No. 20-1666-cv

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. 1:18-cv-11973
Before the Honorable Loretta A. Preska

CONSENTED-TO BRIEF OF IMMIGRANT DEFENSE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT AND FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E) STATEMENT

Immigrant Defense Project is a not-for-profit corporation. It has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

No party's counsel authored this brief in whole or in part.

No party's counsel or any other person contributed money to fund preparing or submitting this brief.

/s/*Andrew Wachtenheim*
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Dated: October 23, 2023

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Immigrant Defense Project ("IDP") is a nationally recognized criminal-immigration law nonprofit legal resource and training center. IDP is a New York State Office of Indigent Legal Services Regional Immigration Assistance Center ("ILS-RIAC") and provides training, technical assistance, and resources to the five ILS-RIAC offices. Since 1997, IDP has published the premier legal resource and treatise on criminal-immigration law for defense counsel in New York State, which is updated annually. *See* Manuel D. Vargas, Representing Immigrant Defendants in New York (6th ed. 2017). IDP regularly appears as *amicus curiae* on matters of criminal-immigration law and the rights of noncitizens accused and convicted of crimes. *See, e.g.*, *Lee v. United States*, 582 U.S. 357 (2017); *Mathis v. United States*, 579 U.S. 500 (2016); *Chaidez v. United States*, 568 U.S. 342 (2013); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *I.N.S. v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001) (citing brief of IDP); *Khalid v. Sessions*, 904 F.3d 129, 139-140 (2d Cir. 2018) (same); *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018); *People v. Peque*, 22 N.Y.3d 168, 188 (2013) (citing brief of IDP).

[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

The failure of Mr. Farhane's criminal defense counsel to investigate, advise about and negotiate to avoid denaturalization and deportation consequences of his guilty plea was ineffective assistance of counsel. By concluding otherwise and excluding Mr. Farhane's denaturalization and deportation claim from the Sixth Amendment's ambit, the Panel opinion conflicts with the text of *Padilla*, and with prevailing professional norms.

Amicus IDP submits that this Court should grant rehearing because the Panel opinion conflicts with *Padilla* by categorically distinguishing denaturalization from deportation and by narrowing the Sixth Amendment right. *Padilla* makes clear that where the immigration and deportation consequences of a conviction are clear, a defendant has a Sixth Amendment right to investigation, advice, and negotiation by counsel to avoid such consequences. This includes denaturalization.

Where a naturalized defendant's conviction is for conduct that predates the date of naturalization, denaturalization is a severe consequence that is "intimately related" to the criminal proceeding. *Padilla*, 559 U.S. at 366. This is so in Mr. Farhane's case. His conviction renders his denaturalization and deportation "virtually inevitable." *Id.* at 360. *Padilla*'s text makes clear that his claim falls within his Sixth Amendment right and therefore within the two-step framework of *Strickland v. Washington*, 466 U.S. 668 (1984). Prevailing professional norms—

which *Strickland* and *Padilla* recognize as the standard for effective assistance—further confirm that defense counsel are trained to investigate, advise, and negotiate to avoid denaturalization and deportation risks where a naturalized defendant is criminally charged with conduct preceding naturalization, like Mr. Farhane.

Amicus IDP respectfully submits that this Court should grant rehearing because the Panel opinion conflicts with Supreme Court precedent in *Padilla*, misunderstands professional norms, and decides issues that the Supreme Court recognizes are exceptionally important. *See Klapprott v. United States*, 335 U.S. 601, 612 (1949) ("[T]o deprive a person of his American citizenship is an extraordinarily severe penalty."); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ([D]eportation is a drastic measure and at times the equivalent of banishment or exile."); *Cuyler v. Sullivan*, 466 U.S. 335, 342-43 (1980) ("The right to counsel guaranteed by the Sixth Amendment is a fundamental right.").

ARGUMENT

I. THE PANEL OPINION CONFLICTS WITH *PADILLA* BY NOT RECOGNIZING THAT MR. FARHANE'S DENATURALIZATION AND DEPORTATION ARE INTERTWINED WITH THE CRIMINAL PROCESS AND ARE WITHIN HIS SIXTH AMENDMENT RIGHT

Padilla unequivocally holds that a defendant's right to effective assistance of counsel includes the right to competent advice regarding whether a plea carries a clear risk of immigration consequences and negotiation to avoid those

consequences. *See* 559 U.S. at 365-66, 373-74. The Court first concluded that immigration consequences could not be characterized as collateral due to the "particularly severe" nature of removal and its "close connection to the criminal process." *Id.* at 365-66. The Court then applied *Strickland* and held: "It 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 is among the deportation consequences that cannot be classified as collateral. It is severe, it is part of deportation, and it is "intimately related to the criminal process." *Padilla*, 559 U.S. at 365. The Panel's decision to categorically exclude claims like Mr. Farhane's from the Sixth Amendment right conflicts with *Padilla*.

Where a naturalized defendant pleads guilty to criminally charged conduct that predates naturalization, denaturalization and deportation are intertwined with the criminal process. They are part of the Sixth Amendment duty and cannot be excluded as collateral. By labeling denaturalization as collateral, the Panel opinion conflicts directly with *Padilla*. Furthermore, by making broad statements about the direct/collateral consequences distinction in a case where *Padilla* has already resolved the consequences at issue are within the *Strickland* Sixth Amendment

framework, the Panel opinion conflicts with this Court's precedent. *See U.S. v. Brennan*, 650 F.3d 65, 136 (2d Cir. 2011) (reaffirming the "prudential principle of avoiding unnecessary constitutional adjudication").

By statute, denaturalization is the government's means to deport a naturalized citizen. *See* 8 U.S.C. §§ 1182(a), 1225(b)(1)(A)(i), 1227(a) (providing only noncitizens may be removable, deportable, or ineligible to be admitted). Once denaturalized, the individual is returned to noncitizen status and is subject to removability. Indeed, the government pursues denaturalization precisely for the purpose of deportation.[2] The immigration statute and longstanding precedential case law make the denaturalization and deportation consequences of convictions like Mr. Farhane's clear. Section 1451(a) of Title VIII authorizes revocation of citizenship where naturalization was procured "illegally" or "by concealment of a material fact or by willful misrepresentation." Where the government initiates §

[2] *See, e.g.*, 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 ("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 "attorneys confirm that goal before filing the complaint."); *Id.* at 15 (stating that many "civil denaturalization cases . . . rely on factual admissions or determinations made in criminal proceedings"); Office of Immigration Litigation, *Immigration Consequences of Criminal Conviction: Padilla v. Kentucky*, p. 46 (2010) ("[A]ny of the acts described" in 8 U.S.C. § 1101(f), "if committed before" a person "naturalizes, can be a basis for denaturalization.").

1451(a) proceedings, a prior conviction "constitutes estoppel in favor of the United States . . . as to those matters determined by the judgment in the criminal case." *Maietta v. Artuz*, 84 F.3d 100, 102 n.1 (2d Cir. 1996). Federal courts adjudicating civil denaturalization cases under § 1451(a) apply collateral estoppel to prevent defendants from contesting facts admitted by a prior guilty plea.[3]

A denaturalized noncitizen convicted of a deportable offense may be deported on that basis even where the individual was a citizen at the time of conviction, so long as the underlying conduct was committed before naturalization. *See Matter of Gonzalez-Muro*, 24 I. & N. Dec. 472 (B.I.A. 2008) (reaffirming *Matter of Rossi*, 11 I. & N. Dec. 514 (B.I.A. 1966)) (holding a denaturalized noncitizen convicted of a deportable offense may be deported on that basis where the individual was a citizen at the time of conviction, so long as the underlying conduct was committed before naturalization).. By clear statute, Mr. Farhane's

[3] *See, e.g., U.S. v. Whittingham*, No. 16-CV-03482-FB, 2022 WL 2291967, at *2 (E.D.N.Y June 24, 2022) (applying collateral estoppel to find defendant's conviction for bank fraud is conclusive proof of lack of good moral character during the five years prior to naturalization); *U.S. v. Teng Jiao Zhou*, 815 F.3d 639, 644–45 (9th Cir. 2016) (finding that defendant "exhibited a lack of good moral character" by committing robbery during the five years prior to naturalization and that his conviction collaterally estops arguments that would "minimize his culpability and role in the offense"); *United States v. Jean-Baptiste*, 395 F.3d 1190, 1194 (11th Cir. 2005) (rejecting defendant's argument that he did not know he had committed a crime during the naturalization process because "scienter was an element of the crime of which [the defendant] was convicted, and this defeats his present claim of lack of knowledge").

conviction is for an "aggravated felony," a category of offenses that results in virtually mandatory deportability. *See* 8 U.S.C. § 1227(a)(2)(A)(iii); §§ 1101(a)(43)(D), (U). In his case, the immigration consequences are denaturalization and deportation.

The Panel wrongly found these consequences to be collateral, *see* 77 F.4th at 131, which conflicts directly with *Padilla*. *See Padilla* 559 U.S. at 366 (holding that immigration consequences like deportation are "uniquely difficult to classify" as direct or collateral and are subject to *Strickland* review because of the severity of the consequence and its "close connection to the criminal process"). It is clear this holding in *Padilla* applies to a case like Mr. Farhane's, where denaturalization and deportation are the immigration consequences at issue. When the Supreme Court resolves a legal issue, the lower federal courts are bound by its decision. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994) ("[O]nce the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.").[4] Once within the collateral consequences framework, the Panel opinion relies on *U.S. v. Parrino* as holding that collateral estoppel is itself a

[4] Further conflicting with Supreme Court precedent, the Panel opinion makes broad statements about categories of "collateral" consequences of convictions that are not at issue in Mr. Farhane's case, formulating constitutional rules where it was not appropriate to do so. *See Farhane*, 77 F.4th at 127; *contra Liverpool, N.Y. & P.S.S. Co. v. Emigration Com'rs*, 113 U.S. 33, 39 (1885) (The federal courts have "rigidly adhered" to a rule "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.").

collateral consequence outside the scope of the Sixth Amendment duty, and that the collateral estoppel effect on Mr. Farhane's denaturalization and deportation proceedings is a collateral consequence. *See Farhane*, 77 F.4th at 132 (discussing , *U.S. v. Parrino*, 212 F.2d 919 (1954)). But *Parrino* makes no such holding, *see Parrino*, 212 F.2d at 919-21, and the Panel opinion's reliance was misplaced.

The *Padilla* Court's animating concern was a defendant's vulnerability to deportation and ability to remain in the United States. The Court did not tie its holding to any one provision of immigration law. It did not tie its holding to the likelihood of actual deportation and immigration enforcement action. Instead, it repeatedly referred broadly to vulnerability to deportation or removal that is caused by the legal effect of a conviction. *See Padilla*, 559 U.S. at 375. *See, e.g.*, *id.* at 368 (discussing importance of "'the client's right to remain in the United States'" (quoting *St. Cyr*, 533 U.S. at 3223)); *id.* at 371 (discussing duty of counsel to provide advice about "an issue like deportation"); *id.* at 370 (referring to "possible exile from this country and [family] separation"); *id.* at 369 (discussing "eligibil[ity] for deportation"); *id.* (describing risk of deportation); *id.* at 365 n.8 (discussing right to advice about "adverse immigration consequences"); *id.* at 366 (describing "removal"). The *Padilla* duty is about vulnerability to removal and related consequences under the immigration and citizenship laws, not about the

government's discretion and decision to pursue removal of a deportable individual or not. *See Padilla*, 559 U.S. at 360, 364.

By incorrectly divorcing denaturalization from deportation, the Panel opinion bars an entire category of ineffective assistance claims from *Strickland* review and conflicts with *Padilla.*

II. PROFESSIONAL NORMS ESTABLISH DEFENSE COUNSEL'S DUTY TO ADVISE ABOUT DENATURALIZATION AND DEPORTATION.

Defense lawyers are trained to identify situations where a naturalized citizen client is charged with pre-naturalization conduct, precisely because pleading guilty to an offense committed while the client was a noncitizen may result in serious immigration consequences. *See, e.g.*, Defending Noncitizens in Federal Court: A Primer, *available at* https://www.immigrantdefenseproject.org/denaturalization-training-materials-for-criminal-defense-counsel/ 7-12 ("[n]aturalized citizens could be at risk" and "[d]on't plead to conduct pre-dating naturalization"); Representing Noncitizen Criminal Defendants, *available at id.* 3-4 (one of the "[c]onsequences of criminal cases beyond removability" is "denaturalization"); Crimes and Naturalization, *available at id.* 38-39 (training about the consequences of "[c]onviction after taking the oath for offense committed before taking the oath"); Immigration: A History of Discrimination, *available at id.* 20-25 (training on mitigation strategies where a naturalized citizen is charged with conduct predating

the date of naturalization); Representing Our Noncitizen/Foreign-born Clients in Marin, *available at id.* 15-17 (same); Effective Representation of Noncitizen Clients, *available at id.* 28 (same).

The ABA Standards for Criminal Justice cited in *Padilla* state that defense counsel should interview clients to learn relevant circumstances and that immigration consequences may be the client's "greatest priority." *See* ABA Standards for Crim. Just., Pleas of Guilty 14–3.2(f), p. 126-27 (3d ed.1999) (cited in *Padilla*, 559 U.S. at 367). A well-known resource for defense attorneys, also cited in *Padilla*, 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 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).

Once defense counsel identifies that denaturalization and deportation are at risk, counsel has a duty to investigate, advise about, and negotiate to avoid those adverse immigration consequences. In Mr. Farhane's case, for example, since he was charged with conduct from before and after his naturalization, counsel possibly could have negotiated for dispositions that involved post-naturalization conduct only. *Cf. Mellouli v. Lynch*, 575 U.S. 798, 806 n.5 (2015) (recognizing "safe harbor guilty pleas that do not expose the [defendant] to the risk of immigration sanctions") (cleaned up). Had he pleaded guilty to charges with factual bases that post-date his naturalization, the conviction could not have resulted in denaturalization or deportation. *See, e.g.*, *Costello v. I.N.S.*, 376 U.S. 120, 122 (1964) (reversing a deportation order against a denaturalized former U.S. citizen where the conduct that formed the basis for deportable convictions occurred while the individual was a citizen).

Padilla and professional norms confirm that Mr. Farhane's defense counsel's performance was objectively unreasonable, because he failed to investigate and advise regarding denaturalization and deportation risk, and he failed to negotiate to avoid those consequences.

CONCLUSION

Amicus curiae IDP respectfully submits that this Court should grant rehearing.

Respectfully submitted,

Dated: October 23, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) & 29(b), and Second Circuit Rule 32, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 2,544 words.

Date: October 23, 2023 /s/ Andrew Wachtenheim

CERTIFICATE OF SERVICE

I, Andrew Wachtenehim, hereby certify that on October 23, 2023, I electronically filed the foregoing *Amicus Curiae* Brief with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by email and by ACMS.

I certify that all participants in the case are registered ACMS and CM/ECF users and that service will be accomplished by the ACMS or CM/ECF system.

Date: October 23, 2023 /s/Andrew Wachtenheim