20-1666

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ABDERRAHMANE FARHANE,

Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

BRIEF FOR *AMICUS CURIAE* ASIAN AMERICANS ADVANCING JUSTICE IN SUPPORT OF PETITIONER-APPELLANT ABDERRAHMANE FARHANE

ANDREW Z. MICHAELSON
ANA V.B. DAILY
KATHRYN R. BARRY
KING & SPALDING LLP
1185 Avenue of the Americas
New York, New York 10036
(212) 556-2100

JOHN C. YANG
NIYATI SHAH
MARITA ETCUBAÑEZ
ASIAN AMERICANS ADVANCING JUSTICE–AAJC
1620 L Street, NW, Suite 1050
Washington, DC 20009
(202) 815-1098

Attorneys for Amicus Curiae Asian Americans Advancing Justice

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King & Spalding LLP

By: /s/ Andrew Z. Michaelson

Andrew Z. Michaelson
Ana V. B. Daily
Kathryn R. Barry
KING & SPALDING LLP
1185 Avenue of the Americas
New York, New York 10036
Telephone: (212) 556-2210
Facsimile: (212) 556-2222
amichaelson@kslaw.com
adaily@kslaw.com
kbarry@kslaw.com

John C. Yang
Niyati Shah
Marita Etcubañez
Asian Americans Advancing Justice-AAJC
1620 L Street, NW, Suite 1050
Washington, DC 20009
Telephone: (202) 815-1098
Facsimile: (202) 296-2318

jcyang@advancingjustice-aajc.org
nshah@advancingjustice-aajc.org
metcubanez@advancingjustice-aajc.org

Counsel for Amicus Curiae Asian Americans Advancing Justice

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INTEREST OF AMICUS CURIAE[1]

For almost 30 years, Asian Americans Advancing Justice | AAJC (Advancing Justice-AAJC) has worked to strengthen the voice and protect the rights of immigrants in their communities through litigation and programming. Asian Americans Advancing Justice is a national affiliation of five independent organizations advocating for the civil and human rights of Asian Americans and underserved communities to promote a fair and equitable society for all. Rooted in the dreams of immigrants and inspired by the promise of opportunity, Advancing Justice-AAJC advocates for an America in which all Americans can benefit equally from, and contribute to, the American dream. Its mission is to advance the civil and human rights for Asian Americans and to build and promote a fair and equitable society for all. Advancing Justice-AAJC is the voice for the Asian American community – the fastest-growing

[1] Counsel for the parties have not authored this brief. The parties and counsel for the parties have not contributed money that was intended to fund preparing or submitting the brief. No person other than the amicus curiae contributed money that was intended to fund preparing or submitting this brief.

This brief is being filed pursuant to Federal Rules of Appellate Procedure Rule 29(a)(2). All parties have consented to the filing of this brief.

population in the U.S. – fighting for their civil rights through education, litigation, and public policy advocacy. Advancing Justice-AAJC serves to empower the Asian American community by bringing local and national constituencies together and ensuring Asian Americans are able to participate fully in the American democracy. Advancing Justice-AAJC has a particularly strong interest in ensuring that the Constitutional rights of naturalized citizens are respected and not eroded.

INTRODUCTION AND SUMMARY OF ARGUMENT

For those immigrants who seek to become naturalized citizens of the United States, the process is long and arduous. It begins with years of lawful residence in the country and concludes only after completing, among other things, a lengthy application, a background check, a biometrics screening, an interview, an English test, a test on the history and structure of the United States government and, ultimately, an Oath of Allegiance to this country. Many of the immigrants who complete the process speak English only as a second language and are of limited means. Many have fled a home country that is ravaged by dictatorship, violence or poverty, or where they would be subject to persecution. During the years-long process of naturalization, they have laid roots in

the United States, held jobs, paid taxes, and raised families. For those immigrants who have overcome all obstacles and successfully navigated the process of naturalization, citizenship can mean everything. Losing it – being denaturalized, being deported – can be devastating.

In *Padilla v. Kentucky*, the Supreme Court recognized that "preserving [an individual's] right to remain in the United States may be more important to [that individual] than any potential jail sentence." 559 U.S. 356, 368 (2010) (*quoting INS v. St. Cyr*, 533 U.S. 289, 322 (2001)). Also in *Padilla*, the Supreme Court held that defense counsel who fails to inform a non-citizen of the adverse immigration consequences of a guilty plea is ineffective, in violation of the client's rights under the Sixth Amendment of the United States Constitution. 559 U.S. at 374. The Court's ruling, which applies to both "affirmative misadvice" and "acts of omission," *id.* at 370, necessarily requires that defense counsel similarly advise naturalized citizens of the potential adverse immigration consequences of a guilty plea. It cannot be the case that the Sixth Amendment provides lesser protection to naturalized citizens than non-citizens.

Legal representation is deficient under the Sixth Amendment if it falls "below an objective standard of reasonableness" as indicated by "prevailing professional norms," and the defendant suffers prejudice. *Strickland v. Washington*, 466 U.S. 668, 669 (1984). The brief submitted on behalf of Petitioner-Appellant ably addresses why the advice provided to Mr. Farhane in connection with his plea falls short of this standard. The *Padilla* court noted that "[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on deportation consequences of a client's plea," 559 U.S. at 372, and the brief of Petitioner-Appellant describes why this requirement applies to naturalized citizens. The laws concerning denaturalization have been stable for decades, denaturalization proceedings have occurred for decades, and it would be "objectively unreasonable" for a lawyer who knows his client to be a naturalized citizen to not at least raise the prospect of adverse immigration consequences flowing from a plea. *Id.* at 369 (noting that where the risk of deportation is unclear, defense counsel "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse of immigration consequences").

Advancing Justice-AAJC respectfully submits this brief to underscore that, while defense counsel generally knows that pleading guilty can result in adverse immigration consequences, this fact is often *not* known to naturalized citizens. The long and complex naturalization process contributes to naturalized citizens' perception that citizenship is final and cannot be undone – a belief that defense counsel generally knows to be false. A naturalized citizen would not, for example, know to consider that a plea allocution could result in denaturalization, deportation, separation from family, and even loss of citizenship for family members. It is therefore critical that defense counsel – who are reasonably expected to have at least general awareness of the risk of denaturalization – raise the prospect of adverse immigration consequences with a client that they know to be a naturalized citizen. With the government increasingly pursuing denaturalization, the import of such advice has never been greater.

ARGUMENT

I. The Naturalization Process is Long and Arduous

Naturalization is the process by which the United States government grants citizenship to lawful permanent residents (LPRs).

Immigrants must navigate a lengthy and difficult path to obtain U.S. citizenship through naturalization. The complexity of this process contributes to naturalized U.S. citizens' perception that citizenship, once obtained, is final.

a. The Requirements for Naturalization Eligibility are Many

To be eligible for naturalization, immigrants must meet numerous statutory requirements. The first is physical presence: pursuant to the Immigration and Nationality Act (INA), an immigrant must generally be an LPR and maintain continuous residence in the U.S. for *at least five years* up to the date of filing for admission to citizenship. 8 U.S.C. § 1427. Given how strictly the U.S. government controls immigrants' ability to enter and stay in the country, this threshold hurdle to naturalization can be surprisingly difficult to clear. *See* Amber Pershon, *Processing Citizenship: Jurisdictional Issues in the Unreasonable Delay of Adjudication of Naturalization Applications*, 5 PHOENIX L. REV. 259, 270 (2011) (*citing* 8 U.S.C. §§ 1111, 1184). In addition, an applicant must maintain residence in a specific state or service district for three months prior to submitting her application. 8 U.S.C. § 1427(b). Absence from the U.S. for more than six months can, in some circumstances, restart

the clock, though there are a variety of exceptions to the rule potentially available through a separate application and approval process. *See generally Policy Manual, Volume 12 - Citizenship and Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/policymanual/volume-12 (last visited Jan. 24, 2021).

In addition to physical presence, applicants must also demonstrate "good moral character." 8 U.S.C. § 1427(d). This requirement is subject to discretion, and observers have commented that it has become a "powerful exclusionary device" used to bar citizenship in circumstances where no statutory bar to naturalization applies. *See, e.g.*, Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1572-73 (2012) (discussing how the good moral character requirement is used by immigration authorities to deny naturalization to legal residents with criminal history not covered by statutory exclusions).

Applicants must also have an "understanding" of the English language, including an ability to read, write, and speak English,[2] and a "knowledge and understanding of the fundamentals of the history, and of the principles and form of government" of the United States. 8 U.S.C. § 1423(a). The latter requirement is measured through a citizenship test concerning the country's structure and history, which has recently become more challenging. As of December 2020, applicants are asked twenty questions and must answer twelve correctly to pass. *The 2020 Version of the Civics Test*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/citizenship/2020test (last visited Jan. 28, 2021). There are 128 potential questions, including naming Cabinet-level positions in the Executive Branch, identifying the authors of the Federalist Papers, and identifying the date on which U.S. taxpayers must submit their income tax forms. *See Civics (History and Government) Questions for the Naturalization Test*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Rev. 01/19), https://www.uscis.gov/sites/default/files/document/questions-and-answers/100q.pdf. A survey conducted in 2018

[2] Pursuant to 8 U.S.C. § 1423(a)(1), "the ability to read and write shall be met if the applicant can read or write simple words and phrases." Complex or advanced skills are not required.

found that two of every three American *citizens* would not pass, even without the hurdles added in December 2020. *See* Alexa Lardieri, *2 of 3 Americans Wouldn't Pass U.S. Citizenship Test*, U.S. NEWS & WORLD REP. (Oct. 12, 2018, 1:09 pm), https://www.usnews.com/news/politics/articles/2018-10-12/2-of-3-americans-wouldnt-pass-us-citizenship-test.

The U.S. Citizenship and Immigration Services' (USCIS) Policy Manual details these and many other requirements for naturalization. It divides the naturalization process into twelve sections, with each section comprised of multiple chapters of requirements. *See generally Policy Manual, Volume 12 - Citizenship and Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/policy-manual/volume-12 (last visited Jan. 24, 2021). The Policy Manual indicates that many of these requirements are subject to exceptions. For example, rules are often different for spouses or children of U.S. citizens or individuals who serve in the military.

b. The Naturalization Process is Long, Expensive, and Often Subject to Delay

In addition to meeting the statutory requirements under the INA, a person seeking to naturalize as a citizen must complete a multi-step process. Only after an applicant completes all of the steps, which takes

years, are they eligible for naturalization. *See How Long Does It Take to Get U.S. Citizenship After Applying?*, BOUNDLESS, https://www.boundless.com/immigration-resources/how-long-does-it-take-to-get-citizenship-after-applying/ (last visited Jan. 23, 2021).

First, the applicant must meet the lawful residency and presence requirements discussed *supra* Section I(a). Second, the applicant must complete and submit her naturalization application, Form N-400. This 20-page form and its accompanying instructions require the applicant to navigate a number of complex terms (*e.g.* "biological," "affiliation," and "proficient") that may not be fully understood by someone whose native language is not English, and it requests significant detail regarding the applicant's family, travel history, and character.[3] *Reforming the Naturalization Process*, NAT'L FOUND. FOR AM. POL'Y (Aug. 2011), http://www.nfap.com/pdf/ReformingtheNaturalizationProcess.NFAPPoli

[3] The N-400 must be submitted with a $640 processing fee. Combined with the $85 biometric services, the entire process costs $725, which is nonrefundable if the U.S. government rejects an application. *How Much Does It Cost to Become a U.S. Citizen?*, BOUNDLESS, https://www.boundless.com/immigration-resources/how-much-does-it-cost-to-apply-for-us-citizenship/ (last visited Jan. 23, 2021). Immigrants seeking naturalization also face costs associated with learning English and U.S. civics, hiring a lawyer to facilitate the process, or taking time off from work to complete various in-person steps.

cyBrief.August2011.pdf; *Application for Naturalization, Form N-400*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Sept. 17, 2019), https://www.uscis.gov/sites/default/files/document/forms/n-400.pdf.

Third, the applicant must schedule and attend a biometrics appointment, where fingerprints are taken. The applicant is then subject to a background check by the FBI, which includes a review of the applicant's N-400, any relevant police records, and neighborhood investigations where the applicant has lived and been employed for the previous five years. Pershon, 5 PHOENIX L. REV. at 271-73. Some applications require "extended investigation time." *Id.*

Once an applicant passes the background check, the fourth step is comprised of a citizenship interview and examination. Applicants are required to answer questions regarding their N-400 forms and demonstrate the necessary understanding of English and U.S. government and civics. Only after completing this step will the applicant receive a decision on their application and, if approved, be eligible for the final step: taking an Oath of Allegiance and receiving a Certificate of Naturalization. *How Long Does It Take to Get U.S. Citizenship After Applying?*, BOUNDLESS, https://www.boundless.com/immigration-

resources/how-long-does-it-take-to-get-citizenship-after-applying/ (last visited Jan. 23, 2021).

Official USCIS statistics suggest that the time required simply to process an applicant's Form N-400 – just the initial application – is averaging just over nine months (and this, of course, is on top of at least five years of lawful residence). *Historical National Average Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year (up to Sept. 30, 2020),* U.S. CITIZENSHIP & IMMIGR. SERVICES, https://egov.uscis.gov/processing-times/historic-pt (last visited Jan. 30, 2021). But processing times can vary from region to region. For example, processing time for the Form N-400 in New York City is estimated to be 16 to 21.5 months; in Atlanta, the estimate is 13 to 33 months. *See Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://egov.uscis.gov/processing-times/ (last visited Jan. 27, 2021).

For many, the naturalization process takes years. For example, in 2004, Elyhau Hadad submitted her application for naturalization, and four years later, was still awaiting a decision due to a delay in the "name check" portion of the FBI background check. Pershon, 5 PHOENIX L. REV. at 260. Many of the thousands of individuals facing delays of months or

even years face issues in the "name check" process like Hadad. Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 402 (2007). During this lengthy period of time, an individual's circumstances may change, which can lead to confusion and unintentional inconsistencies in answering questions throughout the process that need to be remedied before taking the Oath of Allegiance.

c. Naturalized Citizens Face a Risk of Denaturalization

In part because obtaining citizenship is so difficult, naturalized citizens may not know that they face a risk that U.S.-born citizens do not: denaturalization. Denaturalization is the revocation of U.S. citizenship, which can only occur by a judicial order through civil proceedings or a criminal conviction under the naturalization fraud statute.

The civil denaturalization statute has been on the books, unchanged, for well over half a century. *See* 8 U.S.C. § 1451. Civil denaturalization occurs when a court determines by clear, convincing, and unequivocal evidence which does not leave the issue in doubt that 1) the individual illegally procured naturalization, or 2) the individual concealed a material fact or made a willful misrepresentation. Notably,

there is no statute of limitations for civil denaturalization. *United States v. Phattey*, 943 F.3d 1277, 1281 (9th Cir. 2019) (concluding that the catch-all statute imposing five-year limitations periods on government actions seeking "penalties" does not apply because denaturalization is "not a penalty").

Criminal denaturalization can result from a conviction under 18 U.S.C. § 1425, which makes it a crime to knowingly obtain or attempt to obtain naturalization through fraud for oneself or another individual.[4] 8 U.S.C. § 1451; *Fact Sheet on Denaturalization*, NAT'L IMMIGR. F. (Oct. 2, 2018), https://bit.ly/36lN40s (hereinafter "Fact Sheet on Denaturalization"); *see also Policy Manual, Volume 12, Part L – Revocation of Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/policy-manual/volume-12-part-l (last visited Jan. 23, 2021).

Critically, denaturalization can result in the loss of citizenship for members of the naturalized citizen's family: if a spouse or child gained

[4] In the 2017 Supreme Court case *Maslenjak v. United States*, 137 S.Ct. 1918, the Court held that only an illegal act that played a role in an individual's acquisition of U.S. citizenship could lead to criminal denaturalization, narrowing 18 U.S.C. § 1425's scope.

citizenship derivatively through their spouse or parent's citizenship, then denaturalization can cause that spouse or child to have their citizenship revoked in certain situations where the denaturalization was based on concealment or misrepresentation, or the spouse or child is residing outside of the United States. Chapter 3 – Effects of Revocation of Naturalization, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/policy-manual/volume-12-part-l-chapter-3 (last visited Jan. 25, 2021). The U.S. Department of Homeland Security conservatively estimates that of the 34.9 million immigrants who entered the United States and became lawful permanent residents after 1980, approximately five percent (or 1.7 million) had naturalized as derivatives – that is, as children of naturalized U.S. citizens – by 2019. *See* Bryan Baker, *Population Estimates: Estimates of the Lawful Permanent Resident Population in the United States and the Subpopulation Eligible to Naturalize: 2015-2019* at 1, 4, U.S. DEP'T OF HOMELAND SEC. (Sept. 2019), https://bit.ly/3j2LDZN. Between 2015 and 2019, 8.1 million immigrants derived their citizenship through naturalized parents and may be subject to denaturalization as a result of their parents' guilty pleas. *See Id.* at Table 1. Indirect effects on the family are also

significant: for example, a family member may be separated from his or her spouse, children, parents, and siblings through deportation or lose the ability to provide for their family due to loss of employment.

II. To Naturalized Citizens, Denaturalization Is a Hidden Risk of Pleading Guilty

While denaturalization statutes have existed for decades and been addressed in numerous court decisions, there are many reasons why naturalized citizens would not know that criminal proceedings could result in denaturalization and deportation.

First, due to the rigor of the naturalization process, naturalized citizens often believe they have a firm footing in this country – the same as any other citizen. They have spent years in the country, paid fees, completed biometric screenings, passed examinations, signed declarations, sworn oaths, and pledged allegiance. The naturalization ceremony is the culmination of their immigration journey. Naturalized citizens are Americans. Many know more about the United States than citizens who are born here, and some have spent decades here, raising families, working jobs, and paying taxes. The Supreme Court has stated that, "[c]itizenship obtained through naturalization is not a second-class citizenship." *Knauer v. United States*, 328 U.S. 654, 658 (1946). Since

natural-born citizens are not subject to denaturalization and deportation, naturalized citizens may not know this is a possibility.

Second, naturalized citizens are often members of vulnerable populations that cannot be expected to have familiarity with denaturalization statutes and case law. Many naturalized citizens first came to America from predominantly non-English speaking countries such as China and Mexico, and/or countries without similar types of government and civic structures. Brittany Blizzard & Jeanne Batalova, *Naturalization Trends in the United States*, MIGRATION POL'Y INST. (July 11, 2019), https://www.migrationpolicy.org/article/naturalization-trends-united-states-2017#Eligibility. Of those eligible to naturalize in the United States, 14.4 percent have no English ability, and 22.8 percent do not speak English well. *See* Thai V. Le et al., *Paths to Citizenship,* U. OF S. CAL. DORNSIFE CTR. FOR THE STUDY OF IMMIGR. (Jan. 2019), https://dornsife.usc.edu/assets/sites/731/docs/PathsToCitizenship_Full_Report_CSII.pdf. Moreover, many came to the United States as refugees or asylum-seekers. Indeed, those seeking asylum are more likely to naturalize than their counterparts who immigrate as relatives of U.S. residents, and individuals who emigrate from countries with less

democratic and/or more oppressive political systems are also more likely to naturalize. William A. Kandel, *U.S. Naturalization Policy*, CONGR. RES. SERV. (Jan. 16, 2014), https://fas.org/sgp/crs/misc/R43366.pdf.

This means that the subset of immigrants who are most likely to naturalize in the United States are perhaps the least likely to be aware of denaturalization statutes, or to understand when or how they might apply.

Third, even if naturalized citizens have some awareness of the laws of denaturalization, they would not know that a plea allocution could render false a statement they made years prior in connection with their naturalization (whether in the application, during the course of the background interview, or elsewhere). They would not know that denaturalization and deportation could flow from the plea allocution as a matter of course.

For example, in 2018, Norma Borgono, then 63-years old and a Miami resident of 28 years, was surprised to be threatened with denaturalization proceedings. Adiel Kaplan, *Miami grandma targeted as U.S. takes aim at naturalized immigrants with prior offenses*, MIAMI HERALD (July 12, 2018), https://www.miamiherald.com/news/local/

immigration/article214173489.html. Ms. Borgono had emigrated from Peru in 1989 and settled into life in America, becoming a naturalized citizen 18 years later, in 2007. She volunteered weekly at her church and raised two children on a $500-a-week salary. In 2018, she welcomed a granddaughter. Soon thereafter, she received a letter notifying her that the U.S. government was seeking to denaturalize her. *Id.* The reason given was Ms. Borgono's role in a fraud scheme[5] for which she had pleaded guilty and cooperated with authorities to assist in the convictions of others.[6]

While working as a secretary, Ms. Borgono had prepared paperwork for her boss, who pocketed money from doctored loan

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[5] The charges against Ms. Borgono were Conspiracy to Defraud the United States and to Commit Mail Fraud, in violation of 18 U.S.C. § 371.

[6] Although she had not yet been charged when she applied for citizenship, the Department of Justice argued that she lied by not divulging criminal activity on her application. The government is increasingly seeking to denaturalize U.S. citizens for failing to disclose during the naturalization process acts that contributed to a crime for which the citizen was arrested, charged, and convicted after naturalizing.
The following question on the naturalization application underpins this effort: "Have you EVER committed, assisted in committing, or attempted to commit, a crime or offense for which you were NOT arrested?" *Application for Naturalization, Form N-400*, U.S. CITIZENSHIP & IMMIGR. SERVICES, 14 (Sept. 17, 2019), https://www.uscis.gov/sites/default/files/document/forms/n-400.pdf.

applications filed with the U.S. Export-Import Bank. *Id.* Ms. Borgono cooperated with the government and helped the FBI put together a case against her former boss. *Id.* On May 17, 2012, she took a plea deal and was sentenced to one year of house arrest, four years of probation, and $5,000 in restitution. *Id.* According to reporting by the Miami Herald, "[w]orking two jobs, she paid off her restitution and was relieved of her sentence early." *Id.* At the time she pleaded guilty, Ms. Borgono had been in the country for 23 years, and she had been a citizen for five years.

Many years after her plea, Ms. Borgono received the letter notifying her that the U.S. government wanted to take away her citizenship. *Id.* Ms. Borgono was unaware this was a possible result of her plea: she told the Herald that had the risk of denaturalization been brought up during the original case, she would have gone to trial or found some way to fight it. *Id.*

Fourth, the government has historically exercised restraint in pursuing denaturalization. The laws concerning denaturalization were enacted more than fifty years ago, and the government has routinely used them to seek denaturalization. *See, e.g.*, *Kungys v. United States*, 485 U.S. 759 (1988); *Fedorenko v. United States*, 449 U.S. 490 (1981); *Costello*

v. INS, 376 U.S. 120 (1964); *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961). This is why it is "objectively unreasonable" for defense counsel to fail to advise a naturalized citizen that their criminal case could result in denaturalization and deportation.

At the same time, this risk may well not be known to populations of naturalized citizens because the government has historically pursued denaturalization with restraint, consistent with the Supreme Court's warning that "[g]reat tolerance and caution are necessary" when deciding to strip one's citizenship, given its severe consequences and its potential use as a political tool. *Knauer*, 328 U.S. at 658 (1946); *see also Schneiderman v. United States*, 320 U.S. 118, 122 (1943) (noting that it is "difficult to exaggerate [the] value and importance [of citizenship]"). Until recently, denaturalization proceedings were reserved for individuals who committed serious crimes. Amber Qureshi, *The Denaturalization Consequences of Guilty Pleas*, 130 YALE L.J. F. 166, 170-71 (2020); *see also* Fact Sheet on Denaturalization.

This is changing. During the Obama Administration, an effort known as Operation Janus[7] laid the groundwork for the Trump Administration's pursuit of large-scale denaturalization, termed Operation Second Look. In 2017, the DOJ filed at least 30 denaturalization cases in federal district court, *twice* the number of cases filed by the DOJ in the prior year. Fact Sheet on Denaturalization. USCIS has identified approximately 2,500 cases to be examined for possible denaturalization, and it referred at least 110 denaturalization cases to the DOJ for prosecution by the end of August 2018. *Id.*

According to the U.S. Immigration and Customs Enforcement (ICE) Fiscal Year 2019 budget, the Department of Homeland Security planned to devote more than $207.6 million to investigations of citizenship fraud, in addition to Green Card fraud by holders of permanent residency. *U.S.*

[7] A Department of Homeland Security (DHS) initiative, Operation Janus identified about 315,000 cases where some fingerprint data was missing from the centralized digital fingerprint repository. The effort sought to identify citizens who may have circumvented criminal record and other background checks in the naturalization process. These cases were the result of an ongoing collaboration between DHS and the Department of Justice to investigate and seek denaturalization proceedings against those who obtained citizenship unlawfully. Press Release, "Justice Department Secures First Denaturalization As a Result of Operation Janus" (Jan. 9, 2018), https://www.justice.gov/opa/pr/justice-department-secures-first-denaturalization-result-operation-janus.

Immigration and Customs Enforcement Budget Overview (Fiscal Year 2019), U.S. DEP'T. OF HOMELAND SEC., https://bit.ly/39rUO2Z. ICE planned to hire 300 new Homeland Security investigations agents and scores of additional staffers for the effort. *Id.*

While there remain examples of serious misconduct triggering denaturalization, these proceedings are now also instituted against individuals who committed less serious crimes, and who are alleged to have made misrepresentations – sometimes unwittingly – on their naturalization application. Qureshi, *The Denaturalization Consequences of Guilty Pleas* at 167. These cases often involve citizens who have lived in the United States for decades and have significant roots and families in the country. *Id*. According to a report by the Open Society Justice Institute, in denaturalization cases brought in 2017 and 2018, the length of time a person lived in the United States *after* naturalizing as a citizen ranged between two and twenty-four years, with an average of ten years.[8] Open Soc'y Justice Initiative, *Unmaking Americans: Insecure Citizenship*

[8] For example, in 2017, naturalized citizens spent a median of eight years in Lawful Permanent Resident status before becoming citizens. John Teke, *U.S. Naturalizations: 2017, Annual Flow Report* at 5, DEP'T OF HOMELAND SEC. (2018), https://www.dhs.gov/sites/default/files/publications/Naturalizations_2017.pdf.

in the United States, OPEN SOC'Y FOUND., 8 (2019), https://bit.ly/3iUNO1u. The government's recent shift to more aggressive use of civil denaturalization underscores the need for defense counsel to advise clients of the risk.

III. *Padilla* Requires Counsel to Apprise Naturalized Citizens of the Risk of Denaturalization and Deportation

Padilla v. Kentucky held that criminal defense attorneys must advise noncitizen clients about the deportation risks of a guilty plea. 559 U.S. 356 (2010). Justice Stevens, who authored the opinion in *Padilla* before retiring, has since advocated for adequate representation for immigrants because "the consequences are just so drastic." Sam Dolnick, *As Barriers to Lawyers Persist, Immigrant Advocates Ponder Solutions*, N.Y. TIMES (May 3, 2011), https://www.nytimes.com/2011/05/04/nyregion/barriers-to-lawyers-persist-for-immigrants.html.

While *Padilla* concerned the adequacy of advice given to noncitizens, its logic applies with equal, if not greater, force to advice provided to naturalized citizens. As with noncitizens, a naturalized citizen's guilty plea could result in deportation. If it is "objectively unreasonable" for counsel to fail to warn *non*citizens of potential immigration consequences of their criminal case, the same must be true

for advice to naturalized citizens. Denaturalization laws, and denaturalization proceedings, have been around for too long for counsel to not at least raise the risk with clients known to be naturalized. In a criminal case against a naturalized citizen, the defendant is generally, by a large measure, the least sophisticated participant, and the person least likely to understand the ramifications and consequences of the process.

While the complexity of the naturalization process contributes to naturalized citizens' perception that the process cannot be undone, defense counsel should know of the risk, and can provide effective counsel by simply advising clients known to be naturalized citizens that such a risk exists.

For clients, the stakes are too high to not be so advised. As discussed *supra* Section II, to naturalized citizens, denaturalization and deportation constitute a serious and hidden risk of pleading guilty. Accordingly, the logic of *Padilla* mandates that defense counsel advise clients known to be naturalized citizens that pleading guilty could carry adverse immigration consequences. The precise immigration consequences may be unclear, but where that is the case, *Padilla* provides a simple answer: "a criminal defense attorney need do no more

than advise [the naturalized] client that pending criminal charges may carry adverse immigration consequences." *Padilla*, 559 U.S. at 357.

While *Padilla* imposes only a minimal burden on defense counsel, the impact on clients is impossible to overstate. The Court in *Padilla* relied on "the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country" in issuing its decision. *Padilla*, 559 U.S. at 374. The severity of consequences on families living lawfully in the United States *as citizens* are at least as significant.

IV. Failure to Advise Naturalized Citizens of the Risk of Denaturalization and Deportation Will Generally Be Prejudicial

In *Strickland v. Washington*, the Supreme Court held that "the proper standard [for ineffective assistance of counsel] requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. 668, 669 (1984).

Like Ms. Borgono, many defendants would rather take their chances at trial than risk losing their citizenship, or potentially that of

their derivative family members.[9] The Supreme Court has recognized this: "The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea . . . . When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. [The defendant here] would have rejected any plea leading to deportation in favor of throwing a 'Hail Mary' at trial." *Lee v. United States*, 137 S. Ct. 1958, 1961 (2017). Denaturalization, like deportation, "may result in the loss 'of all that makes life worth living.'" *Knauer*, 328 U.S. at 659 (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

Citizens willing to stand trial rather than plead guilty – and be deported on the basis of their allocution – should be allowed the choice. The burden on counsel that would make an informed choice possible is small, and this Court should confirm that the Constitution mandates

[9] In Ms. Borgono's case, she and her children suffer from a rare kidney disease called Alports syndrome that eventually leads to the loss of kidney function. They no longer have any close family or ties to Peru because Ms. Borgono's mother and brother both died from their kidney disease decades ago. Ms. Borgono has been on the Miami transplant list for two years, and her daughter is scared her mother will not be able to get proper care, let alone a transplant, if forced to go back to Peru.

that naturalized citizens receive this baseline level of effective representation.

CONCLUSION

Naturalized citizens are entitled to the rights and privileges guaranteed to all United States citizens under the Constitution, including the Sixth Amendment right to counsel. Defense counsel's failure to advise a client known to be a naturalized citizen that pleading guilty can result in adverse immigration consequences – denaturalization and deportation – is ineffective, in violation of the client's Sixth Amendment right to counsel. Therefore, Advancing Justice-AAJC respectfully urges this Court to reverse the judgment below and remand this matter to the district court with instructions to grant the motion and vacate Mr. Farhane's plea, conviction, and sentence.

Respectfully submitted,

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King & Spalding LLP

By: /s/ Andrew Z. Michaelson
Andrew Z. Michaelson
Ana V. B. Daily
Kathryn R. Barry
KING & SPALDING LLP
1185 Avenue of the Americas

New York, New York 10036
Telephone: (212) 556-2210
Facsimile: (212) 556-2222
amichaelson@kslaw.com
adaily@kslaw.com
kbarry@kslaw.com

John C. Yang
Niyati Shah
Marita Etcubañez
Asian Americans Advancing Justice-AAJC
1620 L Street, NW, Suite 1050
Washington, DC 20009
Telephone: (202) 815-1098
Facsimile: (202) 296-2318
jcyang@advancingjustice-aajc.org
nshah@advancingjustice-aajc.org
metcubanez@advancingjustice-aajc.org

Counsel for Amicus Curiae Asian Americans Advancing Justice

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type volume limitations of FED. R. APP. P. 29(a) and Local Rule 29.1(c) and that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it contains 5,253 words and has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

/s/ Andrew Z. Michaelson
Andrew Z. Michaelson

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on February 2, 2021. In addition, I hereby certify that on February 2, 2021, I served the foregoing document on the counsel below as indicated:

By Appellate CM/ECF:

Won S. Shin, Esq.
Jun Xiang, Esq.
United States Attorney's Office
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

Ramzi Kassem, Esq.
Naz Ahmad, Esq.
Mudassar Hayat Toppa, Esq.
Main Street Legal Services, Inc.
2 Court Square
Long Island City, NY 11101

Alan E. Schoenfeld, Esq.
Princess Diamaculangan Masilungan, Esq.
Margaret Artz, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

/s/ Andrew Z. Michaelson
Andrew Z. Michaelson