No. 11-820

In The Supreme Court of the United States

ROSELVA CHAIDEZ,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF *AMICI CURIAE* OF HABEAS SCHOLARS AND CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PETITIONER

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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 *AMICI CURIAE*[1]

The following scholars are experts in the field of *habeas corpus* law and appear as *amici curiae* to ensure the appropriate application of retroactivity principles to collateral review:

- Eric M. Freedman is the Maurice A. Deane Distinguished Professor of Constitutional Law at the Maurice A. Deane School of Law at Hofstra University. He is the author of HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (NYU PRESS 2002), and of numerous articles for scholarly and general publications concerning habeas corpus and related subjects.

- Randy Hertz is the Vice Dean of N.Y.U. School of Law and the director of the law school's clinical program. He writes in the areas of criminal and juvenile justice and is the co-author, with Professor James Liebman of Columbia Law School, of a two-volume treatise entitled "Federal Habeas Corpus Law and Practice."

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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, *amici* state 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 *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

- Ira P. Robbins is the Barnard T. Welsh Scholar and Professor of Law and Justice at American University, Washington College of Law. He is the author and editor of *Habeas Corpus Checklists* (Thomson/Reuters 2012).

Amicus curiae 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*, 130 S. Ct. 1473 (2010), 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.

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. The question before the Court now is whether the retroactivity framework announced in *Teague v. Lane*, 489 U.S. 288 (1989), prevents Petitioner from pressing a *Padilla* claim of ineffective assistance of counsel on federal collateral review of a federal conviction.

The *Teague* framework should not apply in this case for two basic reasons.

First, the important federalism interests of comity and finality at the heart of *Teague* are not implicated when a federal court engages in post-conviction review of a federal, as opposed to state, conviction. While there remains, of course, a federal interest in the repose of final federal convictions, it is adequately protected by the *Strickland* test itself, which erects a high bar for

petitioners seeking to invalidate convictions because of constitutionally inadequate counsel.

Second, if *Teague* applied to ineffective assistance of counsel claims based on inadequate advice as to the immigration consequences of a guilty plea—which, in federal courts, may be brought only on collateral review—it would leave Petitioner and others in her situation with the right to counsel affirmed in *Padilla*, but no way to vindicate that right. Rather than getting the second bite at the apple that *Teague* sought to avoid when federal courts review state convictions, petitioners like Ms. Chaidez will get no "bite" at all. To apply *Teague* in this fashion would violate the deeply-rooted constitutional principle that for every violation of a right, there must be a remedy.

Even if the Court were to apply the *Teague* retroactivity framework to this case, it should not bar Ms. Chaidez's claims here because *Padilla* 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.

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 applies the Sixth Amendment to the States and was thus the constitutional backdrop of both *Strickland* and *Padilla*, further establishes 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.

This case raises a question of exceptional importance both to the proper, fair functioning of our justice system and to long-term legal 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.

Amici curiae respectfully urge the Court to reverse the judgment below.

ARGUMENT

I. THE *TEAGUE* RETROACTIVITY FRAMEWORK SHOULD NOT APPLY IN THIS CASE.

This Court has expressly reserved the question whether the retroactivity framework articulated in *Teague v. Lane*, 489 U.S. 288 (1989), and applied to federal collateral review of state convictions, applies to post-conviction filings in federal court challenging federal convictions. *Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008).

Amici agree with Petitioner that the *Teague* framework should not apply in this case. *See* Brief for Petitioner at 27-39. First, the important federalism interests furthered by *Teague*'s retroactivity regime are not implicated when a federal court engages in post-conviction review of a federal, as opposed to a state, conviction.

And second, applying *Teague* to ineffective assistance of counsel claims based on inadequate advice as to the immigration consequences of a guilty plea—which, in federal courts, may be brought only on collateral review—would leave

Petitioner and others in her situation with the right to counsel affirmed in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), but no way to vindicate that right.

A. *Teague*'s Federalism Concerns Are Not Implicated By Federal Collateral Review Of A Federal Conviction.

The Court in *Teague* was motivated in large part by a reluctance to upset state convictions through the federal collateral review process, and intended to "minimize[e] federal intrusion into state criminal proceedings." *Danforth*, 552 U.S. at 280. The Court explained that retroactively applying federal decisions articulating "new rules" of law to overturn state convictions, even when the state proceedings "conformed to then-existing constitutional standards," would be highly "intrusive" and tread upon principles of comity. *Teague*, 489 U.S. at 310. *See* Brief for Petitioner at 28. Obviously, these considerations of intrusiveness and comity do not apply when a federal court is reviewing a federal conviction.

To be sure, the Court's concerns about preserving the finality of convictions apply in the federal context, albeit without the federalism gloss present in *Teague*. But these concerns are not nearly as compelling in the context of federal collateral review of federal convictions. When a federal court entertains a state prisoner's constitutional claims on habeas review, the state petitioner will have already have presented these claims to the state court (in order to meet

exhaustion requirements) and had them rejected. The state petitioner will thus have had at least one "bite at the apple" in state court. But in cases such as Petitioner Chaidez's, the federal petitioner will not have had a full and fair opportunity to raise the constitutional claim, as discussed further below. *See* Brief for Petitioner at 29-33.

Moreover, the federal finality interest is protected by the structure of the *Strickland* test itself. First, the courts' inquiry into whether counsel's performance was reasonably effective is highly deferential, recognizing that final judgments carry a "strong presumption of reliability." *Strickland v. Washington*, 466 U.S. 668, 696 (1984). Second, the prejudice prong of the *Strickland* test is expressly designed to protect "the fundamental interest in the finality of" convictions and "guilty pleas." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

Tellingly, the Court in *Padilla*, though expressly concerned with "protecting the finality of convictions obtained through guilty pleas," 130 S. Ct. at 1484, did not consider *Teague* even though Padilla's claim arose on collateral review. The Court simply applied the *Strickland* test to determine whether Padilla's claim met this already "high bar." *Id*. at 1485. Petitioner Chaidez should be given the same opportunity to have her claim assessed under *Strickland* and *Padilla*.

B. Applying *Teague* In Cases Raising *Padilla* Claims Would Be Particularly Problematic Because It Would Impair The Ability Of Petitioners To Vindicate Their Right To Effective Assistance Of Counsel.

Padilla recognized that "the Sixth Amendment right to effective assistance of counsel" requires "that counsel must inform her client whether his [or her] plea carries a risk of deportation" as the client considers whether to accept a plea deal. 130 S. Ct. at 1486. However, as Petitioner explains in her brief, application of *Teague* to her case and other *Padilla* claims could leave Ms. Chaidez and others with a right to effective counsel with respect to the immigration consequences of a guilty plea—but with no way to vindicate that right.

Specifically, because this Court has ruled that ineffective assistance of counsel challenges to federal convictions—at least those that depend on evidence outside the record, as virtually all *Padilla* claims would[2]—must be raised for the first time on collateral review, *Massaro v. United States*, 538 U.S. 500, 508 (2003), federal petitioners like Ms. Chaidez will not have been able to raise their *Padilla* right on direct review. Rather than getting the second bite at the apple that *Teague* sought to avoid, they will get no "bite" at all. To apply

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[2] In this case, the district court held an evidentiary hearing on Ms. Chaidez's claims and found that both prongs of the *Strickland* test had been met and, accordingly, granted a writ of *coram nobis*, vacating her conviction. Pet. App. 36a.

Teague in this fashion would violate the American constitutional tradition, deeply rooted in Anglo-American law, that for every violation of a right, there must be a remedy.

The principle that for every right there must be a remedy traces to the Latin maxim, *abi jus, ibi remedium*. One of the earliest foundations of this fundamental principle is the Magna Carta, which stated that "[t]o no one will we deny, or delay right or justice." Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. Rev. 1309, 1310 n.4 (2003) (quoting Chapter 29 of the 1225 version of the Magna Carta). Over 400 years later, Sir Edward Coke further expanded on this idea stating:

> [E]very subject of this realm, for injury done to him in goods, lands, or person, by any other subject, be he ecclesiastical, or temporall, . . . or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.

EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55 (London, W. Clarke & Sons 1817) (1641).

Coke's view of remedies was reflected in the 1703 case of *Ashby v. White*, which established that "[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it . . . indeed it is a vain thing to imagine a right without

a remedy." 92 Eng. Rep. 126, 136 (K.B. 1703). Sir William Blackstone similarly described "the general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . , whenever that legal right is invaded." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *23 (1768). *See also* 1 BLACKSTONE, COMMENTARIES, at *140-141 (noting that "in vain would these [absolute] rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment").

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Chief Justice John Marshall established this maxim as an important principle of American constitutional law. As Chief Justice Marshall explained in *Marbury*, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.* Quoting Blackstone, Chief Justice Marshall observed that "it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." *Id.* (quoting 3 BLACKSTONE, COMMENTARIES, at *109). Chief Justice Marshall concluded: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.*

While scholars have observed that this principle is not "an ironclad rule" or "an unyielding imperative," Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991), application of the principle to Ms. Chaidez is consistent with the moral and structural rationales that underlie it. As Professors Fallon and Meltzer explain, "[t]he strongest moral argument against denial of a remedy is that corrective justice demands redress on particular facts." *Id.* at 1793. *Teague* is at its essence a doctrine about "redressability." *Danforth*, 552 U.S. at 271 n.5. But the circumstances in which the Court has found *Teague* to bar redress of a constitutional violation do not exist here. Ms. Chaidez has not had the opportunity prior to collateral review to raise her *Padilla* claim of ineffective assistance of counsel. She is entitled to the opportunity to seek a remedy for the violation of her right to assistance of counsel, and *Teague* should not stand in the way.

II. EVEN IF *TEAGUE* APPLIES, *PADILLA* DID NOT CREATE A NEW RULE.

Even if the Court applies the *Teague* retroactivity regime to this case, it should not bar Ms. Chaidez's *Padilla* claim. Under the *Teague* framework, 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. *Padilla* did not announce a "new rule."

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. *See* Brief for Petitioner at 13-27. 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*. Simply put, the right to effective assistance of counsel was not newly announced in *Padilla*—the *Padilla* Court simply applied the guarantee of effective assistance of counsel to hold that counsel's advice was constitutionally defective in the circumstances of that case.

Indeed, the Sixth Amendment does not identify "particular requirements of effective assistance," *Strickland*, 466 U.S. at 688, and the contours of the guarantee of effective assistance of counsel have changed slightly for non-citizens in the criminal system. 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.

Strickland imposes upon counsel the "dut[y] to consult with the defendant on important decisions." 466 U.S. at 688. Entering into a guilty plea that could result in immigration consequences, including removal, is unquestionably an "important" decision. 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). 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)). *See also Bridges,* 326 U.S. at 164 (Murphy, J., concurring) ("The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence.").

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. Brief for Petitioner at 2. 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.

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 integrity of the criminal justice system rests in no small part on the guarantee of effective assistance of counsel, because "it is through counsel that the accused secures his other rights." *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986). In this case, Petitioner is faced with the possibility that she might not have a remedy for the denial of her precious right to effective assistance of counsel on the undeniably important issue of the immigration consequences of a guilty plea. Since the Magna Carta, legal tradition has held that no person "shall be taken or imprisoned . . . or banished . . . except by . . . the law of the land." Phillips, at 1310 n.4 (quoting Chapter 29 of the 1225 version of the Magna Carta). Ms. Chaidez should not be deported based on her prior guilty plea without having the opportunity to vindicate her constitutional rights.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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