publication of the U.S. Attorney's office, "the government does not expend resources on civil denaturalization actions unless the ultimate goal is the removal of the defendant from the United States," and "[Office of Immigration Litigation] attorneys confirm that goal before filing the complaint." Bianco et al., 65 U.S. Att'ys' Bull. 17. Moreover, plea agreements and settlement agreements in denaturalization cases frequently require the individual to consent to or waive their right to challenge their removal from the United States. *See Unmaking Americans* 58, 106, 108-09, (collecting excerpts from plea and settlement agreements in denaturalization cases).

Agency precedent further illustrates the direct link between denaturalization and deportation. The Department of Justice has long held that a denaturalized noncitizen convicted of a deportable offense after naturalization may be deported if the underlying conduct was committed while the individual was a lawful permanent resident. *See Gonzalez-Muro*, 24 I. & N. Dec. at 472-73 (reaffirming

Matter of Rossi, 11 I. & N. Dec. 514 (BIA 1966)). Furthermore, where a denaturalized noncitizen is placed in removal proceedings, courts have found that the doctrine of collateral estoppel applies to the prior denaturalization judgment—*i.e.*, the findings of fact and law in a denaturalization judgment also establish the operative factual and legal issues with respect to deportability and eligibility for relief in immigration court. *Matter of Fedorenko*, 19 I. & N. Dec. 57, 61-62 (BIA 1984), *abrogated on other grounds as recognized by Matter of Negusie*, 28 I. & N. Dec. 120, 130 (BIA 2020); *see also, e.g.*, *Matter of C-*, 8 I. & N. Dec. 577 (BIA 1960) (holding that the fact of the noncitizen's Communist Party membership was litigated in a prior denaturalization proceeding and was conclusive in the subsequent deportation proceeding).

Given the direct immigration consequences that flow from denaturalization—including automatic deportability in many cases, *see supra* Part I.B—and the direct impact on an individual's right to remain in the United States, the logic of *Padilla* must apply equally, if not more forcefully, to defendants who face the risk of losing their *citizenship* and being removed from this country.[2] Put simply, if defense attorneys have a constitutional obligation to provide advice regarding a plea offer's impact on a noncitizen client's right to remain in the

[2] *See* Amber Qureshi, *The Denaturalization Consequences of Guilty Pleas*, 130 Yale L. J. Forum 166 (Oct. 20, 2020).

United States, that obligation must *a fortiori* include advising a naturalized citizen defendant that pleading guilty to an offense that occurred before their naturalization may result in denaturalization and deportation. The court in *Rodriguez v. United States*, 730 F. App'x 39, 42 (2d Cir. 2018), concluded just that, holding that advice that "ignored the possibility of denaturalization" constituted objectively unreasonable performance by counsel.

B. The fairness considerations recognized by *Padilla* apply with equal force in the context of denaturalization.

The *Padilla* Court reasoned that limiting its holding to affirmative misadvice regarding deportation consequences would incentivize defense counsel "to remain silent on matters of great importance," thus protecting only clients who know enough to affirmatively inquire. 559 U.S. at 370-71 (explaining that a "holding limited to affirmative misadvice" would "deny a class of clients least able to represent themselves the most rudimentary advice on deportation when it is readily available"). Similar fairness considerations apply in the denaturalization context. Because one of the primary perceived benefits of naturalization is to be free from the risk of deportation, *see supra* Part II.A., naturalized citizen defendants are *especially* in need of affirmative advice from defense counsel regarding the risk of denaturalization and deportation as the result of a guilty plea.

The critical value of U.S. citizenship intensifies the fairness considerations recognized by *Padilla*. As the Supreme Court has explained, "[i]t would be

difficult to exaggerate [the] value and importance" of U.S. citizenship. *Schneiderman*, 320 U.S. at 122. Citizenship confers "benefits of inestimable value upon those who possess it." *Fedorenko*, 449 U.S. at 522 (Blackmun, J., concurring). Such benefits include not only the right to remain in the country, but also the "rights to vote in federal elections, to travel internationally with a U.S. passport, to convey citizenship to one's own children even if they are born abroad, to be eligible for citizen-only federal jobs, and indeed, to be free of discrimination by Congress on the basis of alienage." *L. Xia*, 865 F.3d at 650. Where pleading guilty to a crime clearly jeopardizes the loss of such important rights, "[i]t is quintessentially the duty of counsel to provide her client with available advice." *Padilla*, 559 U.S. at 371.

III. Defense counsel's failure to effectively negotiate a plea bargain given the client's stated objectives falls below prevailing professional standards and thus also violates the Sixth Amendment right to counsel.

Recognizing the prevalence and significance of plea bargaining in the criminal legal system, the *Padilla* Court explained that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 559 U.S. at 373; *see also id.* at 372 n.13 (citing 2003 Bureau of Justice statistics showing that only about 5% of all federal and state felony prosecutions go to trial). In *Lafler v. Cooper*, the Supreme Court again reaffirmed that the right to effective assistance of counsel "extends to the plea-

bargaining process." 566 U.S. 156, 162 (2012). Moreover, established professional standards have long-required defense counsel to advise regarding immigration consequences before entering any plea and, with respect to plea negotiations, have instructed defense counsel to take into account possible deportation consequences when structuring a plea deal. *See, e.g.*, *ABA Standards for Crim. Just.* 9 (requiring defense counsel to "determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea"); National Legal Aid and Defender Association, *Performance Guidelines for Criminal Defense Representation* 98, Guideline 6.2(a)(3) (1995) (instructing defense counsel to develop a plea negotiation plan that takes into account "other consequences of conviction such as deportation, and civil disabilities"). The obligation to take into account possible immigration consequences during plea negotiations requires defense counsel to consider the client's stated objectives. See *ABA Standards for Crim. Just.* 126-27 (instructing counsel to "interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances"). Mr. Farhane's defense counsel was on notice that the right to remain in the United States was critical to his client's objectives, as he made clear to defense counsel that his priority was to resume life with his wife and children as soon as possible. (Pet'r's Br. 39).

Effective plea negotiation in a case such as Mr. Farhane's must include minimizing exposure to negative immigration consequences resulting from a guilty plea, including denaturalization and deportation. For example, where a naturalized citizen client faces allegations of conduct spanning a period of time, defense counsel may negotiate a plea that limits admitted conduct to incidents that occurred *after* the date of naturalization. Such a plea would strengthen the individual's defenses in subsequent denaturalization proceedings or removal proceedings. An effective plea negotiation strategy for a naturalized defendant also could include pursuing a plea that is contingent upon a commitment by the federal government not to pursue denaturalization. *See Rodriguez*, 730 F. App'x at 43 n.2 ("It is certainly plausible that [defendant's] counsel could have asked the Government to agree not to seek denaturalization[.]").

Effective plea negotiation also would minimize the defendant's exposure to further criminal liability. A plea bargain that requires a defendant to plead guilty to conduct that predates naturalization places the individual at risk of criminal liability for unlawful procurement of naturalization under 18 U.S.C. § 1425, should the government allege that the admitted conduct, or failure to disclose that conduct on the naturalization application, supports an unlawful procurement charge. A conviction under § 1425 may result in up to 25 years' imprisonment and will result in automatic denaturalization (*see* 8 U.S.C. § 1451(e)). In addition to creating a

likelihood of deportation, the conviction also may preclude the individual from ever re-naturalizing and heightens the chance of a judicial removal order being entered by the district court. *See Unmaking Americans* at 88. These are additional severe criminal, immigration, and deportation consequences directly resulting from the plea admitting to conduct prior to naturalization. For all of these reasons, failure to negotiate a plea that minimizes the risk of criminal denaturalization proceedings constitutes further proof of ineffective assistance of counsel.

CONCLUSION

The order of the district court should be reversed.

Respectfully submitted,

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Dated: February 2, 2021

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief conforms with the type-volume limitation set forth in Fed. R. App. P. 29(a)(5) and Local Rule 29.1:

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February 2, 2021

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2021, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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