Immigration for Non-Immigrant Attorneys

Presented by:
The Solo and Small Practice Section

March 19th, 2015
3 p.m. - 5 p.m.

Lloyd George Federal Courthouse
Las Vegas, NV

2 CLE Hours

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9456 Double R Blvd. Suite B Reno, NV 89521 775-329-4100
**BIOGRAPHY**

**Hardeep “Dee” Sull** is the Managing Partner of **Sull and Associates**, based in Las Vegas, Nevada. Sull and Associates is a boutique law firm providing services that focus on the non-immigrant and immigrant issues in Nevada and globally. She is admitted as an attorney of the Nevada Supreme Court and the United States Court of Appeals for the Ninth Circuit. She earned a Masters in Law at the University of Minnesota and an LL.B. with Honors from the University of East Anglia’s, The Norwich Law School. In addition, she has studied at The Hague Academy of International Law located in The Hague, Netherlands and the Sorbonne in Paris, France. Before entering private practice, Ms. Sull spent a substantial amount of time working with Non-Governmental Agencies, notably Amnesty International. She is an active member of the American Immigration Lawyers Association. Ms. Sull has spoken about immigration and human right related topics nationally and has been recognized as an expert in immigration law by state courts. Hardeep or “Dee” has also co-edited publications for the American Immigration Lawyers Association and the Global Migration Section. She focuses on Global immigration and US immigration law, advising individuals, high net worth individual and corporations on their immigration options. Ms. Sull can be reached at dee@sullglobal.com.
Introduction of Immigration Law

• The probability that we may fail in the struggle ought not to deter us from the support of a cause we believe to be just. (Abraham Lincoln).

• Immigration law is a patchwork of laws that can be restrictive and open towards immigrants.

• This is further exacerbated by the various agencies involved in this process.

• In 2002, the Homeland Security Act was enacted which ensured that most decisions would be made by officers of the Department of Homeland Security (DHS).
DHS - Department of Homeland Security

- Consists of U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE).
- USCIS is responsible for the adjudications of immigration benefits and within this agency, we have an appellate body of reviewing decisions, the Administrative Appeals Office (AAO).
- CBP is responsible for all persons and goods arriving at the border.
- ICE is in charge investigating violations of immigration laws, and ensuring the departure of those who are not authorized to stay in the U.S.

Department of State (DOS)

- It is important to note that they have some decision making authority over visas.
- In these instances, a non-citizen of the United States makes an application for either a non-immigrant or immigrant visa to the U.S.
- Here, the consular officer has authority to issue the visa but the rules governing the requirements for the visa are interpreted by DHS. They share authority.
EOIR-Executive Office of Immigration Review

- Many of you will be concerned with this office at one point of your career.
- The immigration court system is directed by the Attorney General’s Office. It is part of the Department of Justice.
- Here, an individual may appear before the judge for apprehension by CBP upon entering of the USA, an adverse decision by an agency, or by ICE while in the country.
- It can be a documented or undocumented alien before the court.

OTHER AGENCIES THAT ARE IMPORTANT

- Office of Special Counsel, responsible for immigration-related employment discrimination.
- Department of Justice’s Office of the Chief Administrative Hearing Officer (OCAHO) will hear such cases and sanction the employer.
- Department of Labor (DOL) is in charge of decisions of the U.S. labor market and workforce issues. Administrative review of adverse decisions is heard by the Board of Alien Labor Certification Appeals (BALCA).
- The Office of Refugee and Resettlement under the Department of Health and Human Services (HHS) are in charge of unaccompanied minors.
Immigration law tugs at the very moral of our nation and is reflected in our immigration laws.

Congress has authority over individuals who may be allowed to stay in the U.S. and who are allowed to stay.

In 1996, the Immigration Reform and Immigrant Responsibility Act (IIRIRA)

Removable vs. Deportability

**WHAT EVERY ATTORNEY NEEDS TO DO IN THEIR PRACTICE!**

- Large immigrant and non-immigrant population
- Hospitality city
- Each intake form should identify if an individual is a U.S. citizen or non-citizen
- If a non-citizen, you must ask if the individual is a documented alien or undocumented alien
- An undocumented alien can be someone who entered this country with a visa but failed to leave upon the expiration of their visa
WHAT EVERY FAMILY ATTORNEY SHOULD BE AWARE OF

• Your intake form should include a question as to what the status of the individual is?
• Where an individual obtained their status as a documented alien, you must inquire whether that was through marriage.
• If an individual obtained their status through marriage, ask them for a copy of the “green” card.
• Where the “green” card was issued on the basis of marriage: there are specific issues that would be of concern to you:
  • For instance, length of marriage.

CONT.

• Was there any domestic violence?
• If there are any U.S. born children?
• Financial Support Issues (Form I-864): why should you care?
• Was there a prenuptial?
• Were they ever on a fiance visa?
• Operation of a fiance visa
Criminal Immigration

- Padilla v. Kentucky, 559 U.S.__(2010)
- Chaidez v. United States, 568 U.S.__(2013)
- Items that should always be on your intakes
  - Status of the individual
  - Length of their stay here
  - Any previous crimes
  - Any previous arrests
  - Use of immigration attorneys for plea agreements, through the process, possible relief.
  - Definition of a criminal conviction in a immigration context

Nevada

- Deportable vs. inadmissible crimes
- Moncrieffe v. Holder (9th Circuit Case)
- Moral turpitude crimes
- Domestic violence
- Crimes against children
- Miscellaneous crimes
- Waivers of relief from deportation
- strategies
HUMANITARIAN RELIEF

- Violence against Women Act (VAWA)
- U-visas
- Special Immigrant Juvenile Status
- Temporary Protective Status
- Prosecutorial discretion

The New Presidential Executive Orders

- Deferred Action for Childhood Arrivals (DACA)
- Who is eligible?
- Continuous residence
- Crimes
- Expanded DACA-current Texas Injunction
- Distinguishing features of this program
- Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)
**Cont.**

- Requirements
- Continuous residence
- Crimes
- Consult an immigration attorney

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**Conclusion**

-a truly complex area of the law.
-When in doubt consult an immigration attorney.

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Sull and Associates

Our firm is a boutique immigration law firm that practices in Nevada and globally. Our immigration services include

- business immigration visas,
- employer/employee visas,
- family based immigration,
- criminal immigration advice,
- appellate work,
- and global migration visas.

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U.S. DEPARTMENT OF HOMELAND SECURITY

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CHIEF PRIVACY OFFICER

CIVIL RIGHTS & CIVIL LIBERTIES

DOMESTIC NUCLEAR DETECTION OFFICE

FEDERAL LAW ENFORCEMENT TRAINING CENTER

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U.S. COAST GUARD

FEDERAL EMERGENCY MANAGEMENT AGENCY

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U.S. SECRET SERVICE

TRANSPORTATION SECURITY ADMINISTRATION
U.S. CITIZENSHIP & IMMIGRATION SERVICES

Program Offices

- Administrative Appeals
- Citizenship
- Communications
- Legislative Affairs
- Performance & Quality
- Privacy
- Transformation Coordination

Directorates

- Customer Service and Public Engagement
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- Field Operations
- Fraud Detection & National Security
- Management
- Refugee, Asylee & International Operations
- Service Center Operations

As of February 20, 2014
Title II: Chapter 2 -- Ch. 2 (§§211-19) -- Admission Qualifications for Aliens; Travel Control of Citizens and Aliens

Sec. 211 Admission of Immigrants into the United States [8 U.S.C. 1181] <Leg Hist>

Sec. 212 Inadmissible Aliens [8 U.S.C. 1182] <Leg Hist>

Sec. 213 Admission of Aliens on Giving Bond or Undertaking; Return Upon Permanent Departure [8 U.S.C. 1183] <Leg Hist>

Sec. 213A Requirements for Sponsor's Affidavit of Support [8 U.S.C. 1183a] <Leg Hist>

Sec. 214 Admission of Nonimmigrants [8 U.S.C. 1184] <Leg Hist>

Sec. 215 Travel Control of Citizens and Aliens [8 U.S.C. 1185] <Leg Hist>

Sec. 216 Conditional Permanent Resident Status for Certain Alien Spouses and Sons and Daughters [8 U.S.C. 1186a] <Leg Hist>


Sec. 218 Admission of Temporary H-2A Workers [8 U.S.C. 1188] <Leg Hist>

Sec. 219 Designation of Foreign Terrorist Organizations [8 U.S.C. 1189] <Leg Hist>
Matter of Graciela QUILANTAN, Respondent

File A095 426 631 - Dallas, Texas

Decided July 28, 2010

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

For purposes of establishing eligibility for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a) (2006), an alien seeking to show that he or she has been “admitted” to the United States pursuant to section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A) (2006), need only prove procedural regularity in his or her entry, which does not require the alien to be questioned by immigration authorities or be admitted in a particular status. Matter of Arequillín, 17 I&N Dec. 308 (BIA 1980), reaffirmed.

FOR RESPONDENT: Furqan Sunny Azhar, Esquire, Dallas, Texas

FOR THE DEPARTMENT OF HOMELAND SECURITY: Judson J. Davis, Assistant Chief Counsel

BEFORE: Board Panel: COLE and PAULEY, Board Members. Concurring Opinion: FILPPU, Board Member.

COLE, Board Member:

In a decision dated October 16, 2006, an Immigration Judge found the respondent removable under sections 212(a)(6)(A)(i) and (7)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(6)(A)(i) and (7)(A)(i) (2006), as an alien who entered without being inspected, admitted, or paroled and who was not in possession of a valid entry document. The Immigration Judge also pretermitted the respondent’s application for adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a) (2006), but granted her voluntary departure. The respondent has timely appealed from that decision and has filed two briefs in support of her appeal. The Department of Homeland Security (“DHS”) filed a brief in response to our request for supplemental briefing. The appeal will be sustained, and the record will be remanded to the Immigration Judge for further proceedings.
I. FACTUAL AND PROCEDURAL HISTORY

The basic facts in this case are not in dispute. The respondent is a native and citizen of Mexico who entered the United States in 1993 using a valid border crossing card. She remained without departure until December 2000, when she returned to Mexico to visit family members. At some point between 1993 and 2000, she lost her border crossing card. In January 2001, she applied for a United States visitor’s visa at the consulate in Mexico, but her application was denied. A few days later, on January 10, 2001, without a valid document to enter, the respondent approached the border as a passenger in a car being driven by her United States citizen friend. According to the respondent’s testimony, the immigration inspector asked her friend whether he was an American citizen but did not ask her anything. The officer then waved the car through the port of entry. The respondent married a United States citizen in January 2006, and she has an approved immediate relative visa petition, which is the basis for her adjustment of status application.\footnote{1}

In a Notice to Appear served on the respondent on August 22, 2005, the DHS charged her with removability under sections 212(a)(6)(A)(i) and (7)(A)(i)(A) of the Act. The respondent denied the charges, but the Immigration Judge found her to be removable on both grounds. The Immigration Judge also found her to be statutorily ineligible for adjustment of status, because she had not been “admitted” to the United States within the meaning of section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A) (2006). Specifically, he held that section 101(a)(13)(A) requires that an alien be lawfully admitted to the United States, which requires a lawful basis to enter the country, as evidenced by a valid document that permits entry or parole. He concluded that procedural regularity at the time of entry was insufficient. The Immigration Judge further found that although the respondent had arguably been inspected, she had not been admitted and thus was statutorily ineligible to adjust status under section 245(a) as one who has been “inspected and admitted or paroled into the United States.”

II. ISSUE

Under section 245(a) of the Act, an applicant for adjustment of status must have been “inspected and admitted or paroled into the United States.”

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1 The respondent previously married her current husband in 2002, but it was later discovered that she had a legal impediment to contracting this marriage because she had never terminated her prior marriage to a Mexican citizen. She subsequently divorced her Mexican husband in December 2005 and remarried her current United States citizen husband in January 2006.
Section 101(a)(13)(A) of the Act provides that the terms “admission” and “admitted” mean “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” Therefore, in order to determine if the respondent is eligible for adjustment of status, we must decide whether she was inspected and “admitted” to the United States. To do so, we must decide whether she need only show procedural regularity in her entry to establish that she was “admitted” pursuant to section 101(a)(13)(A) of the Act, or whether she must prove compliance with substantive legal requirements.

III. ANALYSIS

On appeal, the respondent argues that she was inspected and admitted to the United States for purposes of section 245(a) when she presented herself for inspection at the port of entry and the inspecting officer allowed her to enter the United States. She maintains that the term “admitted,” as defined in section 101(a)(13)(A) of the Act, does not require her to have been lawfully entitled to enter the United States. Rather, she asserts that physically presenting herself for questioning constitutes an inspection, even if she volunteered no information and was not questioned by the immigration authorities. In support of her position, the respondent cites Matter of Arequiillin, 17 I&N Dec. 308 (BIA 1980), where we interpreted the term “admitted,” as it is used in section 245(a) of the Act, to denote only procedural regularity in an entry, not compliance with substantive legal requirements. She asserts that this interpretation remains valid and controlling in her case and that she therefore made a lawful entry into the United States after inspection and authorization. Accordingly, she seeks to have the record be remanded to give her an opportunity to apply for adjustment of status.

Following the respondent’s appeal, we requested supplemental briefing from both parties on two issues. First, we requested the parties’ views on the question whether, for purposes of adjustment of status under section 245(a) of the Act, the term “admitted” (as defined in section 101(a)(13)(A) of the Act to mean “lawful entry” into the United States) requires that an applicant, at the time of the claimed admission, be lawfully privileged or entitled to enter the United States. Second, we sought the parties’ views on whether, in enacting section 101(a)(13)(A) of the Act in section 301(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-575 (“IIRIRA”), Congress intended to continue to allow aliens who physically presented themselves for questioning and were permitted to pass through the port of entry to have
satisfied the "inspected and admitted" requirement of section 245 of the Act. On appeal, both parties agree that the term "admitted" in section 245(a) of the Act demands only procedural regularity in an entry, not compliance with substantive legal requirements, and they urge us to adopt that interpretation. In addition, the DHS argues that the respondent did not establish procedural regularity at the port of entry because she has not shown that she was admitted in a particular nonimmigrant or immigrant status.

For the following reasons, we agree with the parties that admission for purposes of adjustment of status under section 245(a) of the Act requires only procedural regularity.

A. Legislative History of Adjustment of Status Provisions

As originally enacted, section 245(a) of the Act provided, in pertinent part, as follows:

The status of an alien who was lawfully admitted to the United States as a bona fide nonimmigrant and who is continuing to maintain that status may be adjusted by the Attorney General in his discretion (under such regulations as he may prescribe to insure the application of this paragraph solely to the cases of aliens who entered the United States in good faith as nonimmigrants) to that of an alien lawfully admitted for permanent residence [if certain requirements have been met].

Immigration and Nationality Act of June 27, 1952, ch. 477, § 245(a), 66 Stat. 163, 217 (emphasis added). Thus, the statute originally provided adjustment of status to aliens who were lawfully admitted to the United States as bona fide nonimmigrants and continued to maintain that status. See Matter of Pires Da Silva, 10 I&N Dec. 191, 192 (BIA 1963), overruled on other grounds by Tibke v. INS, 335 F.2d 42 (2d Cir. 1964), and modified, Matter of Krastman, 11 I&N Dec. 720 (BIA 1966).

Congress subsequently amended the statute in 1958 to provide as follows:

The status of an alien who was admitted to the United States as a bona fide nonimmigrant may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence [if certain requirements have been met].

Act of Aug. 21, 1958, Pub. L. No. 85-700, 72 Stat. 699 (emphasis added). Thus, Congress dropped the requirement of lawful admission and maintenance of nonimmigrant status, but adjustment of status still remained available only

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2 Before the enactment of the IIRIRA, section 101(a)(13) of the Act defined an "entry" but not an "admission," and it did not state that an "entry" had to be lawful.
to aliens who had been admitted as bona fide nonimmigrants. See Matter of Pires Da Silva, 10 I&N Dec. at 192.

In 1960, Congress further amended section 245(a) of the Act to remove the requirement that an alien have been admitted as a bona fide nonimmigrant. The language of the statute was amended to read as follows:

The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence [if certain requirements have been met].


This 1960 amendment is significant because it replaced the requirement that the alien be admitted as a bona fide nonimmigrant, i.e., that an alien’s admission be substantively lawful, with a requirement that the alien simply be inspected and admitted, i.e., that his or her admission be procedurally regular. In Matter of Pires Da Silva, 10 I&N Dec. at 192-94, we reviewed the legislative history and discussed the significance of the removal of the bona fide nonimmigrant requirement in the 1960 amendments. See id. at 192-93 (discussing section 10 of House Joint Resolution 397, which was enacted as the Act of July 14, 1960); see also S. Rep. No. 86-1651 at 10-12 (1960), reprinted in 1960 U.S.C.C.A.N. 3124, 3135-38, 1960 WL 4866. We noted that Congress expressed its intention to broaden the statute “so as to include all aliens (other than alien crewmen) who have been inspected and admitted or who have been paroled into the United States, thereby providing considerably more flexibility in the administration of the law.” Matter of Pires Da Silva, 10 I&N Dec. at 193. We further commented as follows:

The legislative history fails to reveal any discussion as to the nature of the “considerably more flexibility in the administration of the law” referred to above in connection with the enactment of the proposed amendment. . . . It is believed that the change in language may have been motivated by a series of Service decisions in which the bona fides of the nonimmigrant status of the aliens were questioned and resulted in holdings that aliens, who were not actually bona fide nonimmigrants and were in fact immigrants, were not eligible for adjustment of status. The elimination of the necessity of examining into the bona fides of the nonimmigrant status of persons who were inspected and admitted as nonimmigrants would provide the greater flexibility in the administration of the law referred to in the legislative history.

Id. at 193-94 (footnote omitted).

Thus, we held that an alien was not required to be admitted as a bona fide nonimmigrant in order to be “inspected and admitted.” In other words, as long as an alien’s entry into the United States as a nonimmigrant was procedurally
proper (i.e., the alien underwent an inspection by an immigration officer, who subsequently admitted the alien), the alien could seek adjustment of status under section 245(a).

Matter of Arequillin, 17 I&N Dec. 308, presented a factual scenario nearly identical to the one in this case. After considering the relevant statutes, we expressly rejected the notion that only an alien who had been “lawfully or legally” admitted to the United States could qualify for adjustment of status under section 245(a) of the Act. Id. at 310. Instead, we determined that an alien who had physically presented herself for questioning and made no knowing false claim of citizenship had satisfied the “inspected and admitted” requirement of section 245(a) of the Act. Thus, we interpreted the term “admitted” to denote only procedural regularity, not compliance with substantive legal requirements.

B. Adjustment of Status After the IIRIRA

In light of the 1996 enactment of the current definition of the terms “admission” and “admitted” at section 101(a)(13)(A) of the Act, we are confronted with the question whether the interpretation we set forth in Matter of Arequillin in 1980 remains valid. Specifically, we must decide whether, in enacting the IIRIRA, Congress intended to continue to allow aliens who had presented themselves for inspection and were allowed to enter the United States to have satisfied the inspection and admission requirements for adjustment of status under section 245(a) of the Act.

We find that, by themselves, the terms “admitted” and “admission,” as defined in section 101(a)(13)(A) of the Act, continue to denote procedural regularity for purposes of adjustment of status, rather than compliance with substantive legal requirements.3 We held in Matter of Arequillin, 17 I&N Dec.

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3 We acknowledge that subsequent to the enactment of the IIRIRA in 1996, we issued a decision construing the related term “lawfully” to denote compliance with substantive legal requirements for purposes of section 101(a)(20) of the Act, 8 U.S.C. § 1101(a)(20) (2000), which defines the term “lawfully admitted for permanent residence.” See Matter of Koloamatangi, 23 I&N Dec. 548 (BIA 2003). However, our holding in that case was limited to the specific situation presented by section 101(a)(20), which uses the phrase “lawfully admitted for permanent residence.” (Emphasis added.) In Matter of Koloamatangi, 23 I&N Dec. at 550, we observed that pre-1996 Board decisions and decisions by the Federal courts of appeals found that the phrase “lawfully admitted for permanent residence” did not apply to aliens who had obtained their permanent resident status by fraud or had otherwise not been entitled to it. We found that the reasoning in those decisions remained sound and survived the 1996 amendments to the Act. Id. In contrast, we must now address the ambiguity created by Congress’s use of the term “lawful” (continued...
at 310, that an admission occurs as long as it is procedurally regular. Specifically, we stated that an admission "occurs when the inspecting officer communicates to the applicant that he has determined that the applicant is not inadmissible." Id. at 310 n.6. We are not persuaded that section 101(a)(13)(A) of the Act, as enacted by the IIRIRA, abrogates our holding in Matter of Areguillin.

Initially, we find no indication that in enacting the current definition of the term "admitted" at section 101(a)(13)(A) of the Act, Congress intended to supersede the Board's long-standing interpretation of that term as it applies to the "inspected and admitted" requirement of section 245(a). Specifically, we find no evidence that in amending former section 101(a)(13) of the Act, Congress intended to reestablish, for purposes of demonstrating eligibility for adjustment of status, the former requirement that an alien's admission must comply with substantive legal requirements. On the contrary, as we indicated in Matter of Pires Da Silva, 10 I&N Dec. 191, by changing the law in 1960, Congress intended to establish that aliens who presented themselves for inspection and were allowed to enter the United States had satisfied the requirements for adjustment of status under section 245(a) of the Act. Furthermore, it has been well documented that Congress amended section 101(a)(13) of the Act simply to eliminate that aspect of the "entry doctrine" that permitted aliens who had entered without inspection to have greater procedural and substantive rights in deportation proceedings than those who had presented themselves for inspection at a port of entry and had been placed in exclusion proceedings. See H.R. Rep. No. 104-4691, at 225-26 (1996), 1996 WL 168955 (accompanying H.R. 2022); Memorandum from David Martin, INS General Counsel, to Michael L. Aytes, Ass't Comm'r, Office of Benefits (Feb. 19, 1997) (discussing, inter alia, the amendment to section 101(a)(13) of the Act), reprinted in 74 Interpreter Releases, No. 11, Mar. 24, 1997, app. II at 516-22.

A contrary interpretation of section 101(a)(13)(A) of the Act would attribute to Congress an intent to reinstate an additional requirement of substantive legal compliance for adjustment of status under section 245(a), despite the absence of any evidence of such congressional intent. It would also significantly affect the applicability of other statutory provisions of the Act. In this regard, when Congress amended former section 101(a)(13), it also amended section 237(a) to require that an alien be "in and admitted to the United States" in order to be subject to the various grounds of deportability.

(...continued)

to modify the term "entry" in section 101(a)(13)(A) of the Act, as that term is used to define "admitted" for purposes of adjustment of status under section 245(a).

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(Emphasis added.) See IIRIRA § 301(d)(1), 110 Stat. at 3009-579 (striking "in the United States" and inserting "in and admitted to the United States"). However, section 237(a)(1)(A) of the Act renders deportable those aliens who, at the time of entry, are "within one or more of the classes of aliens inadmissible by the law existing at such time." (Emphasis added.) Thus, section 237 makes any alien who was in and admitted to the United States deportable if he was inadmissible at the time of entry. If the phrase "lawful entry" demanded a substantively lawful admission, this provision of the Act would be internally inconsistent, because an alien could not be both "admitted" and "inadmissible" at the time of entry.

Similarly, interpreting the term "admitted" in section 101(a)(13)(A) of the Act to require an entry to be in compliance with substantive legal requirements, rather than only with procedural regularity, would effectively render null section 237(a)(1)(H) of the Act, which provides a waiver of deportability that is expressly available to aliens who obtained admission by fraud or misrepresentation. See United States v. Menasche, 348 U.S. 528, 538-39 (1955) (noting that a "cardinal principle" of statutory construction is not to destroy parts of a statute, but rather to give effect, if possible, to every clause and word). The fact that Congress retained section 237(a)(1)(H) when it amended former section 101(a)(13) demonstrates that Congress understood that an "admission" could occur in the absence of compliance with substantive legal requirements. See generally IIRIRA § 305(a)(2), 110 Stat. at 3009-598 (redesignating former section 241 of the Act as current section 237 of the Act).

Finally, if an "admission" under section 101(a)(13)(A) of the Act were to require an entry in compliance with substantive legal requirements, the waiver of inadmissibility under section 212(h) would potentially become available to aliens who had procured lawful permanent residence by fraud and misrepresentation, in contravention of our holding in Matter of Ayala, 22 I&N Dec. 398 (BIA 1998) (stating that the statutory bar in section 212(h) applies to any alien who previously gained admission as a lawful permanent resident, notwithstanding any fraud or misrepresentation in procuring that admission).5

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4 We have previously recognized that section 237(a)(1)(H) of the Act specifically contemplates that an alien may obtain admission either by fraud or by misrepresentation, whether innocent or not. See Matter of Fu, 23 I&N Dec. 985 (BIA 2006).

5 The United States Court of Appeals for the Ninth Circuit recently cited with approval our reasoning in Matter of Ayala and found that when section 101(a)(13)(A) of the Act is considered in the context of a waiver under section 212(h), it is clear that "Congress intended to define admission in procedural, rather than substantive, terms" for purposes of section 212(h) of the Act. Hing Sum v. Holder, 602 F.3d 1092, 1097 (9th Cir. 2010).
As previously noted, the DHS argues that while an “admission” under section 101(a)(13)(A) only requires procedural regularity, the evidence does not establish that the respondent’s entry complied with such procedural regularity. According to the respondent’s testimony, the immigration officer only spoke to the driver of the vehicle and allowed the vehicle to enter based on the driver’s declaration of United States citizenship. The DHS asserts that the immigration officer essentially treated the respondent as a United States citizen and that she did not undergo an inspection and admission. Further, the DHS maintains that regardless of whether the immigration officer treated the respondent as a United States citizen, he did not ask her any questions and did not determine her admissibility. Thus, the DHS contends that because procedural regularity required the respondent to present herself before an immigration officer as an alien, she did not make a lawful entry into the United States after inspection and authorization and therefore was not properly “admitted.”

It is true that an immigration officer is not empowered to inspect a citizen in the same manner as an alien. An alien who enters the United States under a false claim of United States citizenship has not been inspected and is not eligible for adjustment of status under section 245 of the Act. See e.g., Reid v. INS, 492 F.2d 251, 255 (2d Cir. 1974); Matter of S-, 9 I&N Dec. 599, 600 (BIA 1962). However, according to the Immigration Judge, the facts were undisputed that the respondent presented herself for inspection, and he made no finding that she falsely claimed to be a United States citizen. Thus, the controlling law is Matter of Arequillin, 17 I&N Dec. 308, which held that an alien who physically presents herself for questioning and makes no knowing false claim to citizenship is “inspected,” even though she volunteers no information and is asked no questions by the immigration authorities, and that such an alien has satisfied the “inspected and admitted” requirement of 245(a) of the Act. See also Matter of G-, 31 I&N Dec. 136, 138 (BIA 1948) (holding that an alien who physically presents himself for questioning, regardless of whether he is asked any questions, has been “inspected”).

The DHS has offered no support for its assertion that the respondent must be admitted in a particular “status” in order for procedural regularity to be found. We therefore conclude that the respondent made a lawful entry into the United States after inspection and authorization by an immigration officer within the meaning of section 101(a)(13)(A) of the Act and that she is not removable under section 212(a)(6)(A)(i). Furthermore, because the respondent was thus “admitted” to the United States, she is eligible for adjustment of status under section 245(a) of the Act. Accordingly, the respondent’s appeal will be sustained and the record will be remanded for adjudication of her application for that relief.
ORDER: The appeal is sustained.

FURTHER ORDER: The decision of the Immigration Judge is vacated, and the record is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

CONCURRING OPINION: Lauri Steven Filppu, Board Member

I respectfully concur in the majority’s conclusion that an “admission” only requires a procedurally lawful entry.

The respondent seeks adjustment of status. But she is only eligible for that relief if she was “admitted,” as that term is defined by section 101(a)(13)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(13)(A) (2006). The majority focuses on the specific history of adjustment of status under section 245 of the Act and the anomaly that would arise if being “admitted” to the United States required a substantively lawful admission. This is obviously relevant, but “admitted” is a defined term. Our focus at the outset needs to be on the language of section 101(a)(13)(A) itself, which provides:

The terms “admission” and “admitted” mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.


In isolation, the “lawful entry” provision of the definition would most naturally be understood to demand a substantively lawful entry, especially as a procedurally lawful entry is separately signified by the requirement of an “inspection and authorization by an immigration officer.” But the meaning and clarity of statutory language should be assessed in the context in which it is used, not in isolation. Leocal v. Ashcroft, 543 U.S. 1, 9 (2004); Beecham v. United States, 511 U.S. 368, 372 (1994). As defined terms, the words “admission” and “admitted” only take on life in the provisions in which they are employed.

The Department of Homeland Security (“DHS”) argues that within the context of the statute as a whole, the word “lawful” in section 101(a)(13)(A)
does not demand a substantively lawful entry. Instead, it simply reinforces the statute’s “inspection and authorization” language, making it clear that an admission cannot be accomplished by an entry that procedurally evades inspection. See Hing Sun v. Holder, 602 F.3d 1092 (9th Cir. 2010) (determining that an “admission” only requires a procedurally lawful entry, not a substantively lawful entry). While this reading of the word “lawful” is not the most natural reading, I agree with the majority that it is the reading that emerges from an overall examination of the statute.

In particular, I find persuasive the portions of the majority opinion’s analyzing the use of the term “admission” in the contexts of sections 212(h) and 237(a)(1)(A) and (H) of the Act, 8 U.S.C. §§ 1182(h) and 1227(a)(1)(A) and (H) (2006). I agree that those statutory sections would essentially be rendered meaningless or would operate in ways not envisioned by Congress if we were to construe an admission as requiring legal compliance with the substantive provisions of the statute. As explained by the majority, the legislative history reflects that Congress added the definition of admission to replace certain aspects of the “entry doctrine,” under which aliens who had entered the United States without inspection gained privileges in immigration proceedings that were not available to aliens who presented themselves for inspection at a port of entry. H.R. Rep. No. 104-469(I), at 225-26 (1996), 1996 WL 168955.1

Our construction of the terms “admission” and “admitted” to demand only a procedurally lawful entry does give limited meaning to the word “lawful,” but it is the interpretation most in keeping with the overall structure and sound operation of the statute as a whole. Accordingly, I agree that an alien can be “admitted” even if he or she is substantively inadmissible at the time of the entry in question.

---

1 The interpretation we adopt here is consistent with the approach we took in Matter of Ayala, 22 I&N Dec. 398 (BIA 1998). But I fail to see how concerns over undermining that 1998 decision should influence our reading of what was intended by a 1996 legislative enactment. What is relevant is how the term “admitted” best operates in the section 212(h) context, and to that extent Ayala does support our present interpretation.
Affidavit of Support Under Section 213A of the Act
Department of Homeland Security
U.S. Citizenship and Immigration Services

<table>
<thead>
<tr>
<th>For USCIS Use Only</th>
<th>Affidavit of Support Submitter</th>
<th>Section 213A Review</th>
<th>Number of Support Affidavits in File</th>
</tr>
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<tr>
<td></td>
<td>□ Petitioner</td>
<td>□ MEETS requirements</td>
<td>□ 1</td>
</tr>
<tr>
<td></td>
<td>□ 1st Joint Sponsor</td>
<td>□ DOES NOT MEET requirements</td>
<td>□ 2</td>
</tr>
<tr>
<td></td>
<td>□ 2nd Joint Sponsor</td>
<td>Reviewed By:__________</td>
<td></td>
</tr>
<tr>
<td></td>
<td>□ Substitute Sponsor</td>
<td>Office:______________</td>
<td></td>
</tr>
<tr>
<td></td>
<td>□ 5% Owner</td>
<td>Date:<strong>/</strong>/__________</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Remarks</td>
<td></td>
</tr>
</tbody>
</table>

► START HERE - Type or print in black ink.

Part 1. Basis For Filing Affidavit of Support

1. ____________________________________________ am the sponsor submitting this affidavit of support because (Check only one box):

1.a. ☐ I am the petitioner. I filed or am filing for the immigration of my relative.

1.b. ☐ I filed an alien worker petition on behalf of the intending immigrant, who is related to me as my

1.c. ☐ I have an ownership interest of at least 5 percent in

which filed an alien worker petition on behalf of the intending immigrant, who is related to me as my

1.d. ☐ I am the only joint sponsor.

1.e. ☐ I am the ☐ first ☐ second of two joint sponsors.

1.f. ☐ The original petitioner is deceased. I am the substitute sponsor. I am the intending immigrant's

NOTE: If you check box 1.b., 1.c., 1.d., 1.e., or 1.f., you must include proof of your citizen, national, or lawful permanent resident status.

Part 2. Information on the Principal Immigrant

1.a. Family Name (Last Name) ____________________________________________

1.b. Given Name (First Name) ____________________________________________

1.c. Middle Name ____________________________________________

Mailing Address

2.a. Street Number and Name ____________________________________________


2.c. City or Town ____________________________________________

2.d. State ______ 2.e. Zip Code ____________________________________________

2.f. Postal Code ____________________________________________

2.g. Province ____________________________________________

2.h. Country ____________________________________________

Other Information

3. Country of Citizenship ____________________________________________

4. Date of Birth (mm dd yyyy) ▶ ____________________________________________

5. Alien Registration Number (A-Number) ▶ A- ____________________________________________

Form I-864 03/22/13 N

Page 1 of 9
### Part 3. Information on the Immigrant(s) You Are Sponsoring

1. I am sponsoring the principal immigrant named in Part 2.
   - [ ] Yes  [ ] No (Applicable only in cases with two joint sponsors)

2. I am sponsoring the following family members immigrating at the same time or within 6 months of the principal immigrant named in Part 2. Do not include any relative listed on a separate visa petition.

#### Family Member 1
2.a. Family Name *(Last Name)*
2.b. Given Name *(First Name)*
2.c. Middle Name
2.d. Relationship to Sponsored Immigrant
2.e. Date of Birth *(mm dd yyyy)*
2.f. Alien Registration Number (A-Number)

#### Family Member 2
3.a. Family Name *(Last Name)*
3.b. Given Name *(First Name)*
3.c. Middle Name
3.d. Relationship to Sponsored Immigrant
3.e. Date of Birth *(mm dd yyyy)*
3.f. Alien Registration Number (A-Number)

#### Family Member 3
4.a. Family Name *(Last Name)*
4.b. Given Name *(First Name)*
4.c. Middle Name
4.d. Relationship to Sponsored Immigrant
4.e. Date of Birth *(mm dd yyyy)*
4.f. Alien Registration Number (A-Number)

#### Family Member 4
5.a. Family Name *(Last Name)*
5.b. Given Name *(First Name)*
5.c. Middle Name
5.d. Relationship to Sponsored Immigrant
5.e. Date of Birth *(mm dd yyyy)*
5.f. Alien Registration Number (A-Number)

#### Family Member 5
6.a. Family Name *(Last Name)*
6.b. Given Name *(First Name)*
6.c. Middle Name
## Part 3. Information on the Immigrant(s) You Are Sponsoring (continued)

### Family Member 5 (Continued)

6.d. Relationship to Sponsored Immigrant

6.e. Date of Birth (mm/dd/yyyy) ➤ 

6.f. Alien Registration Number (A-Number)

➤ A-

7. Enter the total number of immigrants you are sponsoring on this form from Items 1 through 6.

---

## Part 4. Information on the Sponsor

### Sponsor's Full Name

1.a. Family Name (Last Name)

1.b. Given Name (First Name)

1.c. Middle Name

### Sponsor's Mailing Address

2.a. Street Number and Name


2.c. City or Town

2.d. State □ 2.e. Zip Code

2.f. Postal Code

2.g. Province

2.h. Country

### Sponsor's Place of Residence

3.a. Street Number and Name


3.c. City or Town


3.f. Postal Code

3.g. Province

3.h. Country

### Other Information

4. Telephone Number ( ) □ - □

5. Country of Domicile

6. Date of Birth (mm/dd/yyyy) ➤ 

---
Part 4. Information on the Sponsor (continued)

7. City or Town of Birth

8. State or Province of Birth

9. Country of Birth

10. U.S. Social Security Number (Required)

PART 5. Sponsor's Household Size

Your Household Size - DO NOT COUNT ANYONE TWICE

Persons you are sponsoring in this affidavit:

1. Enter the number you entered on line 7 of Part 3.

Persons NOT sponsored in this affidavit:

2. Yourself.

3. If you are currently married, enter "1" for your spouse.

4. If you have dependent children, enter the number here.

5. If you have any other dependents, enter the number here.

6. If you have sponsored any other persons on an I-864 or I-864 EZ who are now lawful permanent residents, enter the number here.

7. OPTIONAL: If you have siblings, parents, or adult children with the same principal residence who are combining their income with yours by submitting Form I-864A, enter the number here.

8. Add together lines 1-7 and enter the number here. Household Size:

Part 6. Sponsor's Income and Employment

I am currently:

1. □ Employed as a/an

1.a. Name of Employer #1 (if applicable)

1.b. Name of Employer #2 (if applicable)

2. □ Self-employed as a/an

3. □ Retired from:

3.a. Company Name

3.b. Date of Retirement

(mm dd yyyy) ▶
### Part 6. Sponsor's Income and Employment (continued)

<table>
<thead>
<tr>
<th>For USCIS Use Only</th>
<th>Household Size</th>
<th>Poverty Guideline</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 ☐ 8 ☐ 9 ☐ Other</td>
<td>Year: 20</td>
<td>Poverty Line:</td>
<td>$</td>
</tr>
</tbody>
</table>

**4.** ☐ Unemployed since

*(mm dd yyyy)*

**5.** My current individual annual income is:

*(See Instructions)*

$ ______________________

**Income you are using from any other person who was counted in your household size, including, in certain conditions, the intending immigrant. (See Instructions.) Please indicate name, relationship and income.**

**Person 1**

**6.a.** Name

____________________________________

**6.b.** Relationship

____________________________________

**6.c.** Current Income

$ ______________________

**Person 2**

**7.a.** Name

____________________________________

**7.b.** Relationship

____________________________________

**7.c.** Current Income

$ ______________________

**Person 3**

**8.a.** Name

____________________________________

**8.b.** Relationship

____________________________________

**8.c.** Current Income

$ ______________________

---

**Person 4**

**9.a.** Name

____________________________________

**9.b.** Relationship

____________________________________

**9.c.** Current Income

$ ______________________

**10.** My current Annual Household Income *(Total all lines from 5, 6.c., 7.c., 8.c., and 9.c. Will be Compared to Poverty Guidelines -- See Form I-864P.)*

$ ______________________

**11.** ☐ The person(s) listed in 6.a., 7.a., 8.a., and 9.a. have completed Form I-864A. I am filing along with this form all necessary Forms I-864A completed by these persons.

**12.** ☐ The person(s) listed in 6.a., 7.a., 8.a., or 9.a. does not need to complete Form I-864A because he/she is the intending immigrant and has no accompanying dependents.

Name(s)

____________________________________

**Federal income tax return information**

**13.** ☐ I have filed a Federal tax return for each of the three most recent tax years. I have attached the required photocopy or transcript of my Federal tax return for only the most recent tax year.
### Part 6. Sponsor's Income and Employment (continued)

My total income (adjusted gross income on IRS Form 1040EZ) as reported on my Federal tax returns for the most recent 3 years was:

<table>
<thead>
<tr>
<th>Tax Year</th>
<th>Total Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>13.a. (most recent)</td>
<td>13.a.1. $</td>
</tr>
<tr>
<td>13.b. (2nd most recent)</td>
<td>13.b.1. $</td>
</tr>
<tr>
<td>13.c. (3rd most recent)</td>
<td>13.c.1. $</td>
</tr>
</tbody>
</table>

14. □ (Optional) I have attached photocopies or transcripts of my Federal tax returns for my second and third most recent tax years.

### Part 7. Use of Assets to Supplement Income (optional) (continued)

Assets from Form I-864A, line 12d for:

5a. Name of Relative

5b. Your household member's assets from Form I-864A, (Optional) $ 

**Assets of the principal sponsored immigrant (Optional).** The principal sponsored immigrant is the person listed in lines 1.a. - 1.c. in Part 2.

6. Enter the balance of the sponsored immigrant's savings and checking accounts.

$ 

7. Enter the net cash value of all the sponsored immigrant's real estate holdings. (Net means investment value minus mortgage debt.) $ 

8. Enter the current cash value of the sponsored immigrant's stocks, bonds, certificates of deposit, and other assets not included on line 6 or 7.

$ 

9. Add together lines 6-8 of Part 7 and enter the number here.

$ 

**Total value of assets.**

10. Add together lines 4, 5b., and 9 of Part 7 and enter the number here. **TOTAL:** $
Part 8. Sponsor’s Contract

Please note that, by signing this Form I-864, you agree to assume certain specific obligations under the Immigration and Nationality Act and other Federal laws. The following paragraphs describe those obligations. Please read the following information carefully before you sign the Form I-864. If you do not understand the obligations, you may wish to consult an attorney or accredited representative.

What is the Legal Effect of My Signing a Form I-864?

If you sign a Form I-864 on behalf of any person (called the “intending immigrant”) who is applying for an immigrant visa or for adjustment of status to a permanent resident, and that intending immigrant submits the Form I-864 to the U.S. Government with his or her application for an immigrant visa or adjustment of status, under section 213A of the Immigration and Nationality Act these actions create a contract between you and the U.S. Government. The intending immigrant’s becoming a permanent resident is the “consideration” for the contract.

Under this contract, you agree that, in deciding whether the intending immigrant can establish that he or she is not inadmissible to the United States as an alien likely to become a public charge, the U.S. Government can consider your income and assets to be available for the support of the intending immigrant.

What If I Choose Not to Sign a Form I-864?

You cannot be made to sign a Form I-864 if you do not want to do so. But if you do not sign the Form I-864, the intending immigrant may not be able to become a permanent resident in the United States.

What Does Signing the Form I-864 Require Me to do?

If an intending immigrant becomes a permanent resident in the United States based on a Form I-864 that you have signed, then, until your obligations under the Form I-864 terminate, you must:

-- Provide the intending immigrant any support necessary to maintain him or her at an income that is at least 125 percent of the Federal Poverty Guidelines for his or her household size (100 percent if you are the petitioning sponsor and are on active duty in the U.S. Armed Forces and the person is your husband, wife, unmarried child under 21 years old.)

-- Notify USCIS of any change in your address, within 30 days of the change, by filing Form I-865.

What Other Consequences Are There?

If an intending immigrant becomes a permanent resident in the United States based on a Form I-864 that you have signed, then, until your obligations under the Form I-864 terminate, your income and assets may be considered (“deemed”) to be available to that person, in determining whether he or she is eligible for certain Federal means-tested public benefits and also for State or local means-tested public benefits. If the State or local government’s rules provide for consideration (“deeming”) of your income and assets as available to the person.

This provision does not apply to public benefits specified in section 403(c) of the Welfare Reform Act such as, but not limited to, emergency Medicaid, short-term, non-cash emergency relief; services provided under the National School Lunch and Child Nutrition Acts; immunizations and testing and treatment for communicable diseases; and means-tested programs under the Elementary and Secondary Education Act.

What If I Do Not Fulfill My Obligations?

If you do not provide sufficient support to the person who becomes a permanent resident based on the Form I-864 that you signed, that person may sue you for this support.
Part 8. Sponsor's Contract (continued)

If a Federal, State or local agency, or a private agency provides any covered means-tested public benefit to the person who becomes a permanent resident based on the Form I-864 that you signed, the agency may ask you to reimburse them for the amount of the benefits they provided. If you do not make the reimbursement, the agency may sue you for the amount that the agency believes you owe.

If you are sued, and the court enters a judgment against you, the person or agency that sued may use any legally permitted procedures for enforcing or collecting the judgment. You may also be required to pay the costs of collection, including attorney fees.

If you do not file a properly completed Form I-865 within 30 days of any change of address, USCIS may impose a civil fine for your failing to do so.

When Will These Obligations End?

Your obligations under a Form I-864 will end if the person who becomes a permanent resident based on a Form I-864 that you signed:

1. Becomes a U.S. citizen;

2. Has worked, or can be credited with, 40 quarters of coverage under the Social Security Act;

3. No longer has lawful permanent resident status, and has departed the United States;

4. Becomes subject to removal, but applies for and obtains in removal proceedings a new grant of adjustment of status, based on a new affidavit of support, if one is required; or

5. Dies.

Note that divorce does not terminate your obligations under this Form I-864.

Your obligations under a Form I-864 also end if you die. Therefore, if you die, your Estate will not be required to take responsibility for the person's support after your death. Your Estate may, however, be responsible for any support that you owed before you died.

1. 

(Print Sponsor's Name)

certify under penalty of perjury under the laws of the United States that:

a. I know the contents of this affidavit of support that I signed.

b. All the factual statements in this affidavit of support are true and correct.

c. I have read and I understand each of the obligations described in Part 8, and I agree, freely and without any mental reservation or purpose of evasion, to accept each of those obligations in order to make it possible for the immigrants indicated in Part 3 to become permanent residents of the United States:

d. I agree to submit to the personal jurisdiction of any Federal or State court that has subject matter jurisdiction of a lawsuit against me to enforce my obligations under this Form I-864:

e. Each of the Federal income tax returns submitted in support of this affidavit are true copies, or are unaltered tax transcripts, of the tax returns I filed with the U.S. Internal Revenue Service; and

f. I authorize the Social Security Administration to release information about me in its records to the Department of State and U.S. Citizenship and Immigration Services.

g. Any and all other evidence submitted is true and correct.

1.a. Signature of Sponsor

1.b. Date of Signature  (mm dd yyyy) →
<table>
<thead>
<tr>
<th>Preparer's Full Name</th>
<th>Preparer's Contact Information</th>
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</thead>
<tbody>
<tr>
<td>1.a. Preparer's Family Name <em>(Last Name)</em></td>
<td>4. Preparer's Day-time Phone Number</td>
</tr>
<tr>
<td></td>
<td>(   )   -</td>
</tr>
<tr>
<td>1.b. Preparer's Given Name <em>(First Name)</em></td>
<td>5. Preparer's Email Address</td>
</tr>
<tr>
<td>2. Preparer's Business or Organization Name</td>
<td>6. Business State ID # <em>(if any)</em></td>
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<td></td>
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</tr>
</tbody>
</table>

### Preparer's Mailing Address

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<thead>
<tr>
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<th>3.e. Zip Code</th>
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</tr>
<tr>
<td>3.c. City or Town</td>
<td></td>
</tr>
<tr>
<td>3.f. Postal Code</td>
<td></td>
</tr>
<tr>
<td>3.g. Province</td>
<td></td>
</tr>
<tr>
<td>3.h. Country</td>
<td></td>
</tr>
</tbody>
</table>

### Declaration

I certify under penalty of perjury under the laws of the United States that I prepared this affidavit of support at the sponsor's request and that this affidavit of support is based on all information of which I have knowledge.

7.a. Signature of Preparer

7.b. Date of Signature *(mm dd yyyy)* ➤
(Slip Opinion)        OCTOBER TERM, 2009

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is
being done in connection with this case, at the time the opinion is issued.
The syllabus constitutes no part of the opinion of the Court but has been
prepared by the Reporter of Decisions for the convenience of the reader.

SUPREME COURT OF THE UNITED STATES

Syllabus

PADILLA v. KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 08–651. Argued October 13, 2009—Decided March 31, 2010

Petitioner Padilla, a lawful permanent resident of the United States for
over 40 years, faces deportation after pleading guilty to drug-
distribution charges in Kentucky. In postconviction proceedings, he
claims that his counsel not only failed to advise him of this conse-
quency before he entered the plea, but also told him not to worry
about deportation since he had lived in this country so long. He al-
leges that he would have gone to trial had he not received this incor-
crect advice. The Kentucky Supreme Court denied Padilla postconvic-
ction relief on the ground that the Sixth Amendment’s effective-
assistance-of-counsel guarantee does not protect defendants from er-
roneous deportation advice because deportation is merely a “collat-
eral” consequence of a conviction.

Held: Because counsel must inform a client whether his plea carries a
risk of deportation, Padilla has sufficiently alleged that his counsel
was constitutionally deficient. Whether he is entitled to relief de-
pends on whether he has been prejudiced, a matter not addressed

(a) Changes to immigration law have dramatically raised the
stakes of a noncitizen’s criminal conviction. While once there was
only a narrow class of deportable offenses and judges wielded broad
discretionary authority to prevent deportation, immigration reforms
have expanded the class of deportable offenses and limited judges’
authority to alleviate deportation’s harsh consequences. Because the
drastic measure of deportation or removal is now virtually inevitable
for a vast number of noncitizens convicted of crimes, the importance
of accurate legal advice for noncitizens accused of crimes has never
been more important. Thus, as a matter of federal law, deportation is
an integral part of the penalty that may be imposed on noncitizen de-
PADILLA v. KENTUCKY

Syllabus

(b) *Strickland v. Washington*, 466 U. S. 668, applies to Padilla’s claim. Before deciding whether to plead guilty, a defendant is entitled to “the effective assistance of competent counsel.” *McMann v. Richardson*, 397 U. S. 759, 771. The Supreme Court of Kentucky rejected Padilla’s ineffectiveness claim on the ground that the advice he sought about deportation concerned only collateral matters. However, this Court has never distinguished between direct and collateral consequences in defining the scope of constitutionally “reasonable professional assistance” required under *Strickland*, 466 U. S., at 689. The question whether that distinction is appropriate need not be considered in this case because of the unique nature of deportation. Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence. Because that distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation, advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Pp. 7–9.

(c) To satisfy *Strickland*’s two-prong inquiry, counsel’s representation must fall “below an objective standard of reasonableness,” 466 U. S., at 688, and there must be “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. The first, constitutional deficiency, is necessarily linked to the legal community’s practice and expectations. *Id.* at 688. The weight of prevailing professional norms supports the view that counsel must advise her client regarding the deportation risk. And this Court has recognized the importance to the client of “[p]reserving the . . . right to remain in the United States” and “preserving the possibility of” discretionary relief from deportation. *INS v. St. Cyr*, 533 U. S. 289, 323. Thus, this is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect. There will, however, undoubtedly be numerous situations in which the deportation consequences of a plea are unclear. In those cases, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear. Accepting Padilla’s allegations as true, he has sufficiently alleged constitutional deficiency to satisfy *Strickland*’s first prong. Whether he can satisfy the second prong, prejudice, is left for the Kentucky courts to consider in the first instance. Pp. 9–12.

(d) The Solicitor General’s proposed rule—that *Strickland* should
be applied to Padilla's claim only to the extent that he has alleged affirmative misuse—-is unpersuasive. And though this Court must be careful about recognizing new grounds for attacking the validity of guilty pleas, the 25 years since Strickland was first applied to ineffective-assistance claims at the plea stage have shown that pleas are less frequently the subject of collateral challenges than convictions after a trial. Also, informed consideration of possible deportation can benefit both the State and noncitizen defendants, who may be able to reach agreements that better satisfy the interests of both parties. This decision will not open the floodgates to challenges of convictions obtained through plea bargains. Cf. Hill v. Lockhart, 474 U.S. 52, 58. Pp. 12–16.

253 S. W. 3d 482, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined.
Cite as: 559 U. S. ____ (2010)

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 08–651

JOSE PADILLA, PETITIONER v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
KENTUCKY

[March 31, 2010]

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U. S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky. 1

In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he "did not have to worry about immigration status since he had been in the country so long." 253 S. W. 3d 482, 483 (Ky. 2008). Padilla relied on his counsel’s erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme

1 Padilla’s crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U. S. C. §1227(a)(2)(B)(i).
Court of Kentucky denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment’s guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a “collateral” consequence of his conviction. Id., at 485. In its view, neither counsel’s failure to advise petitioner about the possibility of removal, nor counsel’s incorrect advice, could provide a basis for relief.

We granted certiorari, 555 U. S. ___ (2009), to decide whether, as a matter of federal law, Padilla’s counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal, Fong Haw Tan v. Phelan, 333 U. S. 6, 10 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes.

The Nation’s first 100 years was “a period of unimpeded immigration.” C. Gordon & H. Rosenfield, Immigration Law and Procedure §1.2(a), p. 5 (1959). An early effort to empower the President to order the deportation of those
immigrants he “judge[d] dangerous to the peace and safety of the United States,” Act of June 25, 1798, ch. 58, 1 Stat. 571, was short lived and unpopular. Gordon §1.2, at 5. It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country, Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. Gordon §1.2b, at 6. In 1891, Congress added to the list of excludable persons those “who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.” Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.2

The Immigration and Nationality Act of 1917 (1917 Act) brought “radical changes” to our law. S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 54–55 (1950). For the first time in our history, Congress made classes of noncitizens deportable based on conduct committed on American soil. Id., at 55. Section 19 of the 1917 Act authorized the deportation of “any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States . . . .” 39 Stat. 889. And §19 also rendered deportable noncitizen recidivists who commit two or more crimes of moral turpitude at any time after entry. Ibid. Congress did not, however, define the term “moral turpitude.”

While the 1917 Act was “radical” because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation “that such alien

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2 In 1907, Congress expanded the class of excluded persons to include individuals who “admit” to having committed a crime of moral turpitude. Act of Feb. 20, 1907, ch. 1134, 34 Stat. 899.
shall not be deported." *Id.*, at 890.\(^3\) This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was "consistently ... interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation," *Janvier v. United States*, 793 F. 2d 449, 452 (CA2 1986). Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.

Although narcotics offenses—such as the offense at issue in this case—provided a distinct basis for deportation as early as 1922,\(^4\) the JRAD procedure was generally

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\(^3\) As enacted, the statute provided:

"That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, ... make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act." 1917 Act, 39 Stat. 889–890.

This provision was codified in 8 U. S. C. §1251(b) (1994 ed.) (transferred to §1227 (2006 ed.).) The judge's nondeportation recommendation was binding on the Secretary of Labor and, later, the Attorney General after control of immigration removal matters was transferred from the former to the latter. See *Janvier v. United States*, 793 F. 2d 449, 452 (CA2 1986).

\(^4\) Congress first identified narcotics offenses as a special category of crimes triggering deportation in the 1922 Narcotic Drug Act. Act of May 26, 1922, ch. 202, 42 Stat. 596. After the 1922 Act took effect, there was some initial confusion over whether a narcotics offense also had to be a crime of moral turpitude for an individual to be deportable. See *Weedin v. Moy Fat*, 8 F. 2d 488, 489 (CA9 1925) (holding that an individual who committed narcotics offense was not deportable because offense did not involve moral turpitude). However, lower courts eventually agreed that the narcotics offense provision was "special." *Chung*
available to avoid deportation in narcotics convictions. See United States v. O’Rourke, 213 F. 2d 759, 762 (CA8 1954). Except for “technical, inadvertent and insignificant violations of the laws relating to narcotics,” ibid., it appears that courts treated narcotics offenses as crimes involving moral turpitude for purposes of the 1917 Act’s broad JRAD provision. See ibid. (recognizing that until 1952 a JRAD in a narcotics case “was effective to prevent deportation” (citing Dang Nam v. Bryan, 74 F. 2d 379, 380–381 (CA9 1934))).

In light of both the steady expansion of deportable offenses and the significant ameliorative effect of a JRAD, it is unsurprising that, in the wake of Strickland v. Washington, 466 U. S. 668 (1984), the Second Circuit held that the Sixth Amendment right to effective assistance of counsel applies to a JRAD request or lack thereof, see Janvier, 793 F. 2d 449. See also United States v. Castro, 26 F. 3d 557 (CA5 1994). In its view, seeking a JRAD was “part of the sentencing” process, Janvier, 793 F. 2d, at 452, even if deportation itself is a civil action. Under the Second Circuit’s reasoning, the impact of a conviction on a noncitizen’s ability to remain in the country was a central issue to be resolved during the sentencing process—not merely a collateral matter outside the scope of counsel’s duty to provide effective representation.

However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA),\(^5\) and in

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\(^5\)The Act separately codified the moral turpitude offense provision and the narcotics offense provision within 8 U. S. C. §1251(a) (1994 ed.) under subsections (a)(4) and (a)(11), respectively. See 66 Stat. 201, 204.

\(^{Que Fong v. Nagle.} 15 F. 2d 789, 790 (CA9 1926); thus, a narcotics offense did not need also to be a crime of moral turpitude (or to satisfy other requirements of the 1917 Act) to trigger deportation. See United States ex rel. Grimaldi v. Ebey. 12 F. 2d 922, 923 (CA7 1926); Todaro v. Munster. 62 F. 2d 963, 964 (CA10 1933).\)
1990 Congress entirely eliminated it, 104 Stat. 5050. In 1996, Congress also eliminated the Attorney General’s authority to grant discretionary relief from deportation, 110 Stat. 3009–596, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996, INS v. St. Cyr, 533 U. S. 289, 296 (2001). Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. See 8 U. S. C. §1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. See §1101(a)(43)(B); §1228.

These changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, 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.

206. The JRA procedure, codified in 8 U. S. C. §1251(b) (1994 ed.), applied only to the “provisions of subsection (a)(4),” the crimes-of-moral-turpitude provision. 66 Stat. 208; see United States v. O’Rourke, 213 F. 2d 759, 762 (CA8 1954) (recognizing that, under the 1952 Act, narcotics offenses were no longer eligible for JRA).

6 The changes to our immigration law have also involved a change in nomenclature; the statutory text now uses the term “removal” rather than “deportation.” See Calcano-Martinez v. INS, 533 U. S. 348, 350. n. 1 (2001).

7 See Brief for Asian American Justice Center et al. as Amici Curiae 12–27 (providing real-world examples).
Before deciding whether to plead guilty, a defendant is entitled to “the effective assistance of competent counsel.” *McMann v. Richardson*, 397 U. S. 759, 771 (1970); *Strickland*, 466 U. S., at 686. The Supreme Court of Kentucky rejected Padilla’s ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i.e.*, those matters not within the sentencing authority of the state trial court.8 253 S. W. 3d, at 483–484 (citing *Commonwealth v. Fuentes*, 170 S. W. 3d 384 (2005)). In its view, “collateral consequences are outside the scope of representation required by the Sixth Amendment,” and, therefore, the “failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.” 253 S. W. 3d, at 483. The Kentucky high court is far from alone in this view.9

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8There is some disagreement among the courts over how to distinguish between direct and collateral consequences. See Roberts, Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, 95 Iowa L. Rev. 119, 124, n. 15 (2009). The disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case because, as even JUSTICE ALITO agrees, counsel must, at the very least, advise a noncitizen “defendant that a criminal conviction may have adverse immigration consequences.” post. at 1 (opinion concurring in judgment). See also post. at 14 (“I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation”). In his concurring opinion, JUSTICE ALITO has thus departed from the strict rule applied by the Supreme Court of Kentucky and in the two federal cases that he cites, post, at 2.

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under Strickland, 466 U.S., at 689. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that deportation is a particularly severe "penalty," Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984), deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, see Part I, supra, at 2–7. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. United States v. Russell, 686 F. 2d 35, 38 (CADC 1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See St. Cyr, 533 U.S., at 322 ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions").

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction

is thus ill-suited to evaluating a Strickland claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Strickland applies to Padilla’s claim.

III

Under Strickland, we first determine whether counsel’s representation “fell below an objective standard of reasonableness.” 466 U.S., at 688. Then we ask whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id., at 694. The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Id., at 688. We long have recognized that “[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . .” Ibid.; Bobby v. Van Hook, 558 U.S. ___, ___ (2009) (per curiam) (slip op., at 3); Florida v. Nixon, 543 U.S. 175, 191, and n. 6 (2004); Wiggins v. Smith, 539 U.S. 510, 524 (2003); Williams v. Taylor, 529 U.S. 362, 396 (2000).

Although they are “only guides,” Strickland, 466 U.S., at 688, and not “inexorable commands,” Bobby, 558 U.S., at ___ (slip op., at 5), these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation §6.2 (1995); G. Herman, Plea Bargaining §3.03,
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We too have previously recognized that "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" St. Cyr, 533 U.S., at 323 (quoting 3 Criminal Defense Techniques §§60A.01, 60A.02[2] (1999)). Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation under §212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." St. Cyr, 533 U.S., at 323. We
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expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief. *Ibid.*, n. 50.

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla’s conviction. See 8 U. S. C. §1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable"). Padilla’s counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla’s counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios
Posited by Justice Alito, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of Strickland. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy Strickland's second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

IV

The Solicitor General has urged us to conclude that Strickland applies to Padilla's claim only to the extent that he has alleged affirmative misuse. In the United States' view, "counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case . . .," though counsel is required to provide accurate advice if she chooses to discuss these matters. Brief for United States as Amicus Curiae 10.


Kentucky describes these decisions isolating an affirmative misuse claim as "result-driven, incestuous . . .

10 As Justice Alito explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice.
[and] completely lacking in legal or rational bases.” Brief for Respondent 31. We do not share that view, but we agree that there is no relevant difference “between an act of commission and an act of omission” in this context. Id., at 30; Strickland, 466 U. S., at 690 (“The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance”); see also State v. Paredes, 2004–NMSC–036, 136 N. M. 533, 538–539.

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of “the advantages and disadvantages of a plea agreement.” Libretti v. United States, 516 U. S. 29, 50–51 (1995). When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.11 Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so “clearly satisfies the first prong of the Strickland analysis.” Hill v. Lockhart, 474 U. S. 52, 62 (1985) (White, J.,

11As the Commonwealth conceded at oral argument, were a defendant's lawyer to know that a particular offense would result in the client's deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client's home country, any decent attorney would inform the client of the consequences of his plea. Tr. of Oral Arg. 37–38. We think the same result should follow when the stakes are not life and death but merely “banishment or exile.” Delgadillo v. Carmichael, 332 U. S. 388, 390–391 (1947).
concurring in judgment).

We have given serious consideration to the concerns that the Solicitor General, respondent, and amici have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar “floodgates” concern in Hill, see id., at 58, but nevertheless applied Strickland to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.\textsuperscript{12}

A flood did not follow in that decision’s wake. Surmounting Strickland’s high bar is never an easy task. See, e.g., 466 U.S., at 689 (“Judicial scrutiny of counsel’s performance must be highly deferential”); id., at 693 (observing that “[a]torney errors . . . are as likely to be utterly harmless in a particular case as they are to be prejudicial”). Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. See Roe v. Flores-Ortega, 528 U.S. 470, 480, 486 (2000). There is no reason to doubt that lower courts—now quite experienced with applying Strickland—can effectively and efficiently use its framework to

\textsuperscript{12}However, we concluded that, even though Strickland applied to petitioner’s claim, he had not sufficiently alleged prejudice to satisfy Strickland’s second prong. Hill, 474 U.S., at 59–60. This disposition further underscores the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy Strickland’s prejudice prong.

Justice Alito believes that the Court misreads Hill, post, at 10–11. In Hill, the Court recognized—for the first time—that Strickland applies to advice respecting a guilty plea. 474 U.S., at 58 (“We hold, therefore, that the two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel”). It is true that Hill does not control the question before us. But its import is nevertheless clear. Whether Strickland applies to Padilla’s claim follows from Hill, regardless of the fact that the Hill Court did not resolve the particular question respecting misadvice that was before it.
separate specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. See, supra, at 11–13. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty. Strickland, 466 U.S., at 689.

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied Strickland to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions. But they account for only approximately 30% of the habeas petitions filed. The nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a

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13See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2003, p. 418 (31st ed. 2005) (Table 5.17) (only approximately 5%, or 8,612 out of 68,533, of federal criminal prosecutions go to trial); id., at 450 (Table 5.46) (only approximately 5% of all state felony criminal prosecutions go to trial).

14See V. Flango, National Center for State Courts, Habeas Corpus in State and Federal Courts 36–38 (1994) (demonstrating that 5% of defendants whose conviction was the result of a trial account for approximately 70% of the habeas petitions filed).
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guilty plea in a habeas proceeding because, ultimately, the challenge may result in a less favorable outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

Finally, informed 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. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. Hill, 474 U. S., at 57; see also Richardson, 397 U. S., at 770-771. The severity of deportation—the equivalent of banishment or exile,” Delgadillo v. Carmichael, 332 U. S. 388, 390-391 (1947)—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.15

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15To this end, we find it significant that the plea form currently used in Kentucky courts provides notice of possible immigration conse-
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V

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the “mercy of incompetent counsel.” Richardson, 397 U.S., at 771. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Taking as true the basis for his motion for postconviction relief, we have little difficulty concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below. See Verizon Communications Inc. v. FCC, 535 U.S. 467, 530 (2002).

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The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.
JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of Strickland v. Washington, 466 U.S. 668 (1984), if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt to explain what those consequences may be. As the Court concedes, “[i]mmigration law can be complex”; “it is a legal specialty of its own”; and “[s]ome members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it.” Ante, at 11. The Court nevertheless holds that a criminal defense attorney must provide advice in this specialized area in those cases in which the law is “succinct and straightforward”—but not, perhaps, in other situations. Ante, at 11–12. This vague, halfway test will lead to much confusion and needless litigation.
Under *Strickland*, an attorney provides ineffective assistance if the attorney’s representation does not meet reasonable professional standards. 466 U.S., at 688. Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the direct consequences of a criminal conviction. See, e.g., *United States v. Gonzalez*, 202 F. 3d 20, 28 (CA1 2000) (ineffective-assistance-of-counsel claim fails if “based on an attorney’s failure to advise a client of his plea’s immigration consequences”); *United States v. Banda*, 1 F. 3d 354, 355 (CA5 1993) (holding that “an attorney’s failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel”); see generally Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 699 (2002) (hereinafter Chin & Holmes) (noting that “virtually all jurisdictions”—including “eleven federal circuits, more than thirty states, and the District of Columbia”—“hold that defense counsel need not discuss with their clients the collateral consequences of a conviction,” including deportation). While the line between “direct” and “collateral” consequences is not always clear, see ante, at 7, n. 8, the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess fire-
arms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. Chin & Holmes 705-706. A criminal conviction may also severely damage a defendant's reputation and thus impair the defendant's ability to obtain future employment or business opportunities. All of those consequences are "seriou[s]," see ante, at 17, but this Court has never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice about such matters.

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations. See ante, at 9 ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation"). However, ascertaining the level of professional competence required by the Sixth Amendment is ultimately a task for the courts. E.g., Roe v. Flores-Ortega, 528 U. S. 470, 477 (2000). Although we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands. See Strickland, supra, at 688 (explaining that "[p]revailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable, but they are only guides"). And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.

Even if the only relevant consideration were "prevailing professional norms," it is hard to see how those norms can support the duty the Court today imposes on defense counsel. Because many criminal defense attorneys have little understanding of immigration law, see ante, at 11, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court's opinion would not just require defense counsel to warn the client
of a general *risk* of removal; it would also require counsel in at least some cases, to specify what the removal *consequences* of a conviction would be. See *ante*, at 11–12.

The Court’s new approach is particularly problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex. “Most crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as *crimes involving moral turpitude* or *aggravated felonies.*” M. Garcia & L. Eig, CRS Report for Congress, Immigration Consequences of Criminal Activity (Sept. 20, 2006) (summary) (emphasis in original). As has been widely acknowledged, determining whether a particular crime is an “aggravated felony” or a “crime involving moral turpitude [(CIMT)]” is not an easy task. See R. McWhirter, ABA, The Criminal Lawyer’s Guide to Immigration Law: Questions and Answers 128 (2d ed. 2006) (hereinafter ABA Guidebook) (“Because of the increased complexity of aggravated felony law, this edition devotes a new [30-page] chapter to the subject”); *id.*, §5.2, at 146 (stating that the aggravated felony list at 8 U. S. C. §1101(a)(43) is not clear with respect to several of the listed categories, that “the term ‘aggravated felonies’ can include misdemeanors,” and that the determination of whether a crime is an “aggravated felony” is made “even more difficult” because “several agencies and courts interpret the statute,” including Immigration and Customs Enforcement, the Board of Immigration Appeals (BIA), and Federal Circuit and district courts considering immigration-law and criminal-law issues); ABA Guidebook §4.65, at 130 (“Because nothing is ever simple with immigration law, the terms ‘conviction,’ ‘moral turpitude,’ and ‘single scheme of criminal misconduct’ are terms of art”); *id.*, §4.67, at 130 (“[T]he term ‘moral turpitude’ evades precise definition”).
Defense counsel who consults a guidebook on whether a particular crime is an "aggravated felony" will often find that the answer is not "easily ascertained." For example, the ABA Guidebook answers the question "Does simple possession count as an aggravated felony?" as follows: "Yes, at least in the Ninth Circuit." §5.35, at 160 (emphasis added). After a dizzying paragraph that attempts to explain the evolution of the Ninth Circuit's view, the ABA Guidebook continues: "Adding to the confusion, however, is that the Ninth Circuit has conflicting opinions depending on the context on whether simple drug possession constitutes an aggravated felony under 8 U.S.C. §1101(a)(43)." Id., §5.35, at 161 (citing cases distinguishing between whether a simple possession offense is an aggravated felony "for immigration purposes" or for "sentencing purposes"). The ABA Guidebook then proceeds to explain that "attempted possession," id., §5.36, at 161 (emphasis added), of a controlled substance is an aggravated felony, while "[c]onviction under the federal accessory after the fact statute is probably not an aggravated felony, but a conviction for accessory after the fact to the manufacture of methamphetamine is an aggravated felony," id., §537, at 161 (emphasis added). Conspiracy or attempt to commit drug trafficking are aggravated felonies, but "[s]olicitation is not a drug-trafficking offense because a generic solicitation offense is not an offense related to a controlled substance and therefore not an aggravated felony." Id., §5.41, at 162.

Determining whether a particular crime is one involving moral turpitude is no easier. See id., at 134 ("Writing bad checks may or may not be a CIMT" (emphasis added)); ibid. ("[R]eckless assault coupled with an element of injury, but not serious injury, is probably not a CIMT" (emphasis added)); id., at 135 (misdemeanor driving under the influence is generally not a CIMT, but may be a CIMT if the DUI results in injury or if the driver knew that his
license had been suspended or revoked); \textit{id.}, at 136 ("If there is no element of actual injury, the endangerment offense \textit{may} not be a CIMT" (emphasis added); \textit{ibid.} ("Whether [a child abuse] conviction involves moral turpitude \textit{may} depend on the subsection under which the individual is convicted. Child abuse done with criminal negligence probably is not a CIMT" (emphasis added)).

Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. To take just a few examples, it may be hard, in some cases, for defense counsel even to determine whether a client is an alien,\footnote{Citizens are not deportable, but "[q]uestions of citizenship are not always simple." ABA Guidebook §4.20, at 113 (explaining that U.S. citizenship conferred by blood is "derivative," and that "[d]erivative citizenship depends on a number of confusing factors, including whether the citizen parent was the mother or father, the immigration laws in effect at the time of the parents' and/or defendant's birth, and the parents' marital status").} or whether a particular state disposition will result in a "conviction" for purposes of federal immigration law.\footnote{"A disposition that is not a 'conviction,' under state law may still be a 'conviction' for immigration purposes." \textit{Id.}, §4.32, at 117 (citing \textit{Matter of Salazar}, 23 I. & N. Dec. 223, 231 (BIA 2002) (en banc)). For example, state law may define the term "conviction" not to include a deferred adjudication, but such an adjudication would be deemed a conviction for purposes of federal immigration law. See ABA Guidebook §4.37; accord. D. Kesselbrenner \\& L. Rosenberg, Immigration Law and Crimes §2:1, p. 2–2 (2008) (hereinafter Immigration Law and Crimes) ("A practitioner or respondent will not even know whether the Department of Homeland Security (DHS) or the Executive Office for Immigration Review (EOIR) will treat a particular state disposition as a conviction for immigration purposes. In fact, the [BIA] treats certain state criminal dispositions as convictions even though the state treats the same disposition as a dismissal").} The task of offering advice about the immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with
which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the "length and type of sentence" and the determination "whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen," Immigration Law and Crimes §2:1, at 2–2 to 2–3.

In short, the professional organizations and guidebooks on which the Court so heavily relies are right to say that "nothing is ever simple with immigration law"—including the determination whether immigration law clearly makes a particular offense removable. ABA Guidebook §4.65, at 130; Immigration Law and Crimes §2:1. I therefore cannot agree with the Court's apparent view that the Sixth Amendment requires criminal defense attorneys to provide immigration advice.

The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel's duty to offer advice concerning deportation consequences may turn on how hard it is to determine those consequences. Where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s]" of a conviction, the Court says, counsel has an affirmative duty to advise the client that he will be subject to deportation as a result of the plea. Ante, at 11. But "[w]hen the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." Ante, at 11–12. This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is "succinct, clear, and explicit." How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in
isolation? What if the application of the provision to a particular case is not clear but a cursory examination of case law or administrative decisions would provide a definitive answer? See Immigration Law and Crimes §2:1, at 2–2 ("Unfortunately, a practitioner or respondent cannot tell easily whether a conviction is for a removable offense.... [T]he cautious practitioner or apprehensive respondent will not know conclusively the future immigration consequences of a guilty plea").

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged with such an offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral. See ABA Guidebook §4.14, at 111 ("Often the alien is both excludable and removable. At times, however, the lists are different. Thus, the oddity of an alien that is inadmissible but not deportable. This alien should not leave the United States because the government will not let him back in" (emphasis in original)). Incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court's rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem—such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences. As amici point out, "28 states and the
ALITO, J., concurring in judgment

District of Columbia have already adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas.” Brief for State of Louisiana et al. 26; accord, Chin & Holmes 708 (“A growing number of states require advice about deportation by statute or court rule”). A nonconstitutional rule requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk; and because such a warning would be given on the record, courts would not later have to determine whether the defendant was misrepresenting the advice of counsel. Likewise, flexible statutory procedures for withdrawing guilty pleas might give courts appropriate discretion to determine whether the interests of justice would be served by allowing a particular defendant to withdraw a plea entered into on the basis of incomplete information. Cf. United States v. Russell, 686 F. 2d 35, 39–40 (CADC 1982) (explaining that a district court’s discretion to set aside a guilty plea under the Federal Rules of Criminal Procedure should be guided by, among other considerations, “the possible existence of prejudice to the government’s case as a result of the defendant’s untimely request to stand trial” and “the strength of the defendant’s reason for withdrawing the plea, including whether the defendant asserts his innocence of the charge”).

Fourth, the Court’s decision marks a major upheaval in Sixth Amendment law. This Court decided Strickland in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel’s failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant’s Sixth Amendment right to counsel. As noted above, the Court’s view has been rejected by every Federal Court
of Appeals to have considered the issue thus far. See, e.g., Gonzalez, 202 F. 3d, at 28; Banda, 1 F. 3d, at 355; Chin & Holmes 697, 699. The majority appropriately acknowledges that the lower courts are "now quite experienced with applying Strickland," ante, at 14, but it casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel's duty to advise on collateral consequences.

The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel's duties under the Sixth Amendment by claiming that this Court in Hill v. Lockhart, 474 U. S. 52 (1985), similarly "applied Strickland to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty." Ante, at 14. That characterization of Hill obscures much more than it reveals. The issue in Hill was whether a criminal defendant's Sixth Amendment right to counsel was violated where counsel misinformed the client about his eligibility for parole. The Court found it "unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the Strickland v. Washington requirement of 'prejudice.'" 474 U. S., at 60. Given that Hill expressly and unambiguously refused to decide whether criminal defense counsel must avoid misinforming his or her client as to one consequence of a criminal conviction (parole eligibility), that case plainly provides no support whatsoever for the proposition that counsel must affirmatively advise his or her client as to another collateral consequence (removal). By the Court's strange logic, Hill would support its decision here even if the Court had held that misadvice concerning parole eligibility does not make counsel's performance
objectively unreasonable. After all, the Court still would have “applied Strickland” to the facts of the case at hand.

II

While mastery of immigration law is not required by *Strickland*, several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting affirmative misadvice regarding a matter as crucial to the defendant’s plea decision as deportation appears faithful to the scope and nature of the Sixth Amendment duty this Court has recognized in its past cases. In particular, we have explained that “a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not ‘a reasonably competent attorney’ and the advice was not ‘within the range of competence demanded of attorneys in criminal cases.’” *Strickland*, 466 U.S., at 687 (quoting *McMann v. Richardson*, 397 U.S. 759, 770, 771 (1970); emphasis added). As the Court appears to acknowledge, thorough understanding of the intricacies of immigration law is not “within the range of competence demanded of attorneys in criminal cases.” See ante, at 11 (“Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it”). By contrast, reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar. Candor concerning the limits of one’s professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on the Kentucky Supreme Court put it, “I do not believe it is too much of a burden to place
on our defense bar the duty to say, 'I do not know.'"


Second, incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question. See Strickland, 466 U. S., at 686 ("In giving meaning to the requirement [of effective assistance of counsel], we must take its purpose—to ensure a fair trial—as the guide"). When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant can fairly be said to assume the risk that the conviction may carry indirect consequences of which he or she is not aware. That is not the case when a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable. In the latter case, it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—or that it embodies a voluntary and intelligent decision to forsake constitutional rights. See ibid. ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result").

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court's approach, not require any upheaval in the law. As the Solicitor General points out, "[t]he vast majority of the
lower courts considering claims of ineffective assistance in the plea context have [distinguished] between defense counsel who remain silent and defense counsel who give affirmative misadvice." Brief for United States as Amicus Curiae 8 (citing cases). At least three Courts of Appeals have held that affirmative misadvice on immigration matters can give rise to ineffective assistance of counsel, at least in some circumstances. ³ And several other Circuits have held that affirmative misadvice concerning nonimmigration consequences of a conviction can violate the Sixth Amendment even if those consequences might be deemed "collateral."⁴ By contrast, it appears that no court of appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can never give rise to ineffective assistance. In short,

³ See United States v. Kwan, 407 F. 3d 1005, 1015–1017 (CA9 2005); United States v. Couto, 311 F. 3d 179, 188 (CA2 2002); Downs-Morgan v. United States, 765 F. 2d 1534, 1540–1541 (CA11 1985) (limiting holding to the facts of the case); see also Santos-Sanchez v. United States, 548 F. 3d 327, 333–334 (CA5 2008) (concluding that counsel’s advice was not objectively unreasonable where counsel did not purport to answer questions about immigration law, did not claim any expertise in immigration law, and simply warned of "possible" deportation consequence; use of the word "possible" was not an affirmative misrepresentation, even though it could indicate that deportation was not a certain consequence).

⁴ See Hill v. Lockhart, 894 F. 2d 1009, 1010 (CA8 1990) (en banc) ("The erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under Strickland v. Washington"); Sparks v. Sowards, 852 F. 2d 882, 885 (CA6 1988) ("[G]ross misadvice concerning parole eligibility can amount to ineffective assistance of counsel"); id., at 886 (Kennedy, J., concurring) ("When the maximum possible exposure is overstated, the defendant might well be influenced to accept a plea agreement he would otherwise reject"); Strader v. Garrison, 611 F. 2d 61, 65 (CA4 1979) ("[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel").
the considered and thus far unanimous view of the lower federal courts charged with administering Strickland clearly supports the conclusion that that Kentucky Supreme Court's position goes too far.

In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.

III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel's duty to assist the client. Instead, an alien defendant's Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.
SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 08–651

JOSE PADILLA, PETITIONER v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
KENTUCKY

[March 31, 2010]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

The Sixth Amendment guarantees the accused a lawyer "for his defense" against a "criminal prosecutio[n]"—not for sound advice about the collateral consequences of conviction. For that reason, and for the practical reasons set forth in Part I of JUSTICE ALITO's concurrence, I dissent from the Court's conclusion that the Sixth Amendment requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those consequences renders an attorney's assistance in defending against the prosecution constitutionally inadequate; or that the Sixth Amendment requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing
permanent, and legislatively irreparable, overkill.

*    *    *

The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel. See, United States v. Van Duzee, 140 U. S. 169, 173 (1891); W. Beaney, Right to Counsel in American Courts 21, 28–29 (1955). We have held, however, that the Sixth Amendment requires the provision of counsel to indigent defendants at government expense, Gideon v. Wainwright, 372 U. S. 335, 344–345 (1963), and that the right to "the assistance of counsel" includes the right to effective assistance, Strickland v. Washington, 466 U. S. 668, 686 (1984). Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the Sixth Amendment's textual limitation to criminal prosecutions. "[W]e have held that 'defence' means defense at trial, not defense in relation to other objectives that may be important to the accused." Rothgery v. Gillespie County, 554 U. S. ___, ___ (2008) (ALITO, J., concurring) (slip op., at 4) (summarizing cases).

We have limited the Sixth Amendment to legal advice directly related to defense against prosecution of the charged offense—advice at trial, of course, but also advice at postindictment interrogations and lineups, Massiah v. United States, 377 U. S. 201, 205–206 (1964); United States v. Wade, 388 U. S. 218, 236–238 (1967), and in general advice at all phases of the prosecution where the defendant would be at a disadvantage when pitted alone against the legally trained agents of the state, see Moran v. Burbine, 475 U. S. 412, 430 (1986). Not only have we not required advice of counsel regarding consequences collateral to prosecution, we have not even required counsel appointed to defend against one prosecution to be

There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand—to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within “the range of competence demanded of attorneys in criminal cases,” *McMann v. Richardson*, 397 U. S. 759, 771 (1970). See id., at 769–770 (describing the matters counsel and client must consider in connection with a contemplated guilty plea). We have never held, as the logic of the Court’s opinion assumes, that once counsel is appointed all professional responsibilities of counsel—even those extending beyond defense against the prosecution—become constitutional commands. Cf. *Cobb*, *supra*, at 171, n. 2; *Moran*, *supra*, at 430. Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the Sixth Amendment has no application.

Adding to counsel’s duties an obligation to advise about a conviction’s collateral consequences has no logical stopping-point. As the concurrence observes,

“[A] criminal conviction can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. . . . All of those consequences are ‘serious,’ . . .” *Ante*, at 2–3 (ALITO, J., concurring in judgment).

But it seems to me that the concurrence suffers from the
same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence’s suggestion that counsel must warn defendants of potential removal consequences, see ante, at 14–15—what would come to be known as the "Padilla warning"—cannot be limited to those consequences except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act, 18 U. S. C. §924(e). We could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar’s devising of ever-expanding categories of plea-invalidating misadvice and failures to warn—not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given.

The concurrence’s treatment of misadvice seems driven by concern about the voluntariness of Padilla’s guilty plea. See ante, at 12. But that concern properly relates to the Due Process Clauses of the Fifth and Fourteenth Amendments, not to the Sixth Amendment. See McCarthy v. United States, 394 U. S. 459, 466 (1969); Brady v. United States, 397 U. S. 742, 748 (1970). Padilla has not argued before us that his guilty plea was not knowing and voluntary. If that is, however, the true substance of his claim (and if he has properly preserved it) the state court can address it on remand.¹ But we should not smuggle the

¹I do not mean to suggest that the Due Process Clause would surely provide relief. We have indicated that awareness of "direct consequences" suffices for the validity of a guilty plea. See Brady, 397 U. S., at 755 (internal quotation marks omitted). And the required colloquy between a federal district court and a defendant required by Federal Rule of Criminal Procedure 11(b) (formerly Rule 11(c)), which we have said approximates the due process requirements for a valid plea, see Libretti v. United States, 516 U. S. 29, 49–50 (1995), does not mention
claim into the Sixth Amendment.

The Court's holding prevents legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given. Moreover, legislation could provide consequences for the misadvice, nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel's misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today's sledge hammer.

In sum, the Sixth Amendment guarantees adequate assistance of counsel in defending against a pending criminal prosecution. We should limit both the constitutional obligation to provide advice and the consequences of bad advice to that well defined area.

collateral consequences. Whatever the outcome, however, the effect of misadvice regarding such consequences upon the validity of a guilty plea should be analyzed under the Due Process Clause.

2 As the Court's opinion notes, ante, at 16–17. n. 15, many States—including Kentucky—already require that criminal defendants be warned of potential removal consequences.
Cite as: 568 U. S. ____ (2013)

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 11–820

ROSELVA CHAIDEZ, PETITIONER v. UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February 20, 2013]

JUSTICE KAGAN delivered the opinion of the Court.

In Padilla v. Kentucky, 559 U. S. ____ (2010), this Court held that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea. We consider here whether that ruling applies retroactively, so that a person whose conviction became final before we decided Padilla can benefit from it. We conclude that, under the principles set out in Teague v. Lane, 489 U. S. 288 (1989), Padilla does not have retroactive effect.

I

Petitioner Roselva Chaidez hails from Mexico, but became a lawful permanent resident of the United States in 1977. About 20 years later, she helped to defraud an automobile insurance company out of $26,000. After federal agents uncovered the scheme, Chaidez pleaded guilty to two counts of mail fraud, in violation of 18 U. S. C. §1341. The District Court sentenced her to four years of probation and ordered her to pay restitution. Chaidez's conviction became final in 2004.

Under federal immigration law, the offenses to which Chaidez pleaded guilty are “aggravated felonies,” subject-
ing her to mandatory removal from this country. See 8 U. S. C. §§1101(a)(43)(M)(i), 1227(a)(2)(A)(iii). But according to Chaidez, her attorney never advised her of that fact, and at the time of her plea she remained ignorant of it.

Immigration officials initiated removal proceedings against Chaidez in 2009, after an application she made for citizenship alerted them to her prior conviction. To avoid removal, Chaidez sought to overturn that conviction by filing a petition for a writ of coram nobis in Federal District Court.1 She argued that her former attorney’s failure to advise her of the immigration consequences of pleading guilty constituted ineffective assistance of counsel under the Sixth Amendment.

While Chaidez’s petition was pending, this Court decided Padilla. Our ruling vindicated Chaidez’s view of the Sixth Amendment: We held that criminal defense attorneys must inform non-citizen clients of the risks of deportation arising from guilty pleas. See 559 U. S., at ___ (slip op., at 9). But the Government argued that Chaidez could not benefit from Padilla because it announced a “new rule” and, under Teague, such rules do not apply in collateral challenges to already-final convictions.

The District Court determined that Padilla “did not announce a new rule for Teague purposes,” and therefore should apply to Chaidez’s case. 730 F. Supp. 2d 896, 904 (ND Ill. 2010). It then found that Chaidez’s counsel had performed deficiently under Padilla and that Chaidez suffered prejudice as a result. Accordingly, the court vacated Chaidez’s conviction. See No. 03 CR 636–6, 2010

1A petition for a writ of coram nobis provides a way to collaterally attack a criminal conviction for a person, like Chaidez, who is no longer “in custody” and therefore cannot seek habeas relief under 28 U. S. C. §2255 or §2241. See United States v. Morgan, 346 U. S. 502, 507–510–511 (1954). Chaidez and the Government agree that nothing in this case turns on the difference between a coram nobis petition and a habeas petition, and we assume without deciding that they are correct.
Opinion of the Court

WL 3979664 (ND Ill., Oct. 6, 2010).

The United States Court of Appeals for the Seventh Circuit reversed, holding that Padilla had declared a new rule and so should not apply in a challenge to a final conviction. "Before Padilla," the Seventh Circuit reasoned, "the [Supreme] Court had never held that the Sixth Amendment requires a criminal defense attorney to provide advice about matters not directly related to [a] client's criminal prosecution," including the risks of deportation. 655 F. 3d 684, 693 (2011). And state and lower federal courts had uniformly concluded that an attorney need not give "advice concerning [such a] collateral (as opposed to direct) consequence[s] of a guilty plea." Id., at 690. According to the Seventh Circuit, Padilla's holding was new because it ran counter to that widely accepted "distinction between direct and collateral consequences." 655 F. 3d, at 691. Judge Williams dissented. Agreeing with the Third Circuit's view, she argued that Padilla "broke no new ground" because it merely applied established law about a lawyer's "duty to consult" with a client. 655 F. 3d, at 695 (quoting United States v. Orocio, 645 F. 3d 630, 638–639 (CA3 2011) (internal quotation marks omitted)).

We granted certiorari, 566 U. S. ___ (2012), to resolve a split among federal and state courts on whether Padilla applies retroactively.² Holding that it does not, we affirm the Seventh Circuit.

II

Teague makes the retroactivity of our criminal proce-

dure decisions turn on whether they are novel. When we announce a "new rule," a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding. Only when we apply a settled rule may a person avail herself of the decision on collateral review. Here, Chaidez filed her *coram nobis* petition five years after her guilty plea became final. Her challenge therefore fails if *Padilla* declared a new rule.

"[A] case announces a new rule," *Teague* explained, "when it breaks new ground or imposes a new obligation" on the government. 489 U.S., at 301. "To put it differently," we continued, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Ibid.* And a holding is not so dictated, we later stated, unless it would have been "apparent to all reasonable jurists." *Lambrix v. Singletary*, 520 U.S. 518, 527–528 (1997).

But that account has a flipside. *Teague* also made clear that a case does not "announce a new rule, [when] it '[is] merely an application of the principle that governed'" a prior decision to a different set of facts. 489 U.S., at 307 (quoting *Yates v. Aiken*, 484 U.S. 211, 217 (1988)). As JUSTICE KENNEDY has explained, "[w]here the beginning point" of our analysis is a rule of "general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. 277, 309 (1992) (concurring in judgment); see also *Williams v. Taylor*, 529 U.S. 362, 391 (2000). Otherwise said, when all we do is apply a general standard to the kind of factual

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3 *Teague* stated two exceptions: "[W]atershed rules of criminal procedure" and rules placing "conductor beyond the power of the [government] to prescribe" apply on collateral review, even if novel. *489 U.S.*, at 311 (internal quotation marks omitted). Chaidez does not argue that either of those exceptions is relevant here.
circumstances it was meant to address, we will rarely state a new rule for Teague purposes.

Because that is so, garden-variety applications of the test in Strickland v. Washington, 466 U. S. 668 (1984), for assessing claims of ineffective assistance of counsel do not produce new rules. In Strickland, we held that legal representation violates the Sixth Amendment if it falls “below an objective standard of reasonableness,” as indicated by “prevailing professional norms,” and the defendant suffers prejudice as a result. Id., at 687–688. That standard, we later concluded, “provides sufficient guidance for resolving virtually all” claims of ineffective assistance, even though their particular circumstances will differ. Williams, 529 U. S., at 391. And so we have granted relief under Strickland in diverse contexts without ever suggesting that doing so required a new rule. See, e.g., ibid.; Rompilla v. Beard, 545 U. S. 374 (2005); Wiggins v. Smith, 539 U. S. 510 (2003).\(^4\) In like manner, Padilla would not have created a new rule had it only applied Strickland’s general standard to yet another factual situation—that is, had Padilla merely made clear that a lawyer who neglects to inform a client about the risk of deportation is professionally incompetent.

But Padilla did something more. Before deciding if failing to provide such advice “fell below an objective standard of reasonableness,” Padilla considered a threshold question: Was advice about deportation “categorically removed” from the scope of the Sixth Amendment right to counsel because it involved only a “collateral consequence” of a conviction, rather than a component of the criminal

\(^4\)We did not consider Teague in Williams, Rompilla, and Wiggins, but we granted habeas relief pursuant to 28 U. S. C. §2254(d)(1) because state courts had unreasonably applied “clearly established” law. And, as we have explained, “clearly established” law is not “new” within the meaning of Teague. See Williams, 529 U. S., at 412.
sentence? 559 U. S., at ___ (slip op., at 7–9). In other words, prior to asking how the Strickland test applied ("Did this attorney act unreasonably?"). Padilla asked whether the Strickland test applied ("Should we even evaluate if this attorney acted unreasonably?"). And as we will describe, that preliminary question about Strickland's ambit came to the Padilla Court unsettled—so that the Court's answer ("Yes, Strickland governs here") required a new rule.

The relevant background begins with our decision in Hill v. Lockhart, 474 U. S. 52 (1985), which explicitly left open whether advice concerning a collateral consequence must satisfy Sixth Amendment requirements. Hill pleaded guilty to first-degree murder after his attorney misinformed him about his parole eligibility. In addressing his claim of ineffective assistance, we first held that the Strickland standard extends generally to the plea process. See Hill, 474 U. S., at 57. We then determined, however, that Hill had failed to allege prejudice from the lawyer's error and so could not prevail under that standard. See id., at 60. That conclusion allowed us to avoid another, more categorical question: whether advice about parole (however inadequate and prejudicial) could possibly violate the Sixth Amendment. The Court of Appeals, we noted, had held "that parole eligibility is a collateral rather than a direct consequence of a guilty plea, of which a defendant need not be informed." Id., at 55. But our ruling on prejudice made "it unnecessary to determine whether there may be circumstances under which" ad-

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5We have never attempted to delineate the world of "collateral consequences," see Padilla, 559 U. S., at ___, n. 8 (slip op., at 7, n. 8), nor do we do so here. But other effects of a conviction commonly viewed as collateral include civil commitment, civil forfeiture, sex offender registration, disqualification from public benefits, and disfranchisement. See id., at ___ (ALITO, J., concurring in judgment) (slip op., at 2–3) (listing other examples).
vice about a matter deemed collateral violates the Sixth Amendment. Id., at 60.6

That non-decision left the state and lower federal courts to deal with the issue; and they almost unanimously concluded that the Sixth Amendment does not require attorneys to inform their clients of a conviction's collateral consequences, including deportation. All 10 federal appellate courts to consider the question decided, in the words of one, that “counsel’s failure to inform a defendant of the collateral consequences of a guilty plea is never” a violation of the Sixth Amendment. Santos-Sanchez v. United States, 548 F. 3d 327, 334 (CA5 2008).7 That constitutional guarantee, another typical decision expounded, “assures an accused of effective assistance of counsel in ‘criminal prosecutions’”; accordingly, advice about matters like deportation, which are “not a part of or enmeshed in the criminal proceeding,” does not fall within the Amendment’s scope. United States v. George, 869 F. 2d 333, 337 (CA7 1989). Appellate courts in almost 30 States agreed.8

6 In saying that much, we declined to rule not only on whether advice about a conviction’s collateral consequences falls outside the Sixth Amendment’s scope, but also on whether parole eligibility should be considered such a consequence, as the court of appeals held.


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By contrast, only two state courts held that an attorney could violate the Sixth Amendment by failing to inform a client about deportation risks or other collateral consequences of a guilty plea. That imbalance led the authors of the principal scholarly article on the subject to call the exclusion of advice about collateral consequences from the Sixth Amendment’s scope one of “the most widely recognized rules of American law.” Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 706 (2002).  


10 The dissent is therefore wrong to claim that we emphasize “the absence of lower court authority” holding that an attorney’s failure to advise about deportation violated the Sixth Amendment. Post, at 10 (opinion of SOTOMAYOR, J.). We instead point to the presence of lower court authority—in case after case and jurisdiction after jurisdiction—holding that such a failure, because relating to a collateral matter.
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So when we decided *Padilla*, we answered a question about the Sixth Amendment's reach that we had left open, in a way that altered the law of most jurisdictions—and our reasoning reflected that we were doing as much. In the normal *Strickland* case, a court begins by evaluating the reasonableness of an attorney's conduct in light of professional norms, and then assesses prejudice. But as earlier indicated, see *supra*, at 5–6, *Padilla* had a different starting point. Before asking whether the performance of Padilla's attorney was deficient under *Strickland*, we considered (in a separately numbered part of the opinion) whether *Strickland* applied at all. See 559 U.S., at ___ (slip op., at 7–9). Many courts, we acknowledged, had excluded advice about collateral matters from the Sixth Amendment's ambit; and deportation, because the consequence of a distinct civil proceeding, could well be viewed as such a matter. See *id.*, at ___ (slip op., at 7). But, we continued, no decision of our own committed us to "appl[y] a distinction between direct and collateral consequences to define the scope" of the right to counsel. *Id.*, at ___ (slip op., at 8). And however apt that distinction might be in other contexts, it should not exempt from Sixth Amendment scrutiny a lawyer's advice (or non-advice) about a plea's deportation risk. Deportation, we stated, is "unique." *Ibid*. It is a "particularly severe" penalty, and one "intimately related to the criminal process"; indeed, immigration statutes make it "nearly an automatic result" of some convictions. *Ibid*. We thus resolved the threshold question before us by breaching the previously chink-free wall between direct and collateral consequences: Notwithstanding the then-dominant view, "*Strickland* applies to Padilla's claim." *Id.*, at ___ (slip op., at 9).

If that does not count as "break[ing] new ground" or "impos[ing] a new obligation," we are hard pressed to

could not do so.
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know what would. *Teague*, 489 U.S., at 301. Before *Padilla*, we had declined to decide whether the Sixth Amendment had any relevance to a lawyer’s advice about matters not part of a criminal proceeding. Perhaps some advice of that kind would have to meet *Strickland’s* reasonableness standard—but then again, perhaps not: No precedent of our own “dictated” the answer. *Teague*, 489 U.S., at 301. And as the lower courts filled the vacuum, they almost uniformly insisted on what *Padilla* called the “categorica[l] remov[al]” of advice about a conviction’s noncriminal consequences—including deportation—from the Sixth Amendment’s scope. 559 U.S., at __ (slip op., at 9).

It was *Padilla* that first rejected that categorical approach—and so made the *Strickland* test operative—when a criminal lawyer gives (or fails to give) advice about immigration consequences. In acknowledging that fact, we do not cast doubt on, or at all denigrate, *Padilla*. Courts often need to, and do, break new ground; it is the very premise of *Teague* that a decision can be right and also be novel. All we say here is that *Padilla*’s holding that the failure to advise about a non-criminal conse-

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11 The separate opinions in *Padilla* objected to just this aspect of the Court’s ruling. Dissents have been known to exaggerate the novelty of majority opinions; and “the mere existence of a dissent,” like the existence of conflicting authority in state or lower federal courts, does not establish that a rule is new. *Beard v. Banks*, 542 U.S. 406, 416, n. 5 (2004); see *Williams*, 529 U.S., at 410. But the concurring and dissenting opinions in *Padilla* were on to something when they described the line the Court was crossing. “Until today,” JUSTICE ALITO wrote, “the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the direct consequences of a criminal conviction.” See 559 U.S., at __ (concurring in judgment) (slip op., at 2). Or again, this time from JUSTICE SCALIA: “[U]ntil today,” the Sixth Amendment guaranteed only “legal advice directly related to defense against prosecution” of a criminal charge. Id., at __ (dissenting) (slip op., at 2). One need not agree with any of the separate opinions’ criticisms of *Padilla* to concur with their view that it modified governing law.
quence could violate the Sixth Amendment would not have been—in fact, was not—"apparent to all reasonable jurists" prior to our decision. *Lambrix*, 520 U. S., at 527–528. *Padilla* thus announced a "new rule."

III

Chaidez offers, and the dissent largely adopts, a different account of *Padilla*, in which we did no more than apply *Strickland* to a new set of facts. On Chaidez's view, *Strickland* insisted "[f]rom its inception" that all aspects of a criminal lawyer's performance pass a test of "reasonableness under prevailing professional norms": The decision thus foreclosed any "categorical distinction between direct and collateral consequences." Brief for Petitioner 21–22 (emphasis deleted) (quoting *Strickland*, 466 U. S., at 688). Indeed, Chaidez contends, courts prior to *Padilla* recognized *Strickland*’s all-encompassing scope and so applied its reasonableness standard to advice concerning deportation. See Brief for Petitioner 25–26; Reply Brief 10–12. She here points to caselaw in three federal appeals courts allowing ineffective assistance claims when attorneys affirmatively misled their clients about the deportation consequences of guilty pleas.12 The only question left for *Padilla* to resolve, Chaidez claims, was whether professional norms also require criminal lawyers to volunteer advice about the risk of deportation. In addressing that issue, she continues, *Padilla* did a run-of-the-mill *Strickland* analysis. And more: It did an especially easy *Strickland* analysis. We had earlier noted in *INS v. St. Cyr*, 533 U. S. 289 (2001)—a case raising an issue of immigration law unrelated to the Sixth Amendment—that a "competent defense counsel" would inform his client about a guilty plea’s deportation consequences. *Id.*, at 323, n. 50.

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All Padilla had to do, Chaidez concludes, was recite that prior finding.

But Chaidez’s (and the dissent’s) story line is wrong, for reasons we have mostly already noted: Padilla had to develop new law, establishing that the Sixth Amendment applied at all, before it could assess the performance of Padilla’s lawyer under Strickland. See supra, at 5–6, 9. Our first order of business was thus to consider whether the widely accepted distinction between direct and collateral consequences categorically foreclosed Padilla’s claim, whatever the level of his attorney’s performance. We did not think, as Chaidez argues, that Strickland barred resort to that distinction. Far from it: Even in Padilla we did not eschew the direct-collateral divide across the board. See 559 U. S., at ___ (slip op., at 8) (“Whether that distinction is [generally] appropriate is a question we need not consider in this case”). Rather, we relied on the special “nature of deportation”—the severity of the penalty and the “automatic” way it follows from conviction—to show that “[t]he collateral versus direct distinction [was] ill-suited” to dispose of Padilla’s claim. Id., at ___ (slip op., at 8–9). All that reasoning came before we conducted a Strickland analysis (by examining professional norms and so forth), and none of it followed ineluctably from prior law.13

13 The dissent’s entire analysis founders on this most basic point. In its lengthy description of Padilla, the dissent picks up in the middle—after the Court concluded that the direct-collateral distinction did not preclude finding that Padilla’s lawyer provided ineffective assistance under the Sixth Amendment. See post, at 3–5. The dissent justifies ignoring that threshold conclusion on the ground that “Padilla declined to embrace the . . . distinction between collateral and direct consequences” and “stated very clearly that it found the distinction irrelevant” to the case. Post, at 6. But it is exactly in refusing to apply the direct-collateral distinction that the Padilla Court did something novel. Before then, as the Court forthrightly acknowledged, that distinction would have doomed Padilla’s claim in well-nigh every court in the
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Predictably, then, the caselaw Chaidez and the dissent cite fail to support their claim that lower courts "accepted that Strickland applied to deportation advice." Brief for Petitioner 25; see post, at 8–11. True enough, three federal circuits (and a handful of state courts) held before Padilla that misstatements about deportation could support an ineffective assistance claim. But those decisions reasoned only that a lawyer may not affirmatively misrepresent his expertise or otherwise actively mislead his client on any important matter, however related to a criminal prosecution. See, e.g., United States v. Kwan, 407 F. 3d 1005, 1015–1017 (CA9 2005). They co-existed happily with precedent, from the same jurisdictions (and almost all others), holding that deportation is not "so unique as to warrant an exception to the general rule that a defendant need not be advised of the [collateral] consequences of a guilty plea." United States v. Campbell, 778 F. 2d 764, 769 (CA11 1985). So at most, Chaidez has shown that a minority of courts recognized a separate rule for material misrepresentations, regardless whether they concerned deportation or another collateral matter. That limited rule does not apply to Chaidez's case. And because it lived in harmony with the exclusion of claims like hers from the Sixth Amendment, it does not establish what she needs to—that all reasonable judges, prior to Padilla, thought they were living in a Padilla-like world.

Nor, finally, does St. Cyr have any relevance here. That

United States. See 559 U. S., at ___ (slip op., at 7); supra, at 9.

11 See also Resendiz v. Kovenisky, 416 F. 3d 952, 957 (CA9 2005) ("[B]ecause immigration consequences remain collateral, the failure of counsel to advise his client of the potential immigration consequences of a conviction does not violate the Sixth Amendment"); Russo v. United States, 1999 WL 164951. *2 ("[C]ounsel cannot be found ineffective for the mere failure to inform a defendant of the collateral consequences of a plea, such as deportation") (relying on United States v. Santelises, 509 F. 2d 703, 704 (CA2 1975) (per curiam)).
decision stated what is common sense (and what we again recognized in Padilla): A reasonably competent lawyer will tell a non-citizen client about a guilty plea's deportation consequences because "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." Padilla, 559 U.S., at ___ (slip op., at 10) (quoting St. Cyr, 533 U.S., at 322). But in saying that much, St. Cyr did not determine that the Sixth Amendment requires a lawyer to provide such information. Courts had held to the contrary not because advice about deportation was insignificant to a client—really, who could think that, whether before or after St. Cyr?—but because it concerned a matter collateral to the criminal prosecution. On those courts' view, the Sixth Amendment no more demanded competent advice about a plea's deportation consequences than it demanded competent representation in the deportation process itself. Padilla decided that view was wrong. But to repeat: It was Padilla that did so. In the years following St. Cyr, not a single state or lower federal court considering a lawyer's failure to provide deportation advice

15The dissent claims the opposite, averring that lower court "decisions show nothing more than that the underlying professional norms had not yet evolved to require attorneys to provide advice about deportation consequences." Post, at 8. But the dissent cannot point to a single decision stating that a lawyer's failure to offer advice about deportation met professional norms; all the decisions instead held that a lawyer's breach of those norms was constitutionally irrelevant because deportation was a collateral consequence. See supra, at 7. Had courts in fact considered professional standards in the slew of cases before Padilla that presented Padilla-like claims, they would have discovered as early as 1968 that the American Bar Association instructed criminal lawyers to advise their non-citizen clients about the risks of deportation. See 3 ABA Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty §3.2(b), Commentary, p. 71 (App. Draft 1968). The difficulty in upholding such claims prior to Padilla had nothing to do with courts' view of professional norms and everything to do with their use of the direct-collateral divide.
abandoned the distinction between direct and collateral consequences, and several courts reaffirmed that divide. See, e.g., Santos-Sanchez, 548 F. 3d, at 335–336; Broomes v. Ashcroft, 358 F. 3d 1251, 1256–1257 (CA10 2004); United States v. Fry, 322 F. 3d 1198, 1200–1201 (CA9 2003). It took Padilla to decide that in assessing such a lawyer's performance, the Sixth Amendment sets the standard.\footnote{Chaidez makes two back-up arguments in her merits briefs—that Teague's bar on retroactivity does not apply when a petitioner challenges a federal conviction, or at least does not do so when she makes a claim of ineffective assistance. Brief for Petitioner 27–39. But Chaidez did not include those issues in her petition for certiorari. Nor, still more critically, did she adequately raise them in the lower courts. Only her petition for rehearing en banc in the Seventh Circuit at all questioned Teague's applicability, and her argument there—that a "Teague-light" standard should apply to challenges to federal convictions—differs from the ones she has made in this Court. See Petition for Rehearing and for Rehearing En Banc in No. 10–3623 (CA7), p. 13. Moreover, we cannot find any case in which a federal court has considered Chaidez's contention that Teague should not apply to ineffective assistance claims. "[M]indful that we are a court of review, not of first view," we decline to rule on Chaidez's new arguments. Cutter v. Wilkinson, 544 U. S. 709, 718, n. 7 (2005).} 

IV

This Court announced a new rule in Padilla. Under Teague, defendants whose convictions became final prior to Padilla therefore cannot benefit from its holding. We accordingly affirm the judgment of the Court of Appeals for the Seventh Circuit.

It is so ordered.
THOMAS, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 11–820

ROSELVA CHAIDEZ, PETITIONER v. UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February 20, 2013]

JUSTICE THOMAS, concurring in the judgment.

In Padilla v. Kentucky, 559 U. S. 356 (2010), this Court held that the Sixth Amendment requires an attorney for a criminal defendant to apprise his client of the risk of deportation created by a guilty plea. I dissented. The Sixth Amendment provides that “[i]n all criminal prosecutions,” an accused enjoys the right “to have the Assistance of Counsel for his defence.” By its terms, this right extends “to legal advice directly related to defense against prosecution of the charged offense,” and “[t]here is no basis in text or in principle” to expand the reach of this guarantee to guidance concerning the collateral consequences of a guilty plea. Id., at ___ (slip op., at 2–3) (SCALIA, J., dissenting). Today, the Court finds that Padilla announced a new rule of constitutional law and that, under our decision in Teague v. Lane, 489 U. S. 288 (1989), “defendants whose convictions became final prior to Padilla therefore cannot benefit from its holding.” Ante, at 15. I continue to believe that Padilla was wrongly decided and that the Sixth Amendment does not extend—either prospectively or retrospectively—to advice concerning the collateral consequences arising from a guilty plea. I, therefore, believe that the Teague analysis is unnecessary and thus concur only in the judgment.
SOTOMAYOR, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 11–820

ROSELVA CHAIDEZ, Petitioner v. UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February 20, 2013]

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

The Court holds today that Padilla v. Kentucky, 559 U. S. ___ (2010), announced a “new” rule within the meaning of Teague v. Lane, 489 U. S. 288, 301 (1989), and so does not apply to convictions that became final before its announcement. That is wrong, because Padilla did nothing more than apply the existing rule of Strickland v. Washington, 466 U. S. 668 (1984), in a new setting, the same way the Court has done repeatedly in the past: by surveying the relevant professional norms and concluding that they unequivocally required attorneys to provide advice about the immigration consequences of a guilty plea. Because Padilla fell squarely within the metes and bounds established by Strickland, I respectfully dissent.

I

A

The majority correctly sets forth the governing legal principles under Teague and Strickland. Ante, at 4–5. The Teague inquiry turns centrally on the “nature of the rule” in question, and for that reason, “[w]here the beginning point is a rule of ... general application, ... it will be the infrequent case that yields a result so novel that it forges a new rule.” Wright v. West, 505 U. S. 277, 308–309 (1992) (KENNEDY, J., concurring in judgment); see ante, at
4–5. The majority makes the important observation that “when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule.” *Ibid.* It makes sense, then, that “garden-variety applications of . . . *Strickland* . . . do not produce new rules.” *Ante,* at 5.

In *Strickland*, we did not provide a comprehensive definition of deficient performance, and instead held that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” 466 U.S., at 688. *Strickland*’s reasonableness prong therefore takes its content from the standards by which lawyers judge their professional obligations, *ibid.*, and those standards are subject to change. That is why, despite the many different settings in which it has been applied, we have never found that an application of *Strickland* resulted in a new rule.1

Significantly, we have previously found that applications of *Strickland* to new factual scenarios are not barred under 28 U.S.C. §2254(d)(1) of the Antiterrorism and Effective Death Penalty Act (AEDPA). Section 2254(d)(1) precludes habeas relief unless a state court decision violates “clearly established Federal law,” which, as relevant here, largely overlaps with the inquiry under *Teague* of whether a decision was “dictated by precedent.” 489 U.S.,

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SOTOMAYOR, J., dissenting

at 301 (plurality opinion). In Wiggins v. Smith, 539 U. S. 510, 522 (2003), for example, we found that Williams v. Taylor, 529 U. S. 362 (2000), “made no new law” when it held that Strickland extended to an attorney’s responsibility to conduct a background investigation in a capital case. Rather, we explained that “in referring to the ABA Standards for Criminal Justice as guides, [Williams] applied the same ‘clearly established’ precedent of Strickland we apply today.” 539 U. S., at 522. Similarly, in Lafler v. Cooper, 566 U. S. ___ (2012) (slip op., at 6, 14–16), we rejected the argument advanced by the Solicitor General that the Sixth Amendment did not extend to advice about a plea offer because it did not impact the fairness of the trial. Instead, we simply held that Strickland applied to this form of attorney misconduct.

In short, where we merely apply Strickland in a way that corresponds to an evolution in professional norms, we make no new law.

B

Contrary to the majority’s reconstruction, Padilla is built squarely on the foundation laid out by Strickland. Padilla relied upon controlling precedent. It began by reciting the basic rule that “[u]nder Strickland, we first determine whether counsel’s representation ‘fell below an objective standard of reasonableness.’” Padilla, 559 U. S., at ___ (slip op., at 9) (quoting Strickland, 466 U. S., at 688). We recognized that “[t]he first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: ‘[t]he proper measure of

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2 AEDPA of course differs from the Teague rule in other important respects. See, e.g., Greene v. Fisher, 565 U. S. ___ (2011) (slip op., at 5). But these differences aside, the fact that we have repeatedly found AEDPA cases involving Strickland to be controlled by established precedent underscores that the application of Strickland in a new context should almost never result in a new rule.

We therefore examined the substantial changes in federal immigration law that provided the backdrop to the relevant professional standards. Padilla, 559 U. S., at ___ (slip op., at 2–6). Pursuant to the Immigration Act of 1917, 39 Stat. 889–890, a judge could recommend that a defendant who had committed a deportable offense not be removed from the country. Congress entirely eliminated this procedure in 1990. 104 Stat. 5050. Then the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–596, abolished the Attorney General’s authority to grant discretionary relief from removal for all but a small number of offenses. Padilla, 559 U. S., at ___ (slip op., at 6). These changes in immigration law meant that for a noncitizen who committed a removable offense, “removal [had become] practically inevitable.” Ibid.

In parallel with these developments, the standards of professional responsibility relating to immigration had become more demanding. “For at least the past 15 years,” we observed in Padilla, “professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.” Id., at ___ (slip op., at 15). Citing an array of practice guides and professional responsibility manuals, we noted that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.” Id., at ___ (slip op., at 9). Indeed, “authorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients.” Id., at ___ (slip op., at 10) (internal quotation
marks omitted).

We drew further support for our conclusion that professional standards required advice about deportation consequences from our decision in *INS v. St. Cyr*, 533 U. S. 289 (2001). See *Padilla*, 559 U. S., at ___ (slip op., at 10–11) (citing *St. Cyr*, 533 U. S., at 323). In *St. Cyr*, we had explained that the availability of discretionary relief from removal was critical to a noncitizen’s decision to accept a plea offer, and expected counsel to follow the instructions of “numerous practice guides,” such as the ABA’s Standards for Criminal Justice, to inform themselves of the possible immigration consequences of a plea. *Padilla*, 559 U. S., at ___ (slip op., at 11) (citing *St. Cyr*, 533 U. S., at 323, n. 50); see *id.*, at 322, n. 48. And we there found that many States already required that a trial judge advise defendants of the same. *Ibid*. *St. Cyr* thus “recognized that ‘preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.’” *Padilla*, 559 U. S., at ___ (slip op., at 10) (quoting *St. Cyr*, 533 U. S., at 322).

Our application of *Strickland* in *Padilla* followed naturally from these earlier observations about changes in immigration law and the accompanying evolution of professional norms. When we decided *St. Cyr* and *Padilla*, nothing about *Strickland’s* substance or applicability had changed. The only difference from prior law was that the underlying professional norms had changed such that counsel’s failure to give this advice now amounted to constitutionally deficient performance.\(^3\) Both before *Pa-

\(^3\) Even before IIRIRA and *St. Cyr*, lawyers of course understood that it was good practice to inform clients of the deportation consequences of a plea. See *ante*, at 14, n. 15 (citing 3 ABA Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty §3.2(b), Commentary, p. 71 (App. Draft 1968)). Following the sea change in immigration law, however, the professional norms had become so established and universally recognized that the measure of constitutionally ade-
dilla and after, counsel was obligated to follow the relevant professional norms. It was only because those norms reflected changes in immigration law that Padilla reached the result it did, not because the Sixth Amendment right had changed at all.

II

A

Accepting that routine applications of Strickland do not result in new rules, the majority nevertheless holds that Padilla went a step further. In its view, Padilla “br[oke] new ground” by addressing the threshold question of whether advice about deportation is a collateral consequence of a criminal conviction that falls within the scope of the Sixth Amendment. Ante, at 9–10. But that is wrong, because Padilla declined to embrace the very distinction between collateral and direct consequences of a criminal conviction that the majority says it did. In fact, the Court stated very clearly that it found the distinction irrelevant for the purposes of determining a defense lawyer’s obligation to provide advice about the immigration consequences of a plea. 559 U. S., at __, n. 8 (slip op., at 7, n. 8). We asserted that we had “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under Strickland,” and concluded that “[w]hether that distinction is appropriate is a question we need not consider in this case.” Id., at ___ (slip op., at 8) (emphasis added). The distinction was “ill suited” to the task at hand, we explained, because deportation has a “close connection to the criminal process,” and is “uniquely difficult to classify as either a direct or a collateral consequence.” Id., at ___ (slip op., at 8–9). Indeed, “[o]ur law

quate performance now included giving such advice in the form Padilla recognized. See 559 U. S., at ___ (slip op., at 10).
ha[d] enmeshed criminal convictions and the penalty of deportation for nearly a century," and we had "long recognized" that deportation is "particularly severe." *Id.*, at __ (slip op., at 8).\(^1\)

At bottom, then, the majority's argument hinges upon a distinction the Court has never embraced and that *Padilla* found irrelevant to the issue it ultimately decided. Without this revision to our recent decisional history, the majority's analysis unravels.

**B**

The majority finds that the "legal landscape," *Graham v. Collins*, 506 U. S. 461, 468 (1993), before *Padilla* was nearly uniform in its rejection of *Strickland's* application to the deportation consequences of a plea. *Ante*, at 7–10. It concludes that the lower courts were generally in agreement that the Sixth Amendment did not require attorneys to inform clients of the collateral consequences of a plea, and that this weighs heavily in favor of finding that *Padilla* announced a new rule. *Ante*, at 7–8, nn. 7, 8. But the majority's discussion of these precedents operates at too high a level of generality and fails to account for the

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\(^1\)See, e.g., *INS v. St. Cyr*, 533 U. S. 289, 322 (2001) (noting that "[p]reserving the client's right to remain in the United States may be more important . . . than any potential jail sentence" (internal quotation marks omitted)); *Jordan v. De George*, 341 U. S. 223, 243 (1951) (Jackson, J., dissenting) (deportation proceedings "practically . . . are criminal" for they extend the criminal process of sentencing to include on the same convictions an additional punishment"); *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10 (1948) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile"); *Ng Fung Ho v. White*, 259 U. S. 276, 284 (1922) (deportation may result in "loss of both property and life; or of all that makes life worth living"); *Fong Yue Ting v. United States*, 149 U. S. 698, 740 (1893) (Brewer, J., dissenting) ("Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel").
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development of professional standards over time. St. Cyr noted the importance of advising clients about immigration consequences was of recent vintage, indeed more recent than some of the cases the majority cites. See 533 U. S., at 322–323. The Court relies upon decisions issued over a period that spans more than 30 years. See ante, at 7–8, nn. 7, 8. Nearly half of them (17) were decided before the enactment of IIRIRA. See ibid. And all but two of the Federal Court of Appeals cases were decided before St. Cyr. See ante, at 7–8, nn. 7, 8. These earlier decisions show nothing more than that the underlying professional norms had not yet evolved to require attorneys to provide advice about deportation consequences.

Cases from the period following IIRIRA and St. Cyr undermine the majority’s generalizations about the state of the law before Padilla. Deportation had long been understood by lower courts to present “the most difficult” penalty to classify as either a collateral or direct consequence. United States v. Russell, 686 F. 2d 35, 38 (CADC 1982); cf. Janvier v. United States, 793 F. 2d 449, 455 (CA2 1986) (holding that Strickland applied to advice about a judicial recommendation against deportation). Eventually, and in parallel with changes in federal immigration law and the corresponding professional norms, the lower courts had acknowledged an important qualification to the collateral consequences rule. After the passage of IIRIRA and this Court’s decision in St. Cyr, many courts concluded that a lawyer’s affirmative misstatements about the immigration consequences of a guilty plea can constitute deficient performance under Strickland. Indeed, each Federal Court of Appeals to address the question after St. Cyr so held. See United States v. Couto, 311 F. 3d 179, 188 (CA2 2002); United States v. Kwon, 407 F. 3d 1005, 1015 (CA9 2005); cf. Downs-Morgan v. United States, 765
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F. 2d 1534, 1540–1541 (CA11 1985). State-court decisions from this period were in accord and relied upon similar reasoning.

These decisions created an important exception to the collateral/direct consequences distinction. They also foreshadowed the Court’s reasoning in Padilla by basing their analysis of the relevant professional norms on the special nature of deportation, the ABA standards governing immigration practice, and the Court’s assessment of those standards in St Cyr. See Kwan, 407 F. 3d, at 1016 (“That counsel may have misled [the defendant] out of ignorance is no excuse. It is a basic rule of professional conduct that a lawyer must ... [remain] abreast of changes in the law and its practice. ... Counsel’s performance ... fell below the [ABA]’s ethical standard for criminal defense attorneys with respect to immigration consequences. The Supreme Court noted this standard in St Cyr’’); Couto, 311 F. 3d, at 187–191 (citing St Cyr and the relevant ABA standards, and concluding that “recent Supreme Court authority supports [a] broader view of attorney responsibility” that encompasses affirmative misrepresentations.

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5See United States v. Mora-Gomez, 875 F. Supp. 1208, 1212 (ED Va. 1995) (“[T]he clear consensus is that an affirmative misstatement regarding deportation may constitute ineffective assistance”).

6See Rubio v. State, 124 Nev. 1032, 1041, 194 P. 3d 1224, 1230 (2008) (per curiam) (“Like other jurisdictions, we recognize the particularly harsh and penal nature of deportation. The Supreme Court of the United States has described deportation as ‘a drastic measure and at times the equivalent of banishment or exile’ and further depicted it as ‘a penalty.’ ... Perhaps understanding the harshness of deportation, a growing number of jurisdictions have adopted the affirmative misrepresentation exception to the collateral consequence rule’’); People v. Correa, 108 Ill. 2d 541, 550–552, 485 N. E. 2d 307, 311 (1985); People v. McDonald, 1 N. Y. 3d 109, 113–115, 802 N. E. 2d 131, 134–135 (2003); see also Alguero v. State, 892 So. 2d 1200, 1201 (Fla. App. 2005) (per curiam); State v. Rojas-Martines, 2005 UT 86 ¶¶ 15–20, 125 P. 3d 930, 933–935; In re Yim, 139 Wash. 2d 581, 588, 989 P. 2d 512, 516 (1999).
about deportation consequences); see also *Downs-Morgan*, 765 F. 2d, at 1541 ("[D]eporation and exclusion [a]re harsh consequences").

The majority believes that these decisions did not meaningfully alter the state of the law in the lower courts before *Padilla*, because they merely applied the age-old principle that a lawyer may not affirmatively mislead a client. *Ante*, at 12–13. But, as explained, the reasoning of these cases renders that characterization at best incomplete. See, e.g., *Kwan*, 407 F. 3d, at 1016. While these lower court precedents are consistent with the general principle that attorneys should not mislead clients by providing incorrect advice, they did not rest primarily on that rule. Rather, they recognized the significant changes in professional norms that predated *Padilla* and that we had noted in *St. Cyr*. As a consequence, the "wall between direct and collateral consequences" that the lower courts had erected, *ante*, at 9, had already been dealt a serious blow by the time the Court decided *Padilla*.

As the majority points out, these misrepresentation cases stopped short of imposing an affirmative obligation on lawyers to consult with clients about the consequences of deportation. *Ante*, at 12–13. But the majority places too much emphasis on the absence of lower court authority finding that an attorney's omissions with respect to deportation resulted in ineffective assistance. The distinction between omissions and affirmative misrepresentations on which these lower court cases depended cannot be reconciled with *Strickland*. In *Padilla* itself, we rejected the Solicitor General's suggestion that *Strickland* should apply to advice about the immigration consequences of a plea only in cases where defense counsel makes an affirmative misstatement. *Padilla*, 559 U. S., at ___ (slip op., at 12). We did so because we found that *Strickland* was incompatible with the distinction between an obligation to give advice and a prohibition on affirmative misstate-
ments. 559 U. S., at ___ (slip op., at 12–13) (citing Strickland, 466 U. S., at 690). Strickland made clear that its standard of attorney performance applied to both “acts” and “omissions,” and that a rule limiting the performance inquiry to one or the other was too narrow. 466 U. S., at 690. Thus, the distinction between misrepresentations and omissions, on which the majority relies in classifying lower court precedent, implies a categorical rule that is inconsistent with Strickland’s requirement of a case-by-case assessment of an attorney’s performance.7 Id., at 688–689; see, e.g., Roe v. Flores-Ortega, 528 U. S. 470, 479 (2000). In short, that some courts have differentiated between misleading by silence and affirmative misrepresentation hardly establishes the rationality of the distinction. Notably, the Court offers no reasoned basis for believing that such a distinction can be extracted from Strickland.

To be sure, lower courts did continue to apply the distinction between collateral and direct consequences after St. Cyr. See ante, at 13–14; see, e.g., Broomes v. Ashcroft, 358 F. 3d 1251, 1256–1257 (CA10 2004). Even so, and even assuming the misrepresentation cases did not call the distinction into question, the existence of these lower court decisions is not dispositive. “[T]he standard for determining when a case establishes a new rule is ‘objective,’ and the mere existence of conflicting authority does

7The majority cites a law review article for the proposition that the categorical consequences rule is “one of the most widely recognized rules of American law.” Ante, at 8 (quoting Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 706 (2002)). But the article was, in fact, quite critical of the rule. The authors explained that “[t]he real work of the conviction is performed by the collateral consequences,” and that the direct/collateral distinction in the context of ineffective-assistance claims was “surprising because it seems inconsistent with the framework that the Supreme Court . . . laid out” in Strickland. Chin & Holmes, at 700–701.

Where the application of *Strickland* was straightforward, rooted in 15 years of professional standards and the Court’s prior *St. Cyr* decision, there is no reason to put these lower court cases, many from more than a decade earlier, ahead of this Court’s simple and clear reasoning in *Padilla*. Nevertheless, the majority reaches the paradoxical conclusion that by declining to apply a collateral-consequence doctrine the Court had never adopted, *Padilla* announced a new rule.

III

What truly appears to drive the majority’s analysis is its sense that *Padilla* occasioned a serious disruption in lower court decisional reasoning. See, *e.g.*, *ante*, at 9–10 (“If that does not count as ‘break[ing] new ground’ . . . we are hard pressed to know what would” (quoting *Teague*, 489 U. S., at 301)). The concurring and dissenting opinions in *Padilla* similarly reflected the impression that it was a significant and destabilizing decision. See 559 U. S., at ___ (ALITO, J., concurring in judgment) (slip op., at 3); id., at ___ (SCALIA, J., dissenting) (slip op., at 5) (describing the majority opinion as a “sledge hammer”); *ante*, at 8–9, n. 10. But the fact that a decision was perceived as momentous or consequential, particularly by those who disagreed with it, does not control in the *Teague* analysis. Faithfully applying the *Teague* rule depends instead on an examination of this Court’s reasoning and an objective assessment of the precedent at issue. *Stringer*, 503 U. S., at 237. In *Padilla*, we did nothing more than apply *Strickland*. By holding to the contrary, today’s decision deprives defendants of the fundamental protection of *Strickland*, which requires that lawyers comply with professional norms.
SOTOMAYOR, J., dissenting

with respect to any advice they provide to clients.

* * *

Accordingly, I would reverse the judgment of the Seventh Circuit and hold that Padilla applies retroactively on collateral review to convictions that became final before its announcement. With respect, I dissent.
SUPREME COURT OF THE UNITED STATES

SYLLABUS

CHAIDEZ v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11–820. Argued November 1, 2012—Decided February 20, 2013

Immigration officials initiated removal proceedings against petitioner Chaidez in 2009 upon learning that she had pleaded guilty to mail fraud in 2004. To avoid removal, she sought to overturn that conviction by filing a petition for a writ of coram nobis, contending that her former attorney’s failure to advise her of the guilty plea’s immigration consequences constituted ineffective assistance of counsel under the Sixth Amendment. While her petition was pending, this Court held in Padilla v. Kentucky, 559 U. S. ___, that the Sixth Amendment requires defense attorneys to inform non-citizen clients of the deportation risks of guilty pleas. The District Court vacated Chaidez’s conviction, determining that Padilla did not announce a “new rule” under Teague v. Lane, 489 U. S. 288, and thus applied to Chaidez’s case. The Seventh Circuit reversed, holding that Padilla had declared a new rule and should not apply in a challenge to a final conviction.

 Held: Padilla does not apply retroactively to cases already final on direct review. Pp. 3–15.

(a) Under Teague, a person whose conviction is already final may not benefit from a new rule of criminal procedure on collateral review. A “case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” Teague, 489 U. S., at 301. And a holding is not so dictated unless it would have been “apparent to all reasonable jurists.” Lambrix v. Singletary, 520 U. S. 558, 527–528. At the same time, a case does not “announce a new rule, [when] it [is] merely an application of the principle that governed” a prior decision to a different set of facts. Teague, 489 U. S., at 307. Thus, garden-variety applications of the test in Strickland v. Washington, 466 U. S. 668, for assessing ineffec-
Syllabus

tive assistance claims do not produce new rules. id., at 687–688. But Padilla did more than just apply Strickland's general standard to yet another factual situation. Before deciding if failing to inform a client about the risk of deportation "fell below [Strickland's] objective standard of reasonableness," 466 U. S., at 688. Padilla first considered the threshold question whether advice about deportation was "categorically removed" from the scope of the Sixth Amendment right to counsel because it involved only a "collateral consequence" of a conviction, rather than a component of a criminal sentence. 559 U. S., at ___. That is, prior to asking how the Strickland test applied. Padilla asked whether that test applied at all.

That preliminary question came to the Court unsettled. Hill v. Lockhart, 474 U. S. 52, had explicitly left open whether the Sixth Amendment right extends to collateral consequences. That left the issue to the state and lower federal courts, and they almost unanimously concluded that the Sixth Amendment does not require attorneys to inform their clients of a conviction's collateral consequences, including deportation. Padilla's contrary ruling thus answered an open question about the Sixth Amendment's reach, in a way that altered the law of most jurisdictions. In so doing, Padilla broke new ground and imposed a new obligation. Pp. 3–11.

(b) Chaidez argues that Padilla did no more than apply Strickland to a new set of facts. But she ignores that Padilla had to develop new law to determine that Strickland applied at all. The few lower court decisions she cites hold only that a lawyer may not affirmatively misrepresent his expertise or otherwise actively mislead his client as to any important matter. Those rulings do not apply to her case, and they do not show that all reasonable judges thought that lawyers had to advise their clients about deportation risks. Neither does INS v. St. Cyr, 533 U. S. 289, have any relevance here. In saying that a reasonably competent lawyer would tell a non-citizen client about a guilty plea's deportation consequences, St. Cyr did not determine that the Sixth Amendment requires a lawyer to provide such information. It took Padilla to decide that question. Pp. 11–15.

655 F. 3d 684, affirmed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, BREYER, and ALITO, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined.
Executive Actions on Immigration

**Update:** Due to a federal court order, USCIS will not begin accepting requests for the expansion of DACA on February 18 as originally planned. The court’s temporary injunction, issued February 16, does not affect the existing DACA. Individuals may continue to come forward and request an initial grant of DACA or renewal of DACA under the guidelines established in 2012. Please check back for updates.

On November 20, 2014, the President announced a series of executive actions to crack down on illegal immigration at the border, prioritize deporting felons not families, and require certain undocumented immigrants to pass a criminal background check and pay taxes in order to temporarily stay in the U.S. without fear of deportation.

These initiatives include:

- Expanding the population eligible for the Deferred Action for Childhood Arrivals (DACA) program to people of any current age who entered the United States before the age of 16 and lived in the United States continuously since January 1, 2010, and extending the period of DACA and work authorization from two years to three years. | Details
- Allowing parents of U.S. citizens and lawful permanent residents to request deferred action and employment authorization for three years, in a new Deferred Action for Parents of Americans and Lawful Permanent Residents* program, provided they have lived in the United States continuously since January 1, 2010, and pass required background checks | Details
- Expanding the use of provisional waivers of unlawful presence to include the spouses and sons and daughters of lawful permanent residents and the sons and daughters of U.S. citizens | Details
- Modernizing, improving and clarifying immigrant and nonimmigrant visa programs to grow our economy and create jobs | Details
- Promoting citizenship education and public awareness for lawful permanent residents and providing an option for naturalization applicants to use credit cards to pay the application fee | Details

*Also known as Deferred Action for Parental Accountability.

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**Next steps**

USCIS and other agencies and offices are responsible for implementing these initiatives as soon as possible. Some initiatives will be implemented over the next several months and some will take longer.

Over the coming months, USCIS will produce detailed explanations, instructions, regulations and forms as necessary. The brief summaries provided below offer basic information about each initiative.

While USCIS is not accepting requests or applications at this time, if you believe you may be eligible for one of the initiatives listed above, you can prepare by gathering documents that establish factors such as your:

- Identity;
- Relationship to a U.S. citizen or lawful permanent resident, if necessary; and
- Continuous residence in the United States over the last five years or more.

strongly encourage you to subscribe to receive an email whenever additional information on these initiatives is available on our website. We will also post updates on Facebook and Twitter.

Share this page with your friends and family members. Remind them that the only way to be sure to get the facts is to get them **directly from USCIS.** Unauthorized practitioners of immigration law may try to take advantage of you by charging a fee to submit forms to USCIS or by pretending to provide other special access or expedited services which do not exist. To learn more about how to spot a scam, please visit our website.
Below are summaries of major planned initiatives by USCIS, including:

1. Deferred Action for Childhood Arrivals (DACA) program

Who
- Individuals with no lawful immigration status who are seeking initial or renewal DACA.

What
- Extends the deferred action period and employment authorization to three years from two years, and allows you to be considered for DACA if you:
  - Entered the United States before the age of 16;
  - Have lived in the United States continuously since at least January 1, 2010, rather than the prior requirement of June 15, 2007;
  - Are of any age (removes the requirement to have been born since June 15, 1981); and
  - Meet all the other DACA guidelines.

When
- See note at the top of the page

How
- Go to the Consideration of Deferred Action for Childhood Arrivals (DACA) page for instructions which will be updated. Subscribe to receive updates by email.

See our flier Deferred Action for Childhood Arrivals (DACA) (PDF).

2. Deferred action for parents of U.S. citizens and lawful permanent residents

Who
- An undocumented individual living in the United States who is the parent of a U.S. citizen or lawful permanent resident and who meets the guidelines listed below.

What
- Allows parents to request deferred action and employment authorization if they:
  - Have lived in the United States continuously since January 1, 2010;
  - Had, on November 20, 2014, a son or daughter who is a U.S. citizen or lawful permanent resident; and

Notes: USCIS will consider each request for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) on a case-by-case basis. Enforcement priorities include (but are not limited to) national security and public safety threats.

When
- Mid-to-late May 2015.

How
- Subscribe to receive updates by email.

See our flier Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) (PDF)

Provisional waivers of unlawful presence

Who
- Undocumented individuals who have resided unlawfully in the United States for at least 180 days and who are:
  - The sons and daughters of U.S. citizens; or
  - The spouse and sons or daughters of lawful permanent residents.
• Expands the provisional waiver program announced in 2013 by allowing the spouses, sons and daughters of lawful permanent residents and the sons and daughters of U.S. citizens to get a waiver if a visa is available. There may be instances when the qualifying relative is not the petitioner.

• Clarifies the meaning of the “extreme hardship” standard that must be met to obtain a waiver.

Notes: Currently, only spouses and minor children of U.S. citizens are allowed to apply to obtain a provisional waiver if a visa is available. For more information about the waivers program, go to the Provisional Unlawful Presence Waivers page which will be updated over the next several months.

When
• Upon issuing of new guidelines and regulations.

How
• Subscribe to receive updates by email.

4. Modernize, improve and clarify immigrant and nonimmigrant visa programs to grow our economy and create jobs

Who
• U.S. businesses, foreign investors, researchers, inventors and skilled foreign workers.

USCIS will:

• Work with the Department of State to develop a method to allocate immigrant visas to ensure that all immigrant visas authorized by Congress are issued to eligible individuals when there is sufficient demand for such visas.

• Work with the Department of State to modify the Visa Bulletin system to more simply and reliably make determinations of visa availability.

• Provide clarity on adjustment portability to remove unnecessary restrictions on natural career progression and general job mobility to provide relief to workers facing lengthy adjustment delays.

• Clarify the standard by which a national interest waiver may be granted to foreign inventors, researchers and founders of start-up enterprises to benefit the U.S. economy.

• Authorize parole, on a case-by-case basis, to eligible inventors, researchers and founders of start-up enterprises who may not yet qualify for a national interest waiver, but who:
  ○ Have been awarded substantial U.S. investor financing; or
  ○ Otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting-edge research.

• Finalize a rule to provide work authorization to the spouses of certain H-1B visa holders who are on the path to lawful permanent resident status.

• Work with Immigration and Customs Enforcement (ICE) to develop regulations for notice and comment to expand and extend the use of optional practical training (OPT) for foreign students, consistent with existing law.

• Provide clear, consolidated guidance on the meaning of “specialized knowledge” to bring greater clarity and integrity to the L-1B program, improve consistency in adjudications, and enhance companies’ confidence in the program.

When
• Upon issuing necessary guidance and regulations.

How
• Subscribe to receive updates by email.

5. Promote the naturalization process

Who
• Lawful permanent residents eligible to apply for U.S. citizenship

What
• Promote citizenship education and public awareness for lawful permanent residents.
• Allow naturalization applicants to use credit cards to pay the application fee.
• Assess potential for partial fee waivers in the next biennial fee study.
Notes: Go to the U.S. Citizenship page to learn about the naturalization process and visit the Citizenship Resource Center to find naturalization test preparation resources. You can also visit the N-400, Application for Naturalization, page.

When
• During 2015

Subscribe to receive updates by email.

Key Questions and Answers

Q1: When will USCIS begin accepting applications related to these executive initiatives?

A1: While USCIS is not accepting applications at this time, individuals who think they may be eligible for one or more of the new initiatives may prepare now by gathering documentation that establishes factors such as their:

• Identity;
• Relationship to a U.S. citizen or lawful permanent resident; and
• Continuous residence in the United States over the last five years or more.

USCIS expects to begin accepting requests for the:

• Expanded DACA program on February 18, 2015; and
• Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program in mid-to-late May 2015.

Others programs will be implemented after new guidance and regulations are issued.

We strongly encourage you to subscribe to receive an email whenever additional information is available on the USCIS website. Remember that the only way to get official information is directly from USCIS. Unauthorized practitioners of immigration law may try to take advantage of you by charging a fee to submit forms to USCIS on your behalf or by claiming to provide other special access or expedited services which do not exist. To learn how to get the right immigration help, visit www.uscis.gov/avoidscams for tips on filing forms, reporting scams and finding accredited legal services.

Q2: How many individuals does USCIS expect will apply?

A2: Preliminary estimates show that roughly 4.9 million individuals may be eligible for the initiatives announced by the President. However, there is no way to predict with certainty how many individuals will apply. USCIS will decide applications on a case-by-case basis and encourages as many people as possible to consider these new initiatives. During the first two years of DACA, approximately 60 percent of potentially eligible individuals came forward. However, given differences among the population eligible for these initiatives and DACA, actual participation rates may vary.

Q3: Will there be a cutoff date for individuals to apply?

A3: The initiatives do not include deadlines. Nevertheless, USCIS encourages all eligible individuals to carefully review each initiative and, once the initiative becomes available, make a decision as soon as possible about whether to apply.

Q4: How long will applicants have to wait for a decision on their application?

A4: The timeframe for completing this new pending workload depends on a variety of factors. USCIS will be working to process applications as expeditiously as possible while maintaining program integrity and customer service. Our aim is to complete all applications received by the end of next year before the end of 2016, consistent with our target processing time of completing review of applications within approximately one year of receipt. In addition, USCIS will provide each applicant with notification of receipt of their application within 60 days of receiving it.

Q5: Will USCIS need to expand its workforce and/or seek appropriated funds to implement these new initiatives?

A5: USCIS will need to adjust its staffing to sufficiently address this new workload. Any hiring will be funded through application fees rather than appropriated funds.

Q6: Will the processing of other applications and petitions (such as family-based petitions and green card applications) be delayed?

A6: USCIS is working hard to build capacity and increase staffing to begin accepting requests and applications for the initiatives. We will monitor resources and capacity very closely, and we will keep the public and all of our stakeholders informed as this process unfolds over the course of the coming months.

Q7: What security checks and anti-fraud efforts will USCIS conduct to identify individuals requesting deferred action who have criminal backgrounds or who otherwise pose a public safety threat or national security risk?

A7: USCIS is committed to maintaining the security and integrity of the immigration system. Individuals seeking deferred action relief...
under these new initiatives will undergo thorough background checks, including but not limited to 10-print fingerprint, primary name and alias name checks against databases maintained by DHS and other federal government agencies. These checks are designed to identify individuals who may pose a national security or public safety threat, have a criminal background, have perpetrated fraud, or who may be otherwise ineligible to request deferred action. No individual will be granted relief without passing these background checks.

In addition, USCIS will conduct an individual review of each case. USCIS officers are trained to identify indicators of fraud, including

Q8: What if someone’s case is denied or they fail to pass a background check?

A8: Individuals who knowingly make a misrepresentation, or knowingly fail to disclose facts, in an effort to obtain deferred action or work authorization through this process will not receive favorable consideration for deferred action. In addition, USCIS will apply its current policy governing the referral of individual cases to Immigration and Customs Enforcement (ICE) and the issuance of Notices to Appear before an immigration judge. If the background check or other information uncovered during the review of a request for deferred action indicates that an individual’s presence in the United States threatens public safety or national security, USCIS will deny the request and refer the matter for criminal investigation and possible removal by ICE, consistent with existing processes.

Q9: If I currently have DACA, will I need to do anything to receive the third year of deferred action and work authorization provided by the executive initiatives?

A9: The new three-year work authorization timeframe will be applied for applications currently pending and those received after the President’s announcement. Work authorizations already issued for a two-year period under the current guidelines will continue to be valid through the validity period indicated on the card. USCIS is exploring means to extend previously issued two-year work authorization renewals to the new three-year period.

Q10: Will the information I share in my request for consideration of deferred action be used for immigration enforcement purposes?

A10: Information provided in your request is protected from disclosure to Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) for the purpose of immigration enforcement proceedings unless you meet the criteria for the issuance of a Notice to Appear or a referral to ICE under the criteria set forth in USCIS’ Notice to Appear guidance. Individuals who are granted deferred action will not be referred to ICE. The information may be shared, however, with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including:

- Assisting in the consideration of the deferred action request;
- To identify or prevent fraudulent claims;
- For national security purposes; or
- For the investigation or prosecution of a criminal offense.

This policy covers family members and guardians, in addition to you.

Q11: What is USCIS doing to assist dependents of U.S. armed services personnel?

A11: USCIS is working with the Department of Defense to determine how to expand parole authorization to dependents of certain individuals enlisting or enlisted in the U.S. armed services. For information on the existing parole-in-place policy for military personnel, please read this policy memorandum.

Glossary

- **Continuous residence**: For a detailed explanation, go to the USCIS Policy Manual, Chapter 3: Continuous Residence.
- **DACA**: Deferred Action for Childhood Arrivals, a program launched in 2012. For more information, go to the Consideration of Deferred Action for Childhood Arrivals (DACA) page.
- **Deferred action**: A use of prosecutorial discretion to not remove an individual from the country for a set period of time, unless the deferred action is terminated for some reason. Deferred action is determined on a case-by-case basis and only establishes lawful presence but does not provide immigration status or benefits of any kind. DACA is one type of deferred action.
- **Parole in place**: Immigration and Nationality Act section 212(d)(5)(A) gives the Secretary the discretion, on a case-by-case basis, to “parole” for “urgent humanitarian reasons or significant public benefit” an alien applying for admission to the United States. Although it is most frequently used to permit an alien who is outside the United States to come into U.S. territory, parole may also be granted to aliens who are already physically present in the U.S. without inspection or admission. This latter use of parole is sometimes called “parole in place.”
- **Prosecutorial discretion**: The legal authority to choose whether or not to take action against an individual for committing an offense.
- **Provisional waiver**: Waiver for individuals who are otherwise inadmissible due to more than 180 days of unlawful presence in the United States, based on a showing of extreme hardship to certain U.S. citizen or lawful permanent resident family members, which allows the individual to return after departure for an immigrant visa interview at a U.S. embassy or consulate. For more information, go to the Provisional Unlawful Presence Waivers page.

You can find definitions of other terms used on our website in Glossary of Terms.
June 17, 2011

MEMORANDUM FOR: All Field Office Directors
All Special Agents in Charge
All Chief Counsel

FROM: John Morton
Director

SUBJECT: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

Purpose

This memorandum provides U.S. Immigration and Customs Enforcement (ICE) personnel guidance on the exercise of prosecutorial discretion to ensure that the agency’s immigration enforcement resources are focused on the agency’s enforcement priorities. The memorandum also serves to make clear which agency employees may exercise prosecutorial discretion and what factors should be considered.

This memorandum builds on several existing memoranda related to prosecutorial discretion with special emphasis on the following:

- Sam Bernsen, Immigration and Naturalization Service (INS) General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976);
- Bo Cooper, INS General Counsel, INS Exercise of Prosecutorial Discretion (July 11, 2000);
- Doris Meissner, INS Commissioner, Exercising Prosecutorial Discretion (November 17, 2000);
- Bo Cooper, INS General Counsel, Motions to Reopen for Considerations of Adjustment of Status (May 17, 2001);
- William J. Howard, Principal Legal Advisor, Prosecutorial Discretion (October 24, 2005);
- Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion (November 7, 2007);
- John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens (March 2, 2011); and
- John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).
The following memoranda related to prosecutorial discretion are rescinded:

- Johnny N. Williams, Executive Associate Commissioner (EAC) for Field Operations, Supplemental Guidance Regarding Discretionary Referrals for Special Registration (October 31, 2002); and
- Johnny N. Williams, EAC for Field Operations, Supplemental NSEERS Guidance for Call-In Registrants (January 8, 2003).

Background

One of ICE’s central responsibilities is to enforce the nation’s civil immigration laws in coordination with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE, however, has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency’s enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system. These priorities are outlined in the ICE Civil Immigration Enforcement Priorities memorandum of March 2, 2011, which this memorandum is intended to support.

Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise “prosecutorial discretion” if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual. ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case.

In the civil immigration enforcement context, the term “prosecutorial discretion” applies to a broad range of discretionary enforcement decisions, including but not limited to the following:

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question, or arrest for an administrative violation;
- deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;

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1 The Meissner memorandum’s standard for prosecutorial discretion in a given case turned principally on whether a substantial federal interest was present. Under this memorandum, the standard is principally one of pursuing those cases that meet the agency’s priorities for federal immigration enforcement generally.
settle or dismissing a proceeding;
granting deferred action, granting parole, or staying a final order of removal;
agreeing to voluntary departure, the withdrawal of an application for admission, or
other action in lieu of obtaining a formal order of removal;
pursuing an appeal;
executing a removal order; and
responding to or joining in a motion to reopen removal proceedings and to consider
joining in a motion to grant relief or a benefit.

Authorized ICE Personnel

Prosecutorial discretion in civil immigration enforcement matters is held by the Director² and
may be exercised, with appropriate supervisory oversight, by the following ICE employees
according to their specific responsibilities and authorities:

- officers, agents, and their respective supervisors within Enforcement and Removal
  Operations (ERO) who have authority to institute immigration removal proceedings or to
  otherwise engage in civil immigration enforcement;

- officers, special agents, and their respective supervisors within Homeland Security
  Investigations (HSI) who have authority to institute immigration removal proceedings or
to otherwise engage in civil immigration enforcement;

- attorneys and their respective supervisors within the Office of the Principal Legal
  Advisor (OPLA) who have authority to represent ICE in immigration removal
  proceedings before the Executive Office for Immigration Review (EOIR); and

- the Director, the Deputy Director, and their senior staff.

ICE attorneys may exercise prosecutorial discretion in any immigration removal proceeding
before EOIR, on referral of the case from EOIR to the Attorney General, or during the pendency
of an appeal to the federal courts, including a proceeding proposed or initiated by CBP or
USCIS. If an ICE attorney decides to exercise prosecutorial discretion to dismiss, suspend, or
close a particular case or matter, the attorney should notify the relevant ERO, HSI, CBP, or
USCIS charging official about the decision. In the event there is a dispute between the charging
official and the ICE attorney regarding the attorney’s decision to exercise prosecutorial
discretion, the ICE Chief Counsel should attempt to resolve the dispute with the local supervisors
of the charging official. If local resolution is not possible, the matter should be elevated to the
Deputy Director of ICE for resolution.

² Delegation of Authority to the Assistant Secretary, Immigration and Customs Enforcement, Delegation No. 7030.2
(November 13, 2004), delegating among other authorities, the authority to exercise prosecutorial discretion in
immigration enforcement matters (as defined in 8 U.S.C. § 1101(a)(17)).
Factors to Consider When Exercising Prosecutorial Discretion

When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to—

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person's ties and contributions to the community, including family relationships;
- the person's ties to the home country and conditions in the country;
- the person's age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person's spouse is pregnant or nursing;
- whether the person or the person's spouse suffers from severe mental or physical illness;
- whether the person's nationality renders removal unlikely;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

This list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities.
That said, there are certain classes of individuals that warrant particular care. As was stated in the Meissner memorandum on Exercising Prosecutorial Discretion, there are factors that can help ICE officers, agents, and attorneys identify these cases so that they can be reviewed as early as possible in the process.

The following positive factors should prompt particular care and consideration:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence, trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.

In exercising prosecutorial discretion in furtherance of ICE’s enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

- individuals who pose a clear risk to national security;
- serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- known gang members or other individuals who pose a clear danger to public safety; and
- individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

Timing

While ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding. As was more extensively elaborated on in the Howard Memorandum on Prosecutorial Discretion, the universe of opportunities to exercise prosecutorial discretion is large. It may be exercised at any stage of the proceedings. It is also preferable for ICE officers, agents, and attorneys to consider prosecutorial discretion in cases without waiting for an alien or alien's advocate or counsel to request a favorable exercise of discretion. Although affirmative requests from an alien or his or her representative may prompt an evaluation of whether a favorable exercise of discretion is appropriate in a given case, ICE officers, agents, and attorneys should examine each such case independently to determine whether a favorable exercise of discretion may be appropriate.

In cases where, based upon an officer's, agent's, or attorney's initial examination, an exercise of prosecutorial discretion may be warranted but additional information would assist in reaching a final decision, additional information may be requested from the alien or his or her representative. Such requests should be made in conformity with ethics rules governing
communication with represented individuals and should always emphasize that, while ICE may be considering whether to exercise discretion in the case, there is no guarantee that the agency will ultimately exercise discretion favorably. Responsive information from the alien or his or her representative need not take any particular form and can range from a simple letter or e-mail message to a memorandum with supporting attachments.

Disclaimer

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

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3 For questions concerning such rules, officers or agents should consult their local Office of Chief Counsel.
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