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 citizens through its Human and Civil Rights Program and its focus on citizenship, immigration and the Constitution. The framers of the Fourteenth Amendment established a system of overlapping protections by guaranteeing the privileges and immunities of citizens while protecting the rights of *all* persons to due process and equal protection of the laws. CAC is committed to fulfilling these textual guarantees in the courts and Congress.

This case raises the question of what the right to assistance of counsel articulated in the Sixth Amendment and applied to the States through the

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. 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*, its members, or its counsel made a monetary contribution to its preparation or submission.

Fourteenth Amendment's Due Process Clause means in the context of misadvice as to the serious immigration consequences of a guilty plea. CAC has an interest in demonstrating that the text and history of the Fourteenth Amendment's Due Process Clause show that the framers of the Amendment were particularly concerned that non-citizens be treated fairly in state criminal justice systems.

SUMMARY OF ARGUMENT

The Fourteenth Amendment requires states to provide the protections of equality and fundamental fairness to aliens as well as to citizens. In the vision of our Reconstruction Framers, "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). This framing vision, and its manifestation in the Due Process Clause, mandate that the Sixth Amendment right to counsel in criminal proceedings, incorporated through the Fourteenth Amendment, is not diminished when a non-citizen defendant stands accused in our criminal justice system. The Supreme Court of Kentucky's ruling—that counsel's advice at the plea stage regarding likely deportation is outside the scope of the Sixth Amendment—cannot be squared with this constitutional first principle.

In order for a non-citizen defendant to enjoy the full scope of due process protections guaranteed

to him by the Fourteenth Amendment, the Sixth Amendment right to effective assistance of counsel must mean—at least—that counsel has a duty not to give objectively, egregiously incorrect advice as to the immigration consequences of a guilty plea. Regardless of whether automatic deportation flowing from an aggravated felony conviction is labeled as a direct or collateral consequence—and Petitioner has made a compelling argument that the false dichotomy between direct and collateral consequences has no place in the ineffective-assistance-of-counsel inquiry—due process is not satisfied when a lawful permanent resident alien is induced to plead guilty based on blatantly incorrect legal advice regarding post-conviction deportation.

This Court has recognized that deportation is akin to banishment, a harsh penalty that is frequently perceived to be a more serious consequence of conviction than the criminal sentence itself and, accordingly, of great import to an immigrant defendant deciding whether to plead guilty. If citizens were automatically banished as a result of certain criminal convictions, surely the Constitution would require that they not be misinformed as to this drastic consequence when deciding whether or not to plead guilty to a charged offense. There is no constitutional reason why a non-citizen criminal defendant, faced with the equivalent of banishment as an inevitable result of a conviction, should not be properly advised of the immigration consequences of his plea and receive the full scope of due process protections.

The rights to effective assistance of counsel and due process of law are violated when state criminal justice systems maintain guilty pleas that were secured through blatant misadvice of counsel regarding a consequence as serious as deportation. In light of the full constitutional protections extended to non-citizens by the Fourteenth Amendment, and the seriousness of the consequence of deportation, the scope of the Sixth Amendment right to effective assistance of counsel cannot be as limited as the Kentucky Supreme Court's cramped conception of that right.

ARGUMENT

I. THE TEXT AND HISTORY OF THE FOURTEENTH AMENDMENT REQUIRE STATES TO PROVIDE THE FULL RANGE OF DUE PROCESS PROCEDURAL PROTECTIONS TO ALL PERSONS.

Drafted in 1866 and ratified in 1868, the Fourteenth Amendment wrote into our Constitution broad protections for liberty and equality, and guarantees of impartial justice for all people residing in the United States, citizens and non-citizens alike. Its words provide:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

> United States; nor shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., amend. XIV, § 1 (emphasis added).

As the plain language of the text reflects, the final two clauses of Section 1 provide protections not just to "citizens," but rather to "any person," a broader scope of coverage designed to specifically include both citizens and aliens residing on American soil. Senator Jacob Howard, speaking on behalf of the Joint Committee on Reconstruction that drafted the Amendment, explained this difference during the Senate debates on the Fourteenth Amendment. Sen. Howard observed that the Privileges or Immunities Clause would protect "those fundamental rights and privileges which pertain to citizens of the United States," Cong. Globe, 39th Cong., 1st Sess. 2766 (1866), while the "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, or from denying to him the equal protection of the laws of the State." *Id. See also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 182 (1998) ("The privileges-or-immunities clause would protect citizen rights, and the due-process and equal-protection principles . . . would protect the wider category of persons.").

Other framers of the Fourteenth Amendment emphasized that the Due Process Clause's fair trial guarantee specifically included aliens as well as citizens. During debates on an early version of the Fourteenth Amendment, Representative John Bingham—the main author of Section 1—explained that, "no man, no matter what his color, no matter beneath what sky he may have been born, . . . no matter how poor, no matter how friendless, no matter how ignorant shall be deprived of life, liberty, or property without due process of law—law . . . which is impartial, equal, exact justice." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866).

The prevailing understanding of due process at the time of Reconstruction looked to "the Constitution itself" to define the term. *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-77 (1856). Accordingly, the "impartial, equal, and exact justice" written into the Fourteenth Amendment's Due Process Clause required states to provide to all persons on American soil the specific procedural protections in the Bill of Rights, including the Sixth Amendment's guarantee of assistance of counsel at issue here. *See* AMAR, *supra*, at 173 ("[P]rocedural due process embodied—incorporated, if you will—all the other procedural rules laid down in "'the Constitution itself.'") (quoting *Murray*, 59 U.S. at 276-77); *cf. Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963) (applying to the states the fundamental Sixth Amendment right to assistance of counsel).

The Fourteenth Amendment's textual design reflected an enduring American constitutional

tradition of providing due process protections to all persons residing on American soil, regardless of whether they were citizen or alien. The Due Process Clause, initially included in the Fifth Amendment, grew out of the Magna Carta, that great 13th century charter of English liberty. *See Murray*, 59 U.S. at 276. But, unlike the Magna Carta, whose protections applied only to "freemen," the Due Process Clause applied universally, protecting all persons.

This difference was foremost in the minds of the framers of the Fourteenth Amendment. As Rep. Bingham observed a few years before he drafted the Fourteenth Amendment: "This clear recognition of the rights of all was a new gospel to mankind, something unknown to the men of the thirteenth century . . . . The barons of England demanded the security of law for themselves; the patriots of America proclaimed the security and protection of the law for *all* . . . no matter whether citizen or strangers." Cong. Globe, 37th Cong., 2nd Sess. 1638 (1862). The wording of the Due Process Clause of the Fifth Amendment—soon to be copied into the Fourteenth Amendment—was proof positive that the Due Process Clause "embrace[s] all men when the Constitution guarantees life and liberty and trial by jury. The Constitution has the same care for the rights of the stranger within your gates as for the rights of the citizen." Cong. Globe, 36th Cong., 2nd Sess. app. 83 (1861).[2]

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[2] *Amicus* recognizes that this Court has countenanced limits placed on an alien's due process rights when Congress exercises its plenary power over naturalization. *Demore v.*

II. CONTEMPORANEOUS CONGRESSIONAL ACTION AND SUBSEQUENT SUPREME COURT CASE LAW CONFIRM THAT NON-CITIZENS WERE TO ENJOY THE FULL SCOPE OF DUE PROCESS PROTECTIONS IN OUR NATION'S COURTS.

The Fourteenth Amendment specifically gave Congress power to enforce the Amendment's new constitutional guarantees, curing what Rep. Bingham called the "great want of the citizen and stranger, protection by national law from unconstitutional State enactments . . . ." Cong. Globe, 39th Cong., 1st Sess. 2543 (1866). Within two years of the Amendment's ratification, Congress used its enforcement power to protect the constitutional rights of resident aliens, primarily Chinese immigrants in California.

The Enforcement Act of 1870, 16 Stat. 140, 144 (codified at 42 U.S.C. § 1981), banned discrimination against aliens in the exercise of civil rights and ensured that aliens would have the same rights as citizens to enjoy the full and equal benefit of all laws for the security of person and

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Kim, 538 U.S. 510, 521 (2003) (explaining that, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens") (citation omitted). This special treatment of congressional action establishing rules for removal proceedings is not at issue here.

property, including procedural fair trial guarantees applicable in state courts. As Senator William Stewart explained, "we will protect Chinese aliens or any other aliens who we allow to come here, and give them a hearing in our courts; let them sue and be sued; and let them be protected by all the laws and the same laws that other men are." Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870).

Opponents of the Fourteenth Amendment and the 1870 Act never once contradicted the idea that the Fourteenth Amendment would protect resident aliens. Instead, they appealed to prejudice, arguing against giving aliens any such legal rights. The 1870 Act, for example, was bitterly attacked for giving federal protections to the "hordes [that] infest our country." *Id.* at 3880. The congressmen who had just framed the Fourteenth Amendment rejected these attacks. They argued that the Amendment's "express words" protected aliens, *id.* at 3871 (Rep. Bingham), and that it was Congress' "solemn . . . duty to see that those people are protected . . . ." *Id.* at 3658 (Sen. Stewart).

Consistent with this text and history, the Supreme Court recognized in 1886 that the Fourteenth Amendment "is not confined to the protection of citizens." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Referring to both the Due Process and Equal Protection Clauses, the *Yick Wo* Court observed that "[t]hese provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ." *Id.*

It is now settled law that aliens within the United States enjoy robust due process protections, including the Sixth Amendment right to counsel. *E.g., Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (explaining that, "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); *see also Plyler v. Doe*, 457 U.S. 202, 215 (1982) ("Whatever his status under immigration law, an alien is surely a 'person' in any ordinary sense of that term."); *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). The question raised by this case is what these Sixth Amendment and due process rights mean in the context of advice about the immigration consequences of a criminal conviction.

As demonstrated above in Section One, our constitutional text and history establish that non-citizens were intended to receive the full scope of due process protections under the Fourteenth Amendment. Contemporaneous congressional action and subsequent Supreme Court precedent confirm that the Constitution plainly guarantees that all persons, whether citizen or alien, be treated fairly in our criminal justice system. As well-settled as these fundamental principles are in our constitutional jurisprudence, they are completely ignored by the Kentucky Supreme

Court's conception of the scope of the right to effective assistance of counsel. When the Sixth Amendment right is viewed within its proper constitutional context, the lower court's application of the collateral-consequences rule to bless counsel's ineffective assistance at the plea stage is clearly wrong.

III. IMMIGRANT DEFENDANTS CANNOT ENJOY THE FULL SCOPE OF DUE PROCESS PROTECTIONS IF COUNSEL CAN INDUCE A GUILTY PLEA THROUGH ERRONEOUS ADVICE AS TO THE IMMIGRATION CONSEQUENCES OF CONVICTION.

The Constitution's promise of due process for all will ring hollow if non-citizen defendants can be induced to plead guilty based on completely erroneous advice as to the immigration consequences of their conviction. The constitutional first principles outlined above make clear that due process for non-citizen defendants requires that they not be misled as to the immigration consequences of their guilty pleas.

Deportation is a severe punishment akin to banishment, and, as an often inevitable consequence of a guilty plea, surely requires adequate advice and effective counsel under the Sixth Amendment. *Cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-66 (1963) (finding citizenship-stripping statutes unconstitutional "because in them Congress has plainly employed the sanction of deprivation of nationality as a

punishment—for the offense of leaving or remaining outside the country to evade military service—without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments").[3] As Petitioner has argued, in light of the severity of deportation, even if the Court does not reject the collateral-consequences rule altogether it should nonetheless refuse to apply the rule to ineffective-assistance claims based on advice about deportation consequences. Br. of Petitioner at 50-55. The historical treatment of banishment and deportation supports this argument.

Throughout history, banishment has been recognized as a harsh and drastic consequence. *See generally 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)). Banishment has been acknowledged as a particularly harsh punishment for centuries, and was recognized as such both at the time of our Nation's Founding and its Reconstruction. *See Stogner*, 539 U.S. at 642, 644-45 (Kennedy, J., dissenting); *see also id.* at 644-45 (citing William F. Craies, *Compulsion of Subjects to Leave the Realm*, 6 L.Q. Rev. 388, 392 (1890) ("[B]anishment, perpetual or temporary, was well known to the common law"); An Act for

[3] The Court subsequently determined that citizens could not be involuntarily deprived of their citizenship. *Afroyim v. Rusk*, 387 U.S. 253 (1967).

Punishment of Rogues, 39 Eliz. 1, c. 4, s. 4 (1597); Roman Catholic Relief Act, 10 Geo. 4, c. 7, s. 28 (1829) (providing for the banishment of Jesuits)). In 1798, this Court in *Calder v. Bull* cited the banishments of Lord Clarendon in 1667 and Bishop Francis Atterbury in 1723 as examples of improper, increased punishments exacted by British parliamentary enactments. 3 Dall. 386, 389 (1798). *See also Mendoza-Martinez*, 372 U.S. at 168 n.23 ("[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 from a country into which he has been invited as the asylum most auspicious to his happiness, a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the moveable and temporary, kind; where he enjoys, under the laws, a greater share of the blessings of personal security and

> personal liberty than he can elsewhere hope for; * * * if a banishment of this sort 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), *quoted in Fong Yue Ting v. United States*, 149 U.S. 698, 740-41 (1893) (Brewer, J., dissenting).[4] 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).

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[4] The Alien and Sedition Act passed over Madison's objections and expired in 1800. Madison's views were more enduring, however, and, "by 1832, Vice-President John C. Calhoun asserted that the unconstitutionality of the Alien and Sedition laws was 'settled.'" Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 98 (2002).

There is a compelling argument that the line between penal and immigration consequences has been blurred, *see* Br. of National Ass'n of Criminal Defense Lawyers, et al., but the Court need not decide whether removal is the equivalent of criminal punishment in order to resolve this case. As Justice Murphy explained, concurring in *Bridges*, "It is no answer that a deportation proceeding is technically non-criminal in nature and that a deportable alien is not adjudged guilty of a 'crime.' Those are over-subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights." 326 U.S. at 163-164 (Murphy, J., concurring). 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).

Deportation is a particularly serious penalty for longtime lawful permanent residents like Mr. Padilla.[5] *See Landon v. Plasencia*, 459 U.S. 21, 32

[5] The status of lawful permanent resident aliens closely approximates that of a citizen, making distinctions between citizens and lawful permanent resident aliens in the context of automatic removal as a result of an uninformed guilty plea even more troubling. As Justice Souter has explained, "[t]he immigration laws give LPRs the opportunity to establish a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen."

(1982) (noting that, "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly"). Mr. Padilla has made this country his home for over forty years, and served honorably in the defense of the United States in Vietnam. He has built a life here. The Court has characterized the interests of lawful permanent resident aliens like Mr. Padilla as undeniably "weighty," *id.* at 34, given that a permanent resident alien stands to "lose the right 'to stay and live and work in this land of freedom,'" *id*. (quoting *Bridges*, 326 U.S. at 154), as well as "the right to rejoin [his] immediate family, a right that ranks high among the interests of the individual," *id.* (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). In light of these "weighty" interests, this Court has expressly recognized that deportation "can be the equivalent of banishment or exile." *Rosenberg v. Fleuti*, 374 U.S. 449, 456-458 (1963) (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)).

The severity of removal from one's home country and the importance of being properly informed as to whether it is a likely consequence of a guilty plea is clear under this Court's due process jurisprudence. Before the Court rejected involuntary expatriation of citizens altogether, it held that federal statutes automatically stripping

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Demore v. Kim, 538 U.S. 510, 544 (2003) (Souter, J., concurring in part and dissenting in part).

citizens of their citizenship status were unconstitutional if they did not afford due process rights, including the Sixth Amendment right to counsel. *Mendoza-Martinez*, 372 U.S. at 164-67. The Fourteenth Amendment's Due Process Clause will tolerate no less for non-citizens.

In deciding whether to plead guilty, Mr. Padilla should have been able to make an informed choice as to whether the potential for a slightly reduced term of imprisonment was worth near-certain deportation—or at least not have been expressly and incorrectly advised that his conviction would not cause him to be deported. He has stated, unchallenged, that he accepted the plea bargain in reliance on his attorney's advice that he did not have to worry about his immigration status and that he would have made a different choice had he been aware of the actual immigration consequences of his plea. Br. of Petitioner at 10-11; J.A. 72-73. Thus, the question is whether a person facing exile from his lawful home of almost half a century as an automatic result of a state criminal conviction is deprived of effective assistance of counsel if he decides to plead guilty to such crime after being incorrectly advised that he would not face removal. The text and history of our Constitution provide a clear answer: non-citizen defendants must be properly advised of the automatic immigration consequences of conviction—or at the very least not misadvised of these serious consequences.

* * *

The Due Process Clause applies to *all* persons and the Sixth Amendment right to effective counsel applies to any "accused" defendant in any and all "criminal prosecutions." Because an inevitable consequence of conviction as severe as deportation is undoubtedly crucial to an intelligent guilty plea, we urge the Court to find that counsel's error is not categorically excluded from an ineffective-assistance-of-counsel inquiry by operation of the Kentucky Supreme Court's formulation of the collateral-consequences rule.

Mr. Padilla is entitled to the full and fair justice promised to all persons in the Fourteenth Amendment, and he should be allowed the opportunity to prove that his counsel's woefully incorrect immigration advice fell below the Sixth Amendment standard for effective representation.

CONCLUSION

The judgment of the Kentucky Supreme Court should be reversed.

Respectfully submitted,

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