No. 11-820

In The Supreme Court of the United States

ROSELVA CHAIDEZ,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment, as applied to the States through the Fourteenth Amendment, when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation. Does this ruling apply retroactively to persons whose convictions became final before its announcement?

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees.

CAC works to defend constitutional protections for non-citizen immigrants as well as for citizens. CAC filed an *amicus curiae* brief in support of the petitioner in *Padilla v. Kentucky* and has an interest in seeing that *Padilla*'s protection of the right to assistance of counsel required by the Sixth Amendment is applied retroactively.

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk; notice was provided to the parties more than ten days prior to this filing. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Padilla v. Kentucky*, this Court applied the analysis of *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether counsel's misadvice regarding the immigration consequences of a guilty plea fell below the constitutionally required level of effective assistance of counsel in criminal proceedings. 130 S. Ct. 1473 (2010). Applying the first prong of the *Strickland* analysis—which asks whether counsel's representation "fell below an objective standard of reasonableness," 466 U.S. at at 688—the Court in *Padilla* held that a lawyer's failure to inform her client whether his plea carries a risk of deportation falls below the constitutional minimum. This holding did not announce a new rule. Rather, it reflected the Constitution's guarantee that no criminal defendant—citizen or not—shall be deprived of the effective assistance of counsel. Nonetheless, the court below held that *Padilla* announced a "new rule," and thus, under this Court's jurisprudence, would not be applied retroactively. The Court should grant the Petition to resolve the split among the circuits on this issue, and make clear that *Padilla* applies retroactively.

The Sixth Amendment's guarantee of the right to assistance of counsel is plainly not limited to citizens, but rather provides protection to the broader category of "the accused." U.S. CONST. amend. VI. The Fourteenth Amendment, which applied the Sixth Amendment to the States and was thus the constitutional backdrop of both *Strickland* and *Padilla*, further established the

Constitution's protections for non-citizens in our nation's criminal justice system by requiring states to provide the protections of equality and fundamental fairness to aliens as well as to citizens. Under our Constitution, "no man, no matter what his color, no matter beneath what sky he may have been born, . . . shall be deprived of life, liberty, or property without due process of law." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866). Constitutional text and history mandate that the Sixth Amendment right to counsel in criminal proceedings shall not be diminished when a non-citizen defendant stands accused in our criminal justice system. *Padilla* simply recognized this constitutional command and applied *Strickland* when it held that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." 130 S. Ct. at 1482.

The decision below is not only incorrect and in conflict with other courts' rulings—it also raises a question of indisputably exceptional importance both to the proper, fair functioning of our justice system and to residents like Petitioner who face deportation as a result of a prior conviction. This Court has acknowledged that deportation is akin to banishment, a particularly harsh penalty, and, as the Court recognized in *Padilla*, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* at 1480. If citizens were automatically banished as a result of certain criminal convictions, surely it would not be a "new

rule" if the Court were to apply the *Strickland* analysis of ineffective assistance and hold that the Constitution requires that they not be misinformed as to this drastic consequence when deciding whether or not to plead guilty to a charged offense. It is of the utmost importance for the Court to clarify that non-citizens enjoy this protection as well. Professional norms, constitutional principles, and basic common sense and compassion demonstrate "how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." *Padilla*, 130 S. Ct. at 1486.

The importance of this issue is reflected in the facts of this case. Petitioner Roselva Chaidez was born in Mexico, but has made her home in the United States as a lawful permanent resident since the 1970s; she has three U.S.-citizen children. Pet. at 4. It is undisputed that had Ms. Chaidez known she would be deported for pleading guilty to charges arising out of her minor role in an insurance fraud scheme, she would not have done so. Unfortunately, her lawyer failed to follow established professional standards and advise Ms. Chaidez of the immigration consequences of potential criminal convictions. Pet. at 5. If *Padilla* applies to her case, Ms. Chaidez is entitled to relief. This case is an ideal vehicle for resolving the exceptionally important issue of the retroactivity of *Padilla*, which has divided the lower courts. *Amicus curiae* respectfully urges the Court to grant the Petition.

ARGUMENT

THE PETITION SHOULD BE GRANTED BECAUSE THE SEVENTH CIRCUIT, IN DIRECT CONFLICT WITH OTHER COURTS, INCORRECTLY DECIDED AN ISSUE OF EXCEPTIONAL IMPORTANCE.

A. The Court Should Grant Review To Clarify That *Padilla* Should Be Retroactively Applied Because It Was A Fact-Specific Application Of The Long-Standing Principle That Counsel Must Provide Reasonably Effective Assistance.

As the Petition demonstrates, the lower courts are "openly and intractably divided" on the question of whether this Court's ruling in *Padilla* applies retroactively to convictions that became final before its announcement. Pet. at 9, 10-16. Under the framework this Court announced in *Teague v. Lane*, 489 U.S. 288 (1989), a decision that simply applied an established rule to the facts of a particular case will apply retroactively; a decision imposing a "new obligation on the States or the Federal Government" will not. *Id.* at 301. The U.S. Court of Appeals for the Seventh Circuit erroneously held that *Padilla* was a "new rule" under *Teague*, deepening a conflict among the lower courts. *See* Pet. at 11-15.

Padilla's recognition that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel"

and thus can serve as the basis for an ineffective assistance of counsel claim, 130 S. Ct. at 1482, does not impose a "new obligation on the States or Federal Government," *Teague*, 489 U.S. 301. It is well-established that the right to assistance of counsel when considering a guilty plea is the right to "the *effective* assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (emphasis added); *Strickland*, 466 U.S. at 686. *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 116 (1998) (noting that "[t]he landmark English Treason Act of 1696, which first affirmed a right of counsel, explicitly spoke of '[c]ounsel learned in the law'") (citing 7 and 8 Will. 3, ch. 3, §I). This Sixth Amendment guarantee to effective counsel applies just as strongly to non-citizen defendants as it does to citizens: the right to counsel refers simply and broadly to "the accused." U.S. CONST. amend. VI.

The Fourteenth Amendment, which applied the Sixth Amendment to the States and was thus the constitutional backdrop of both *Strickland* and *Padilla*, further established the Constitution's protections for non-citizens by writing into our Constitution broad protections for liberty and equality, and guarantees of impartial justice. U.S. CONST. amend. XIV. Explaining the coverage of the equal protection and due process clauses of the Fourteenth Amendment—which apply not just to "citizens," but rather to "any person"—Senator Jacob Howard, speaking on behalf of the Joint Committee on Reconstruction that drafted the Amendment, affirmed that these "last two clauses . . . disable a State from depriving not merely a

citizen of the United States but any person, whoever he may be, of life, liberty, or property without due process of law." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). *See also Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that "all persons within the territory of the United States," including aliens, "are entitled to the protection" guaranteed by the Fifth and Sixth Amendments); *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963) (applying to the States the fundamental Sixth Amendment right to assistance of counsel). In sum, both the States and the federal government were constitutionally required to ensure that non-citizen criminal defendants receive the same guarantee of effective assistance of counsel long before *Padilla*.

Because the Sixth Amendment does not identify "particular requirements of effective assistance," it "relies instead on the legal profession's maintenance of standards." *Strickland*, 466 U.S. at 688. Accordingly, when determining whether legal counsel "fell below an objective standard of reasonableness," *id.*, the Court assesses "reasonableness under prevailing professional norms," *id.* at 688.

As explained in *Padilla*, in light of changes to our nation's immigration laws, "[t]he 'drastic measure' of deportation or removal [] is now virtually inevitable for a vast number of noncitizens convicted of crimes." 130 S. Ct. at 1478 (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). With these laws having "dramatically raised the stakes of a noncitizen's criminal

conviction[, t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important." *Id.* at 1480. As the Court recognized nearly ten years before the *Padilla* decision, "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (quoting 3 Bender's *Criminal Defense Techniques* §§60A.01, 60A.02[2] (1999)).

In the wake of these dramatic changes to immigration law, prevailing norms of professional practice required defense attorneys to advise their non-citizen clients regarding the risk of deportation. *Padilla*, 130 S. Ct. 1482 (citing professional standards, practice guides, and other sources). Accordingly, for at least fifteen years prior to the *Padilla* ruling, "professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." *Id.* at 1485.

As Justice Kennedy has explained, where the "beginning point" for a decision being analyzed for retroactivity is a rule of "general application" that is "designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring). The Sixth Amendment, which does not specify particular practices that amount to constitutionally sufficient assistance of counsel, and the *Strickland* test, which articulated a

general framework designed for fact-specific application, are precisely such "beginning points." *Padilla*, moreover, is not the "infrequent case" that announces "a result so novel that it forges a new rule." *Id.*

Given the constitutional command that non-citizens enjoy the robust protections of the Sixth Amendment's right to effective assistance of counsel just as citizens do, and the professional norms that require effective counsel to include advice regarding deportation consequences of a guilty plea to non-citizen defendants—both of which predate the *Padilla* ruling—the application of *Strickland*'s ineffective assistance of counsel analysis to Mr. Padilla's case cannot have articulated a "new rule." *Padilla* imposes no "new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. The guarantee of effective assistance of counsel for citizens and non-citizens alike has bound the federal government since the ratification of the Sixth Amendment, and the States at least since the Amendment was incorporated by the Fourteenth Amendment. The *Strickland* test for reasonably effective assistance of counsel has always been keyed to "prevailing professional norms." *Strickland*, 466 U.S. at 688. Accordingly, as the Petition argues, "[i]n *Padilla* this Court did not break any new ground; it simply held its ground." Pet. at 24. The Seventh Circuit's ruling to the contrary, which deepened a split among the courts, is incorrect.

B. The Retroactivity Of *Padilla* Is Of Exceptional Importance.

The decision below is not only incorrect and in conflict with other courts' rulings—it also raises a question of indisputably exceptional importance. *See* Pet. at 16-18; Gov't Pet. for Reh'g En Banc 3-4, *United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011) (arguing that the question of *Padilla*'s retroactivity is "a question of exceptional importance"). The Court has generally recognized the pressing importance of the retroactivity of criminal procedure decisions. *E.g.*, *Whorton v. Bockting*, 549 U.S. 406 (2007); *Schriro v. Summerlin*, 542 U.S. 348 (2004). The need for a swift resolution to the question of *Padilla*'s retroactivity is similarly compelling.

Deportation is a "particularly severe penalty." *Padilla*, 130 S. Ct. at 1481; *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893). This Court has recognized that deportation can be the equivalent of "banishment or exile," *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947), which, throughout history, has been recognized as a harsh and drastic consequence. *See Stogner v. California*, 539 U.S. 607, 643 (2003) (Kennedy, J., dissenting) (explaining that historically banishment was considered to be punishment for severe offenses and was "'the highest punishment next to death'") (quoting *Edward Earl of Clarendon's Trial*, 6 How. St. Tr. 292, 386 (1667)). *See also Calder v. Bull*, 3 Dall. 386, 389 (1798) (citing the banishments of Lord Clarendon in 1667 and Bishop Francis

Atterbury in 1723 as examples of improper, increased punishments exacted by British parliamentary enactments); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n.23 (1963) ("[F]orfeiture of citizenship and the related devices of banishment and exile have throughout history been used as a punishment . . . . Banishment was a weapon in the English arsenal for centuries, but it was always adjudged a harsh punishment even by men accustomed to brutality in the administration of criminal justice.") (citations and quotation marks omitted). Recognizing that removal of a resident alien can be as severe a punishment as criminal banishment, James Madison argued in opposition to the Alien and Sedition Act that "[i]f the banishment of an alien . . . be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the names can be applied." James Madison, Report on the Virginia Resolutions of 1799, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (1836).

This Court has echoed Madison's sentiments, explaining that:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Bridges v. Wixon, 326 U.S. 135, 154 (1945).

The severity of deportation and its importance to an alien's decision whether to plead guilty to a crime cannot be understated, as this Court has recognized. *INS v. St. Cyr*, 533 U.S. 289, 322 (2001). Indeed, "[t]he impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence." *Bridges,* 326 U.S. at 164 (Murphy, J., concurring). For Ms. Chaidez, deportation would mean that she would be forced from the country she has called home for more than thirty years and separated from her U.S.-citizen children and grandchildren. Pet. at 17. The importance of these consequences is undisputed. Here, the district court found after an evidentiary hearing that "had Chaidez known of the immigration consequences, she would not have pled guilty." Pet. App. 36a.

The Petition raises a question of exceptional importance to the proper and fair functioning of our justice system, as well as to residents like Petitioner who face deportation as a result of a prior conviction. *Amicus* urges the Court to grant review.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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