SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,	)	
Respondent,	)	No. 2020-06264
-against-	)	Dutchess County SCI 316/2013
VICTOR EDUARDO TERRERO,	)	
Defendant-Appellant,	)	

NOTICE OF MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLANT

PLEASE TAKE NOTICE, that upon the affirmation of Brooke Menschel sworn to on May 24, 2021, and all exhibits attached thereto including a copy of the proposed brief of *amici curiae*, the undersigned will move this Court at 45 Monroe Place, Brooklyn, New York, 11201, on Tuesday, June 1, at 10:00 a.m., or as soon thereafter as is practicable for an order granting leave to the Brooklyn Defender Services, et al. to file with this Court a brief of *amici curiae* in support of Defendant-Appellant Victor Eduardo Terrero in the above-captioned action.

Dated: May 24, 2021
Brooklyn, NY

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
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AFFIRMATION OF BROOKE MENSCHEL IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Brooke Menschel, an attorney admitted to practice before the courts of New York, affirms the following to be true under penalty of perjury:

1. I am an attorney at Brooklyn Defender Services ("BDS"). On behalf of BDS, Albany Regional Immigration Assistance Center, The Legal Aid Society of Westchester County, Long Island Regional Immigration Assistance Center, Neighborhood Defender Service of Harlem ("NDS"), New York County Defender Services ("NYCDS"), Queens Defenders ("QD"), Regional Immigration Assistance Center of Hudson Valley, Regional Immigration Assistance Center Region 2, and WNY Regional Immigration Assistance Center, I submit this affirmation in support of the motion for leave to file the attached brief as *amici curiae* in support of

Defendant-Appellant Victor Eduardo Terrero.

2. This case raises important issues concerning the scope of *Padilla v. Kentucky*, 559 U.S. 356 (2010), whether it requires defense counsel to provide advice on immigration consequences of a plea beyond deportability under 8 U.S.C. § 1227(a) et seq., and whether the Dutchess County Court was wrong to adopt a *per se* rule that it does not.

3. *Amici curiae* BDS, The Legal Aid Society of Westchester County, NDS, NYCDS, and QD are public defense offices with in-house immigration attorneys to meet the unique needs of immigrants facing criminal legal proceedings in New York. These immigration experts provide individualized assessments on the wide range of potentially devastating immigration consequences that may result from a criminal case, including deportability grounds, inadmissibility grounds, bars to immigration status, and triggers for enforcement priorities, mandatory detention, or enhanced criminal re-entry penalties.

4. The Regional Immigration Assistance Centers ("RIAC"), created through a grant from the New York State Office of Indigent Legal Services in 2016 to provide expert immigration legal resources across six regions covering the entire State of New York, include *amici curiae* Albany RIAC, Long Island RIAC, RIAC of Hudson Valley, RIAC Region 2, and WNY RIAC. The RIACs were designed to improve the quality of indigent legal services and ensure the right to effective

representation of counsel for noncitizens of the United States as prescribed in *Padilla v. Kentucky*.

5. The essential functions of the RIAC attorneys include providing defense counsel with advisals for all noncitizen clients, and training defenders on the intersection of immigration and criminal law. RIAC trainings and attorney advisals invariably include, as a fundamental concept of immigration law, advice concerning removability, which necessarily includes both "deportability" from and "inadmissibility" to the United States. The RIACs seek to improve the quality of justice for immigrants accused or convicted of crimes and, therefore, have a great interest in ensuring that courts correctly construe the Supreme Court's holding in *Padilla v Kentucky*.

6. *Amici* seek to participate in this case because they regularly represent or assist low-income New Yorkers for whom the immigration consequences of a plea bargain may mean the difference between continuing their lives in the United States or being permanently separated from their families and banished from this country that they consider home. For many noncitizens, it is grounds of inadmissibility, not deportability, that will impose the harshest and most severe consequences.

7. The proposed *amici* brief in support of Defendant-Appellant Terrero (submitted herewith at Exhibit A) would provide perspectives and examples from

the experience of *amici* representing and assisting noncitizens in New York's criminal courts. These experiences demonstrate that convictions that trigger grounds of inadmissibility can have significant and often irrevocable harm on noncitizens. The examples set forth in the proposed brief show that when noncitizens are provided individualized and specific advice on how a disposition could trigger inadmissibility, they are better equipped to avoid catastrophic consequences for themselves and their families. And they show that creating an illogical and unjust distinction between deportability and inadmissibility is not only unconstitutional, but also will deprive noncitizens of the crucial advice that defense counsel is mandated to provide.

8. For these reasons, proposed *amici curiae* respectfully request leave of Court to file the attached *amici* brief.

Dated: May 24, 2021
Brooklyn, NY

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EXHIBIT A

Docket No. 2020-06264

New York Supreme Court
Appellate Division – Second Department

PEOPLE OF THE STATE OF NEW YORK,
Respondent,
– against –

VICTOR EDUARDO TERRERO,
Defendant-Appellant.

BRIEF OF *AMICI CURIAE* BROOKLYN DEFENDER SERVICES, ALBANY REGIONAL IMMIGRATION ASSISTANCE CENTER, THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY, LONG ISLAND REGIONAL IMMIGRATION ASSISTANCE CENTER, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, NEW YORK COUNTY DEFENDER SERVICES, QUEENS DEFENDERS, REGIONAL IMMIGRATION ASSISTANCE CENTER OF HUDSON VALLEY, REGIONAL IMMIGRATION ASSISTANCE CENTER REGION 2, WNY REGIONAL IMMIGRATION ASSISTANCE CENTER IN SUPPORT OF DEFENDANT-APPELLANT

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As public defenders who provide legal services in New York's criminal courts and organizations who provide immigration advisals to public defenders regarding immigration consequences, *amici curiae* Brooklyn Defender Services, Albany Regional Immigration Assistance Center, The Legal Aid Society of Westchester County, Long Island Regional Immigration Assistance Center, Neighborhood Defender Service of Harlem, New York County Defender Services, Queens Defenders, Regional Immigration Assistance Center of Hudson Valley, Regional Immigration Assistance Center Region 2, and WNY Regional Immigration Assistance Center, respectfully offer this brief in support of Defendant-Appellant Victor Eduardo Terrero's appeal of the motion to vacate his judgment of conviction on grounds that he received ineffective assistance of counsel when neither counsel nor the Dutchess County Court properly advised him of the immigration consequences of his guilty plea.[1]

STATEMENT OF INTEREST OF *AMICI CURIAE*

In its groundbreaking 2010 decision in *Padilla v. Kentucky*, the United States Supreme Court recognized that the Sixth Amendment requires defense counsel to provide direct and specific advice about the potential immigration consequences of

[1] *Amici* submit this brief pursuant to 22 N.Y.C.R.R., Part § 1250.4(f), pending leave of Court. *Amici* confirm that no party's counsel authored this *amici curiae* brief in whole or in part; and no party, party's counsel, or other person—other than *amici*, its members, or its counsel—contributed money intended to fund preparing or submitting the brief.

a plea bargain. 559 U.S. 356 (2010). Following *Padilla*, a wide range of resources developed across the state to ensure appropriate advice is available to people facing an impact due to their status as a noncitizen. Many offices, including larger public defense offices, hired on-staff immigration experts to provide individualized assessments on the wide range of potentially devastating immigration consequences that could result from a plea.

Amicus curiae BDS is one of the largest public defense offices in New York State, handling between 20,000 and 40,000 cases of people who are arrested and facing criminal charges per year. The vast majority – more than 90% – of people BDS represents as criminal defense counsel waive their right to a trial and other important due process protections by pleading guilty in order to obtain a favorable and certain disposition of the charges. A significant portion of people represented by BDS are immigrants. BDS provides specialized resources to meet the unique needs of immigrants facing criminal legal proceedings by maintaining full-time on-site staff to provide specific and comprehensive immigration advice to any client who was not born in the United States. BDS also represents people in a wide range of immigration matters, including filing applications for people eligible for immigration relief and representing people in removal proceedings. Since 2009, BDS has counseled or represented more than 15,000 people in immigration matters,

including removal defense, affirmative applications, advisals, and immigration consequence consultations in Brooklyn's criminal court system.

Amicus curiae The Legal Aid Society of Westchester County is a not-for profit corporation that provides criminal defense representation to people in Westchester County who are too poor to retain counsel according to the standards of the New York State Office of Indigent Legal Services. We are the institutional provider in Westchester County that is assigned by the court on felony cases. Our criminal division attorneys receive advice from two senior attorneys that have been trained on the intersection of criminal law and immigration law. We also receive referrals for post-conviction representation from the Legal Aid Society of New York City, the Bronx Defenders, and Brooklyn Defender Services that represent people in immigration court when relief in immigration court is adversely affected by a Westchester County conviction.

Amicus curiae Neighborhood Defender Service of Harlem ("NDS") is a community-based public defense office serving the residents of Northern Manhattan. NDS's unique holistic defense model provides clients with zealous, client-centered advocacy in addressing a wide array of legal issues. NDS advocates for clients in courthouses across New York City including criminal court, family court, housing court, and civil court, as well as in immigration and custody proceedings. NDS's Immigration Defense Team advises every noncitizen client that the organization

represents in criminal proceedings about the adverse immigration consequences of the charges against them and any plea or conviction that may result, including deportability grounds, inadmissibility grounds, bars to immigration status, and triggers for enforcement priorities, mandatory detention, or enhanced criminal re-entry penalties. NDS has a strong interest in ensuring its clients and other New Yorkers obtain competent advice and counsel in criminal court in order to avoid immigration consequences, which often are permanent and outweigh all other consequences of a criminal conviction, and can uproot and destabilize the lives of noncitizens, their families, and their communities.

Amicus curiae New York County Defender Services ("NYCDS") is a public defender office serving clients in Manhattan since 1997. Operating at the immigrant crossroads of the world, NYCDS represents over one thousand noncitizen defendants every year. To serve this client population, NYCDS maintains a dedicated Immigration Unit, which is staffed by highly experienced attorneys with expertise in the intersection of criminal and immigration law. All consultations by our Immigration Unit attorneys are conducted with the ultimate goal of helping noncitizen defendants make informed decisions about their criminal cases and ensuring their fundamental Sixth Amendment right to the effective assistance of counsel. Because inadmissibility poses disastrous consequences for virtually any noncitizen, regardless of status or circumstance, it is an essential component of our

advice to our clients, and, in turn, an essential consideration in the decisions our clients make in their criminal cases. Excluding this critical advice from the constitutional right to effective assistance of counsel would both frustrate our professional legal practice and imperil our noncitizen clients.

Amicus curiae Queens Defenders ("QD") provides indigent defense to people in the criminal and immigration systems. Representing over 450,000 clients since our founding in 1996, QD provides services to the most ethnically diverse county in the United States. QD believes that all individuals have the constitutional right to legal representation if they are charged with a crime and cannot afford an attorney. Our Immigration Department, launched in 2012, is tasked with (a) advising our criminal defense attorneys and strategizing with clients to avoid negative immigration consequences; (b) providing immigration support to the attorneys at arraignments; (c) representing clients before the Immigration Courts and Board of Immigration Appeals; (d) engaging in emergency response to Immigration and Customs Enforcement ("ICE") enforcement actions; and (e) delivering community education efforts in collaboration with QD's Outreach Centers. Our immigration attorneys provide QD's noncitizen clients with competent and complete advice about the immigration consequences of their criminal arrest, charges, and convictions.

In addition, following *Padilla*, the Regional Immigration Assistance Centers ("RIAC") for the State of New York were created through a grant from the New

York State Office of Indigent Legal Services in 2016 to provide expert immigration legal resources across six regions covering the entire State of New York. They include *amici curiae* Albany RIAC, Long Island RIAC, RIAC of Hudson Valley, RIAC Region 2, and WNY RIAC.[2] The RIACs were designed to improve the quality of indigent legal services and ensure the right to effective representation of counsel for noncitizens of the United States as prescribed in *Padilla v. Kentucky*.

The essential functions of the RIAC attorneys include providing defense counsel with advisals for all noncitizen clients, and training defenders on the intersection of immigration and criminal law. RIAC trainings and attorney advisals invariably include, as a fundamental concept of immigration law, advice concerning *removability*, which necessarily includes *both* "deportability" from and "inadmissibility" to the United States. Also included as essential are the impacts on future applications, such as for lawful permanent resident status and naturalization to become a U.S. citizen, and possible relief from removal if the noncitizen is placed in removal proceedings in Immigration Court. Each RIAC is housed in a defense office for mandated representation of indigent persons (*i.e.*, public defenders, legal aid, and assigned counsel programs) while handling referrals from the counties located within each Region. The RIACs handle hundreds of referrals each year from their respective regions. As a result, the criminal and family court attorneys in each

[2] The Padilla Support Center RIAC is the sixth RIAC.

region rely on the advice and legal support of their RIAC to ensure compliance with their legal and ethical obligations as set forth in *Padilla*. Each RIAC also assists the appeals and post-conviction units for each county in their region to understand the consequences of criminal convictions for noncitizen clients who appeal their criminal convictions and/or seek to vacate them.

In addition to the extensive trainings given to the defenders in each region, each RIAC provides training to members of the judiciary throughout the state on immigration-related issues and best practices based on current law and changing case law. RIAC Directors have trained judges at the local level through Magistrates Association meetings; at the district level through annual Judicial District conferences; and at the state level through annual statewide organization annual conferences such as the New York State Association of City Court Judges and the New York State Magistrates Association. The RIACs seek to improve the quality of justice for immigrants accused or convicted of crimes and, therefore, have a great interest in ensuring that courts correctly construe the Supreme Court's holding in *Padilla v Kentucky*.

Amici seek to participate in this case because they regularly represent or assist low-income New Yorkers for whom the immigration consequences of a plea bargain may mean the difference between continuing their lives in the United States or being permanently separated from their families and banished from this country that they

consider home. For many noncitizens, it is grounds of inadmissibility, not deportability, that will impose the harshest and most severe consequences.

In this brief, *amici* provide perspectives and examples from their experience representing and assisting noncitizens in New York's criminal courts to demonstrate that convictions that trigger grounds of inadmissibility can have significant and often irrevocable harm on noncitizens. The examples set forth below of individuals we represent and assist show that when they are provided individualized and specific advice on how a disposition could trigger inadmissibility, they are better equipped to avoid catastrophic consequences for themselves and their families. Creating an illogical and unjust distinction between deportability and inadmissibility is not only unconstitutional, but also will deprive noncitizens of the crucial advice that defense counsel is mandated to provide.

ARGUMENT

The United States Constitution guarantees that anyone facing criminal charges be afforded "the guiding hand of counsel at every step," regardless of financial means. *Gideon v. Wainright*, 372 U.S. 335 (1963). In New York State, this mandate is effectuated on a county-by-county basis, with a state office, the Office of Indigent Legal Services ("ILS") setting statewide standards and distributing funding.[3] County

[3] ILS's budget, provided by New York State, was approximately $261 million in Fiscal Year 2020-21.

indigent defense systems are designed to address each county's unique criminal legal system, the nature of the locality including the mix of urban, suburban, or rural locations, the makeup of the population, the way their police forces operate, and other variables, such as the existence of a college or prison within the county.[4]

Consistent with obligations under the Sixth Amendment, *Gideon*, *Padilla*, and their progeny, New York's defense bar – including certain *amici* – regularly provide effective assistance of counsel that incorporates advice regarding clear immigration consequences of a plea. *See Padilla*, 559 U.S. at 369 (requiring defense counsel to provide "correct advice" whenever the immigration consequence is "clear"). These comprehensive advisals are a central tenet of criminal defense in New York and are critical to ensuring an effective and just legal system.

In the decade since the Supreme Court's decision in *Padilla*, *amici* have advised and assisted thousands of New Yorkers regarding clear immigration consequences of criminal court plea bargain offers, helping noncitizen who have been accused of crimes mitigate the most severe immigration consequences, remain eligible for immigration relief, and maintain family unity and community ties, all while driving down deportations and avoiding long-term or permanent bars to entry into the United States.

[4] The five boroughs that comprise New York City are considered one county for purposes of providing indigent legal services.

A decision, such as the one at issue here, that narrows the scope of *Padilla* risks depriving countless New Yorkers of the opportunity to make an informed decision in their criminal case, creates an unnecessary hurdle to effective negotiations between defense counsel and prosecutors, leads to more New Yorkers being detained and removed by immigration authorities, risks undermining the structures set up to provide the scope of immigration advice currently provided, and thwarts New York defense counsel's ability to satisfy its Sixth Amendment obligations in violation of federal law under *Padilla*.

I. Narrowing the Scope of *Padilla v Kentucky* Would Undermine New York's Public Defense System, Harm Countless People, and Abrogate the Fundamental Right to Counsel in Violation of Federal Law

New York's multi-faceted public defense system, created to provide effective assistance of counsel in accordance with *Gideon*'s mandate, is provided through the State's 62 counties. *See* N.Y. County Law Art. 18-A, § 717 ("The public defender shall represent, without charge, at the request of the defendant, or by order of the court with the consent of the defendant, each indigent defendant who is charged with a crime…"); *id.* at 18-B, § 722 ("The governing body of each county and the governing body of the city in which a county is wholly contained shall place in operation throughout the county a plan for providing counsel to persons charged with a crime…"). Each county's plan may differ slightly, as counties can provide defense services through a county-based public defender office, though a legal aid

society non-profit, by way of individual attorneys accepted onto an 18-B panel pursuant to N.Y. County Law article 18-B, or any combination of these methods. Regardless of the structure, each county must ensure that defense services are provided consistent with constitutional guarantees, including those mandated by the Sixth Amendment and, of particular relevance here, the Supreme Court's *Padilla* decision.

To realize the guarantee of effective assistance of counsel, New York State, through whatever method it chooses to effectuate its responsibility, is required to address the mandate of *Gideon*, *Padilla*, and their progeny by ensuring that all public defenders, whether county-based, non-profit or individual assigned counsel, have the resources necessary to address all the Sixth Amendment obligations under the law.[5] The counties and state (through ILS) have dedicated significant resources for this task, primarily because they are required to do so by the *Padilla* decision. The existence of these resources is what allows defense counsel in New York to fulfill their obligation to provide *Padilla* advisals and to negotiate plea bargains with a view towards avoiding a wide range of immigration consequences. Many of the people we assist are facing deportation based on the particular charges and/or plea bargain they accept. But many others are facing different kinds of immigration

[5] *Padilla* mandates that all criminal defense attorneys, including private attorneys, provide advice where there are clear immigration consequences and does not draw a distinction between private criminal defense attorneys and public defenders. *See, e.g., Padilla*, 559 U.S. at 368.

consequences, such as inadmissibility, a bar to re-entry into the United States, or the loss of defenses to removal based solely on the particular conviction and sentence that results from their guilty plea. Many others will face mandatory immigration detention in jail-like conditions if they are convicted of the charges. The resulting emotional and financial impact of civil immigration detention is hard to overstate: it separates family members, removes breadwinners from households, and deprives many small businesses of their workforce. Additionally, many individuals will lose the chance to obtain status through their family or other programs, such as Deferred Action for Childhood Arrivals ("DACA"). Therefore, robust immigration advice includes a comprehensive analysis and full disclosure of a wide range of potential consequences. Moreover, criminal defense counsel have affirmative constitutional obligations, pursuant to *Padilla,* as well as professional ethical obligations, to actively negotiate a plea bargain that will reduce or eliminate those consequences for the people they represent.[6]

Many of New York's public defender offices, including all *amici* public defense offices, have in-house immigration attorneys, colloquially referred to as

[6] *See* National Legal Aid and Defender Association Performance Guidelines for Criminal Representation, Guidelines 6 & 8 (discussing the need to consider collateral consequences when negotiating pleas and advising defendants); *see also* American Bar Association, Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999), Standard 14-3.2 & cmt. at 126-27 (requiring advice on collateral consequences, and instructing that defense counsel should determine which collateral consequences are important to their clients).

"Padilla" attorneys, named after the Supreme Court case at issue in this litigation. In addition, New York State has created RIACs to provide these assessments and advisals to criminal defense counsel that do not have access to in-house Padilla attorneys. The RIACs serve many public defense offices and are also a resource for the 18-B panel (assigned counsel from the private bar).

With these and other resources, New York's defense bar have standardized providing comprehensive immigration advisals on individual circumstances and consequences of criminal court proceedings, including – where necessary – inadmissibility. Indeed, *amici* routinely train our own staffs, as well as defense attorneys throughout the state, on the need to research all grounds of removability, including both deportability and inadmissibility, as well as eligibility for immigration relief and naturalization, and to negotiate for a disposition that will preserve someone's ability to remain in the United States. These advisals are critical to preserving a person's ability to obtain or retain lawful permanent resident status, naturalize to become a U.S. citizen, and maintain eligibility for other relief – including deferred action for young people who came to the United States without status when they were children, protected status for those from countries that have suffered natural disasters, and special visas for victims of trafficking or domestic violence. Many of these forms of immigration relief can provide a pathway for permanent lawful residence in the United States and eventual citizenship.

If the Second Department were to adopt the Dutchess County Court's highly limited and unconstitutional reading of *Padilla*'s scope, counties could erroneously believe that they can legally limit financial resources for providing the breadth of services *amici* currently provide and which are constitutionally required. These services are essential under *Padilla* as they involve what is minimally required of criminal defense counsel when providing advice about the consequences of a noncitizen accepting settlement of their criminal case by way of a guilty plea. If funding were to be reduced for these essential services, it would be very difficult for most public defense attorneys to ascertain the potential immigration consequences for an individual client. Therefore, defense counsel's ability to avoid those consequences through zealous plea negotiations would likely be hindered and they would be less equipped to warn or advise the people they represent about the precise immigration risk the noncitizen is facing. Immigration law is particularly complex and constantly changing, making it nearly impossible for attorneys without specialized knowledge and training to assess the immigration consequences of different plea bargain offers or determine the risk of proceeding to, and potentially losing at, trial for a noncitizen they represent.

If the unconstitutionally narrow reading of *Padilla* in the lower court's analysis in this case is allowed to stand, *amici* and other organizations that assist noncitizens accused of crimes would be placed in the untenable situation of being

required to meet their Sixth Amendment obligations but being denied adequate resources to do so. Defender offices would have no other way to provide advice consistent with *Padilla*, and countless New Yorkers would be deprived of the constitutional right to counsel.

II. Narrowing *Padilla*'s Scope and Thereby Limiting Access to Counsel Would be Particularly Detrimental to Already-Marginalized Groups

Lawful permanent residents ("LPR") returning from abroad, asylees and refugees, victims of crimes and gender-based persecution, people who entered the country without authorization, and those who have received DACA or Temporary Protected Status ("TPS") may be subject to inadmissibility grounds, even if they are not subject to deportability grounds. Entering a plea in criminal court to an offense included in the inadmissibility grounds could result in removal from the United States and a permanent bar to reentry. Denying people the right to effective assistance of counsel by narrowing the scope of mandated *Padilla* advice would predictably tear apart New York families and communities.

A. Lawful Permanent Residents May Lose Status and Face Detention

Absent accurate, comprehensive advice, a LPR could easily lose their status, face mandatory detention, and be removed and barred from the United States, solely because they were not provided with an individualized assessment, following a careful analysis, of the specific immigration consequences of a particular plea bargain. For LPRs, advice on both deportability and inadmissibility is often equally

important. For instance, a plea that renders someone inadmissible, even if it does not render them deportable, may mean they can never travel abroad without facing banishment from the United States.

Based on their priorities, an LPR may prefer to accept a prison sentence that preserves their permanent residency or ability to travel abroad, particularly to their country of origin where their parents, grandparents or other family members may still reside, rather than take a plea to probation that will result in mandatory immigration detention and removal from the United States, as well as potentially a permanent bar from returning. Distinguishing between advice on deportability and inadmissibility will deprive people of essential immigration advice. Failing to require or equip defense attorneys to provide that relevant advice, as well as negotiate with the prosecutor for the more humane outcome for a particular individual is unjustified, illogical, and unconstitutional, particularly when the ultimate result is often the same for LPRs – banishment from their homes, parents, children, jobs, schools, and communities.

R.Z.

R.Z., a New York City-based LPR, was finishing his master's degree in accounting and looking forward to establishing a safe and stable life when he was charged with Grand Larceny in the Third Degree. R.Z. had lived in the United States for six years and had no prior criminal convictions. A conviction for any felony

larceny-related offense would have rendered him inadmissible as a Crime Involving Moral Turpitude ("CIMT"), 8 U.S.C. § 1182(a)(2)(A)(i), and a conviction for Grand Larceny in the Third Degree would have precluded him from the "petty offense exception."[7] It was critical for R.Z. that his criminal case be disposed of – by plea agreement or otherwise – without making him inadmissible to the United States so that he could travel abroad to see his mother, who had been the only source of love and support during his otherwise violent and traumatic childhood, and still return to his husband in the United States.

R.Z. was also concerned that the case would prevent him from one day becoming a United States citizen. Though R.Z. was otherwise eligible for naturalization, his application would be barred if he was convicted of either a felony CIMT or any CIMT offense resulting from a sentence of more than six months.

After significant advocacy and negotiations with the District Attorney's office, his public defender was able to negotiate a plea agreement that involved a plea to a class B misdemeanor with a sentence of restitution. Although the plea offense was also a CIMT, because the misdemeanor was only punishable by a three-

[7] The Immigration and Nationality Act ("INA") § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii), includes a "petty offense" exception to inadmissibility based upon the conviction of a CIMT where "the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed)."

month jail sentence, it fell within the "petty offense exception" and thus would not render him inadmissible. Tragically, just before R.Z.'s case was scheduled for disposition, his mother died and R.Z. traveled abroad to attend her funeral while his criminal case was still pending. If R.Z. did not resolve his criminal case with a disposition that retained his admissibility, he would have been denied admission to the United States when he returned home from his mother's funeral.

R.Z.'s public defense team sprang into action and arranged for R.Z. to plead guilty to the agreed-upon offense while he was still abroad. His attorneys provided a travel letter explaining why he remained legally admissible to the United States and proof that the case was resolved with a conviction that maintained his admissibility.

Upon landing in New York, R.Z. was detained for more than three hours in the Customs and Border Protection ("CBP") offices and initially told that he was inadmissible because of the Grand Larceny charge. When R.Z. asked the officers to closely review the paperwork that his public defender provided, they agreed he was admissible and he was admitted back to the United States, where he was able to return to his husband and his life. If his public defense team had not focused on preserving his admissibility during plea negotiations, R.Z. would have faced the unimaginable choice between attending his beloved mother's funeral and preserving his ability to maintain his life in the United States.

B. Barriers to Adjustment of Status

P.A.

P.A. had a long history of ties to the United States and came to live permanently after his family suffered devastation and death as a result of violence in his country of origin. Although P.A. was deportable, he had no criminal record and was eligible for lawful immigration status because of either a history of abuse (pursuant to the Violence Against Women Act ("VAWA")[8]) by his ex-wife or through marriage to his U.S. citizen partner as long as he remained admissible. When P.A. was charged with Menacing in the Second and Third Degrees and Criminal Possession of a Weapon in the Fourth Degree, his eligibility for lawful status was placed in danger. A conviction on any of those offenses would have rendered him inadmissible, making it far more difficult to adjust to permanent resident status based on the history of abuse he suffered.

P.A.'s public defense team prioritized resolving the case with a disposition that would not render him inadmissible and were ultimately able to negotiate a non-criminal plea bargain. After the case was resolved, P.A. happily married his U.S. citizen girlfriend and his application for a green card is pending. Once approved, he will no longer be deportable or face separation from his partner.

[8] VAWA created a special route to lawful immigration status for victims of domestic abuse who normally must rely on their U.S. citizen or LPR abusers to file for status for them. *See* 8 U.S.C. § 1255(a) (permitting VAWA self-petitioners to adjust status to that of a LPR).

C. Jeopardizing Special Immigrant Juvenile Status

S.E.

S.E., a teenager who crossed the southern border into the United States by himself, was placed in removal proceedings after he requested asylum from U.S. immigration authorities. Because of his young age and history of abuse, neglect, or abandonment by a parent, his public defense team determined that he was also eligible for Special Immigrant Juvenile Status ("SIJS"). SIJS provides a pathway to permanent residency for vulnerable youth for whom a state court has determined it is in their best interest to stay in the United States.[9]

While his removal proceedings were pending, S.E. was charged with Grand Larceny in the Third Degree. A conviction to that charge would have rendered S.E. inadmissible and thus ineligible for SIJS. To preserve S.E.'s chance to build a life in the United States, his public defense team prioritized resolving the case in a way that would not render him inadmissible. Ultimately, his public defenders were able to negotiate a plea that did not jeopardize S.E.'s future and resulted in a non-criminal disposition.

Because the case was resolved without making him inadmissible, S.E. was able to file his applications for SIJS and accompanying lawful permanent residency, thus providing him with a defense to removal.

[9] *See* 8 U.S.C. § 1101(a)(27)(J)(i).

D. Negatively Impacting Other Forms of Immigration Relief

In New York, approximately 725,000 people – comprising 15% of the immigrant population – are undocumented.[10] Many are eligible for immigration relief in the form of prosecutorial discretion or temporary authorization to remain in the United States. Those forms of relief – including DACA[11] and TPS[12] – often require a person to be admissible to the United States.

Temporary Protected Status ("TPS")

B.E.

B.E., a father of two U.S. citizen children for whom he is the sole caretaker, came to the United States as a child with his parents and is a longtime TPS recipient. Although B.E. has Haitian citizenship, he had never been to Haiti. B.E. lived and worked in the United States under TPS authorization, which he diligently renewed on a regular basis. As a young teenager, B.E. was bullied by gang members in his neighborhood and assaulted to the point of losing consciousness and suffering significant harm.

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[10] *See* American Immigration Council, Fact Sheet: *Immigrants in New York*, Aug. 6, 2020, https://www.americanimmigrationcouncil.org/research/immigrants-in-new-york.

[11] DACA, which was created through executive action in 2012, defers the removal of certain people who were brought to the United States as children and provides them with work authorization. *See* U.S. Citizenship and Immigration Service, "Consideration for Deferred Action for Childhood Arrivals," http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca.

[12] TPS is a statutory form of relief for nationals of countries affected by natural disasters or armed conflict. *See* 8 U.S.C. § 1254a.

After living in the United States for two decades, B.E. was involved in an altercation with a neighbor that left B.E. badly injured. As a result of the conflict, B.E. was charged with a number of felony and misdemeanor offenses, including criminal possession of a firearm. While the case was pending, B.E. was required to re-register for TPS or let the status lapse, rendering him undocumented and deportable. If convicted of any of the felony offenses, or any of the class A misdemeanors and sentenced to six months or longer in jail, United States Citizenship and Immigration Services ("USCIS") would likely have revoked B.E.'s TPS. Even if B.E.'s TPS was revoked, he might have been eligible for other immigration relief so long as he was not convicted of a firearm offense, which would constitute a CIMT punishable by more than one year in prison, or certain other offenses.

Because preserving B.E.'s TPS was critical to ensuring he was able to remain in the United States and care for his children, any conviction on the charged offenses would have a severe punitive result: having to leave the United States with his U.S. citizen children to a country where he had never even been and being barred from returning to the U.S. where he had lived for nearly 25 years. After asking the court to dismiss the case in the interest of justice, B.E.'s public defense team was able to negotiate a plea bargain to a B misdemeanor that was not a CIMT and that did not bar him from re-registering for TPS and preserved his admissibility and eligibility

for the other forms of immigration relief. Shortly after pleading guilty to the agreed-upon disposition, B.E. successfully renewed his TPS.

Deferred Action for Childhood Arrivals ("DACA")

S.A.

S.A., a DACA recipient, is a young mother of three U.S. citizen children. She was charged with felony assault in the second degree less than two weeks before her DACA was set to expire. S.A. was not able to renew her DACA with a pending criminal case, so it expired. Because preserving her admissibility, and therefore eligibility for DACA, was critical to ensuring that she be able to protect herself and her children from family separation, her public defenders negotiated for her to complete pre-indictment programming. After S.A. completed six months of programming, the District Attorney agreed to dismiss her case. Shortly thereafter, S.A., with the help of her public defense team, submitted a DACA renewal application, which USCIS approved within a month, providing S.A. with the chance to maintain life in the United States for herself and her children.

G.V.S.

G.V.S. came to the United States as a three-year-old and later received DACA. Before New York decriminalized marijuana possession, he was charged under the marijuana provisions of the criminal law. Pleading guilty to the charges would have rendered G.V.S. inadmissible and threatened his DACA, but his public defender was

ultimately able to secure a disposition that did not trigger inadmissibility and preserved DACA, allowing him to work and live lawfully in the United States.

III. Narrowing the Scope of *Padilla* Would Hinder the Ability of Defense Counsel and District Attorneys to Continue To Engage in Plea Negotiations Informed by Immigration Consequences

The *Padilla* Court recognized the prosecution's responsibility to understand and consider immigration consequences when formulating a plea offer. *Padilla*, 559 U.S. at 366-67; *see also generally* Robert M. A. Johnson*, A Prosecutor's Expanded Responsibilities Under Padilla*, 31 St. Louis U. Pub. L. Rev. 129, 130-131, 136 (2011) (noting that prosecutors are charged "to seek justice, not merely to convict offenders" and describing the "Supreme Court's recognition of the importance of collateral consequences to a just resolution of a matter"). The decision also acknowledges that when immigration consequences inform a negotiation, the result will often be more favorable to both the prosecution and defendants in a criminal case. *See Padilla*, 559 U.S. at 374. Prosecutors who consider the immigration consequences of a plea bargain regularly rely on defense counsel to provide a thorough, credible analysis during negotiations. In many jurisdictions, District Attorney's offices recognize that noncitizens should not suffer harsher consequences than U.S. citizens for the same offenses and are therefore willing to alter plea offers to address a wide range of potential immigration consequences based on a review of memos and other information provided by defense counsel after consultation with

an immigration expert. These negotiations regularly lead to plea offers that preserve admissibility and thus eligibility for adjustment of status to lawful permanent residency, the ability of LPRs to travel to see aging parents or handle personal matters, and certain visas or relief from deportation.

Where defense counsel understands the clear immigration consequences of a criminal plea, they can directly impact negotiations to avoid such consequences. This benefits the system as a whole. *See Padilla*, 559 U.S. at 373 ("[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."). District Attorneys across New York State and the United States have recognized and responded to *Padilla*'s mandate by negotiating with criminal defense attorneys to not only address pleas that would make a noncitizen deportable, but also inadmissible. They acknowledge the relevance of advice tailored to the individual circumstances for each person, including inadmissibility, and also consider the importance of a noncitizens' ability to obtain or preserve legal status and the possibility for future immigration remedies.

These types of negotiations are often critical to ensuring access to immigration relief for people who have never known any home other than the United States. For

example, M.D. a longtime U.S. resident who came to the United States as a child without lawful status, was charged with an attempt to commit Robbery in the First Degree. After speaking with an immigration specialist in the public defender office, it was established that M.D. may be eligible for a visa or other immigration relief, including DACA. A conviction to the charged offense would have rendered him ineligible for DACA. Although the District Attorney's office was expected to offer a plea bargain that would have involved pleading guilty to an A misdemeanor, his public defense team negotiated a plea bargain that preserved his eligibility for these forms of immigration relief and that would enable him to defend himself against removal from the United States

Similarly, C.F., a longtime TPS recipient from El Salvador, has lived in the United States for more than 20 years, since he was a young child. He was charged with Criminal Contempt in the First Degree, placing his TPS in danger as a conviction on that charge would result in the revocation of his TPS. His public defender prioritized preserving his TPS eligibility and was able to negotiate a plea to a non-criminal disposition with the District Attorney's office.

CONCLUSION

The Sixth Amendment guarantee of legal advice and the benefit of negotiations are fundamental to the right to counsel and have been upheld as nationwide mandates. This is with good reason: grounds of inadmissibility can have

catastrophic consequences on noncitizen New Yorkers that *amici* assist and represent. To satisfy this constitutional mandate and meet its requirement defense counsel needs adequate and appropriate resources. In the context of noncitizens accused of crimes who face potential immigration-related consequences, it is crucial that expert immigration attorneys be involved and advise criminal defense counsel to assure that counsel can properly identify, advise, and negotiate in the client's best interest.

The narrow reading of *Padilla* in this case, if upheld, will send the message that, in New York, the counties and state responsible for providing the right to counsel for the accused do not have to fund or support this essential service. The elimination of this requirement to advise on grounds of inadmissibility (despite the clear and substantial impact those grounds may have on a defendant's immigration situation) and the corresponding impact on resources to support these advisals, would significantly impede not only defense counsel's obligation to advise the client, but also their effectiveness in negotiating better outcomes with prosecutors. It likewise would obstruct the prosecutors ability and mandate to consider immigration consequences when fashioning an offer or plea bargain to present to the defense counsel. Furthermore, limitations on the crucial advice necessary regarding immigration consequences will wreak havoc on New York's immigrant

communities – tearing families apart and leading to unnecessary removals of individuals who otherwise would have had avenues to status or relief.

This Court should reverse the County Court's Decision and reaffirm the broad nature of the right to immigration analysis and advice in New York State.

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Brooklyn, NY

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CERTIFICATE OF COMPLIANCE

This brief complies with § 1250.8 of the Practice Rules of the Appellate Division. This computer-generated brief was prepared using a proportionally spaced typeface. It complies with the typeface and type style requirements because it was prepared using Microsoft Word in Times New Roman 14-point font with double line spacing.

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PROOF OF SERVICE

This notice of motion for leave to submit a brief as *amici curiae* and proposed *amici brief* attached hereto as Exhibit A was filed through digital submission on May 24, 2021, and served on: Carter E. Greenbaum (cgreenbaum@paulweiss.com), Luke H. Phillips (lphillips@paulweiss.com), Walter Rieman (wrieman@paulweiss.com), Christina M. Tapiero (ctapiero@bronxdefenders.org), and Kirsten A. Rappleyea, Esq. (krappleyea@dutchessny.gov) via e-mail.

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