No. 23-2237

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SAMIR BAPTISTA,
Petitioner,
v.
MERRICK GARLAND,
UNITED STATES ATTORNEY GENERAL,
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals
Agency Case No. A055-727-998

BRIEF OF *AMICI CURIAE* THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, MARYLAND OFFICE OF THE PUBLIC DEFENDER, AND MASSACHUSETTS COMMITTEE FOR PUBLIC COUNSEL SERVICES IN SUPPORT OF PETITIONER

Katherine L. Evans
Jenny Kim
Grace Embrey, *Supervised Law Student*
DUKE UNIVERSITY SCHOOL OF LAW
IMMIGRANT RIGHTS CLINIC
210 Science Drive, Box 90360
Durham, NC 27708-0360
Phone: 919-613-7036

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-2237 Caption: Baptista v. Garland

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Immigration Lawyers Assoc., Maryland Office of the Public Defender, Capital Area Immigrants' Rights Coalition, Committee for Public Counsel Services
(name of party/amicus)

who is amici curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Katherine L. Evans Date: 04/05/2024

Counsel for: Amici Curiae

Print to PDF for Filing

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici curiae are organizations whose staff and members represent noncitizen defendants in criminal proceedings and advise counsel for noncitizen defendants. Collectively, amici advise defense counsel and noncitizen defendants in thousands of criminal matters across the country every year, as well as providing training and technical assistance. Amici, therefore, have a strong interest in the predictable and proper application of U.S. immigration law, including the federal standard for attempt, to criminal convictions. The decision of the Board of Immigration Appeals ("BIA" or "Board") would expand the category of attempt offenses and impede amici's ability to meet their constitutional duties and professional standards. A statement of interest for each organization can be found in the accompanying motion for leave to file this amici curiae brief.

[1] This brief, proffered pursuant to Federal Rule of Appellate Procedure 29(a), was authored solely by counsel indicated on the cover page. No party, party's counsel, or any person other than amici curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. Petitioner has consented to the filing of this brief, and the Government does not oppose this filing.

INTRODUCTION

Petitioner Samir Baptista, a Lawful Permanent Resident, was charged and convicted of Assault with Intent to Rob or Steal, Unarmed, in violation of Massachusetts Gen. Laws Chapter 265 § 20. The offense was not charged as attempted robbery under Massachusetts law, though Massachusetts law contains attempt offenses. *See* Mass. Gen. Laws ch. 274, § 6. Nevertheless, the Department of Homeland Security ("DHS") charged Mr. Baptista as removable for the aggravated felony of attempted theft. A.R. 479 (citing 8 U.S.C. 1101(a)(43)(U)). The Board sustained this ground of removal. A.R. 6-7. In doing so, it converted a completed act X (not an aggravated felony) with intent to commit different act Y, into the aggravated felony of attempted Y, even though the element of attempt was not established by the conviction.

Amici submit this brief to address the wider implications of the Board's decision for defense attorneys, the immigration attorneys who advise them, and the criminal justice system as a whole. The Board's methodology creates uncertainty as to the immigration consequences of criminal convictions and undermines the ability of defense counsel, and their immigration advisors, to provide accurate advice to their noncitizen clients as required by their professional standards and the Sixth Amendment of the Constitution. The standards and norms for defense counsel across the country often require advice as to the consequences for deportation, detention,

naturalization, relief from removal, and immigration benefits. The Immigration and Nationality Act attaches numerous consequences for both attempted crimes involving moral turpitude (CIMT) and attempted aggravated felonies. 8 U.S.C. 1182(a)(2)(A)(i) (attempted CIMTs); 8 U.S.C. 1227(a)(2)(A)(iii) (aggravated felony); 8 U.S.C. 1101(a)(43)(U) (defining aggravated felony to include attempt). By arrogating the determination of whether a state offense that is not charged as a state "attempt" nonetheless meets the federal generic definition of "attempt," the Board is veering into impermissible and unpredictable fact-finding, undermining amici's ability to advise noncitizen defendants of the immigration consequences of a plea.

Furthermore, the Board's methodology could extend to other similarly structured state statutes with significant effects for the criminal justice system. Noncitizen defendants may be less likely to enter guilty pleas if they are concerned that an offense, which does not involve a completed removable act, could be charged as an attempted CIMT or attempted aggravated felony. Additionally, criminal defense attorneys could face an increase in ineffective assistance of counsel claims if they fail to predict when the Board will reconstitute a non-attempt offense as an attempted CIMT or attempted aggravated felony. For these reasons, this Court should correct the Board's error and vacate its decision.

ARGUMENT

I. DEFENSE COUNSEL MUST ACCURATELY ADVISE NONCITIZEN CLIENTS ON THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS.

The Fourth Circuit is authorized to review removal orders based on criminal convictions from any state and its decisions govern immigration judges physically located in the Fourth Circuit, including those based in immigration adjudication centers, which decide cases from across the country. 8 U.S.C. 1252(b)(2); *Herrera-Alcala v. Garland*, 39 F.4th 233, 241–43 (4th Cir. 2022). Consequently, this Court's ruling could affect the ability of defense counsel throughout the country, and the immigration attorneys who advise them, to provide accurate advice so that defense counsel can meet their professional standards. These standards often go beyond advising a noncitizen that a plea may carry a risk of deportation to include consequences for detention, naturalization, and relief from deportation.

A. Defense Counsel Has a Constitutional Obligation to Advise Noncitizen Clients About Potential Deportation Consequences Before They Plead Guilty.

For decades now, defense counsel has had a clear obligation "to provide advice on the deportation consequences of a client's plea." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). The Supreme Court in *Padilla* noted that "[t]he severity of deportation—the equivalent of banishment or exile—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation."

Id. at 373–74 (internal quotation and citation omitted). In light of the prevailing professional practices and the gravity of deportation, the Court held that defense counsel must advise noncitizen defendants about potential "adverse immigration consequences" in order to satisfy noncitizens' right to effective assistance of counsel under the Sixth Amendment of the Constitution. *Id.* at 369, 374.

The Supreme Court explained that "it [is] most difficult to divorce the penalty from the conviction in the deportation context." *Id*. at 365–66 (internal citations omitted). In fact, "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." *Id*. at 364. As a result, the Court acknowledged that "accurate legal advice for noncitizens accused of crimes has never been more important." *Id*.

In reaching its holding, the Court gave significant weight to the fact that professional standards had for years imposed an obligation on defense counsel to provide defendants with notice of potential immigration consequences. The Court noted that the "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable" to expect of defense counsel's representation. *Id*. at 366 (quoting *Strickland v. Washington,* 466 U.S. 668, 688 (1984)). The Court recognized that "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 367 (quoting Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12–14).

The Court further recognized that preserving the availability of discretionary relief was likely one of the main considerations defendants would have made when deciding whether or not to enter into a plea bargain. *Id*. at 368. It noted that "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process." *Id*. at 373. When a discussion of the deportation consequences is present, "the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." *Id*. Additionally, "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Id*. Thus, defense counsel must advise their clients regarding the immigration consequences of a plea and consider these consequences in plea negotiations. *Id.* at 366, 373–74.

B. The Professional Norms in Many States Expand *Padilla*'s Requirements to Include Counseling Noncitizen Clients on Consequences for Detention, Naturalization, and Bars to Relief.

Since *Padilla*, the American Bar Association ("ABA") and many states have developed standards, norms, and resources in order to provide comprehensive advice on the immigration consequences of criminal convictions. Under these standards and

norms, defense counsel must ascertain the immigration status of a client at the beginning of the representation and discuss potential immigration consequences before a defendant decides to accept a plea. These advisals often address the impact of a criminal conviction on deportation, detention, naturalization, eligibility for fear-based protection and other immigration relief, as well as bars to reentry.

The American Bar Association (ABA) has a comprehensive standard for defense attorneys that builds on the principles and duties set out in *Padilla*. *See* ABA, Criminal Justice Standards: Defense Function, Standard 4-5.5 (Special Attention to Immigration Status and Consequences) (4th ed. 2017). After determining that a client is not a U.S. citizen, the ABA standards require defense counsel to "investigate and identify particular immigration consequences that might follow possible criminal dispositions." *Id*. at 4-5.5(a), (b) ("Consultation or association with an immigration law expert or knowledgeable advocate is advisable in these circumstances."). Immigration consequences include "removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family." *Id.* 4-5.5(c). According to the ABA, counsel should then "advise the client of all such potential consequences and determine with the client the best course of action for the client's interests and how to pursue it." *Id.*

Massachusetts, the state in which Petitioner was convicted, has similarly expanded the standards governing counsel for indigent clients. Amicus curiae,

Committee for Public Counsel Services (CPCS), promulgates the policies and procedures that apply to all attorneys appointed to represent indigent clients in Massachusetts criminal, delinquency, youthful offender, child welfare, mental health, sexually dangerous person and sex offender registry cases, as well as related appeals and post-conviction matters. Mass. Gen. Laws ch. 211D. These standards provide that "[c]ounsel must advise [a] client, prior to any change of plea, of the consequences of conviction, including: . . . consequences for noncitizens; and possible immigration consequences including but not limited to deportation, denial of naturalization or refusal of reentry into the United States." CPCS, Assigned Counsel Manual, at 4.23, 4.68–69 (March 1, 2024) (version 1.17) ("Manual").[2] Counsel must also consider the immigration consequences attaching to any possible sentence. *Id.* at 4.34. Furthermore, in *Commonwealth v. Lavrinenko*, the Massachusetts Supreme Judicial Court (SJC) found that defense counsel did not meet his obligations when he failed to inquire about the immigration status of his refugee client and therefore did not provide advice that a conviction might make the client ineligible for relief from removal. N.E.3d 278, 282–83 (Mass. 2015). The SJC held that because deportation is a particular severe consequence for refugees, a defendant's refugee or asylee status is a special circumstance that should be given

[2] *Available at* https://www.publiccounsel.net/wp-content/uploads/2023/11/Assigned-Counsel-Manual.pdf.

"particularly substantial weight" in determining whether defense counsel's representation was ineffective. *Id*. at 282, 290.

Likewise, Maryland's professional norms and standards for defense counsel require advice regarding multiple types of immigration consequences. In order for the court to enter a guilty plea, a criminal defendant must be advised that "(1) that by entering the plea, if the defendant is not a United States citizen, the defendant may face additional consequences of deportation, detention, or ineligibility for citizenship… and (3) that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequences of the plea." Md. Rule 4-242(f); *see also State v. Sanmartin Prado*, 141 A.3d 99, 116–125 (Md. Ct. App. 2016) (evaluating whether defense counsel complied with the rule). Accordingly, amicus curiae, Maryland Office of the Public Defender (MOPD), works to ensure that noncitizens receive zealous advocacy and are informed of potential immigration consequences that could result from a plea, trial, or other disposition. MOPD's immigration division provides case-specific advice for any noncitizen client upon the attorney's request. This advice is not limited to identifying the direct and certain consequences of the offenses charged on the person's current status. It also includes (1) identifying pathways to immigration relief that could be available to the client, and assessing the impact of the charges on

the possibility of that future relief, and (2) assessing the potential impact of the charges on discretionary decisions by immigration officials.

In Virginia, public defenders are governed by the Standards of Practice for Indigent Defense Counsel. *See* Va. Code Ann. § 19.2–163.01 (directing the Virginia Indigent Defense Commission to establish standards of practice). Standard 6.1 discusses the plea negotiation process and duties of counsel. Virginia Standards of Practice for Indigent Defense Counsel, *Standard 6.1*, *Plea Negotiation Process and Duties of Counsel* (Last modified July 2023).[3] The standard requires defense counsel to consider "the immigration consequences of any plea agreement…communicate with the client regarding immigration priorities in relation to criminal outcomes… [and] ascertain the immigration consequences of the criminal disposition." *Id*.; *see also Zemene v. Clarke*, 768 S.E.2d 684 (Va. 2015) (concluding that counsel's failure to determine his client's precise immigration status, advise him that the proffered plea would result in removal proceedings, or seek an alternative plea was deficient performance). When determining the immigration consequences, standard 6.1 further instructs that defense counsel should consider:

> a. Possible removal charges and proceedings;
> b. Mandatory detention;
> c. Effect on the ability to renew green card;
> d. Effect on the ability to re-enter the United States;

[3] *Available at* https://www.vadefenders.org/wp-content/uploads/SOP/VIRGINIA_STANDARDS_OF_PRACTICE_FOR_INDIGENT_DEFENSE_COUNSEL.pdf.

e. Inability to naturalize;
f. Ineligibility for status;
g. Loss of current status;
h. The effect of the conviction on possible defenses to removal and relief.

Id. Amicus curiae, CAIR Coalition, provides immigration advice to private certified court-appointed counsel in Virginia so that they can comply with these Standards of Practice.

New York and California, two states with large noncitizen populations, have greatly expanded their requirements for criminal defense attorneys in order to provide comprehensive advice to noncitizen residents. *See* Megan Elman, *Unexpected Consequences: Why Criminal Defense Attorneys Have an Ethical Obligation to Inform Noncitizen Clients of the Immigration Consequences of Conviction*, 87 Geo. Wash. L. Rev. 430, 457–58 (2019). California "has written an expansion of *Padilla* into its penal code." *Id*. at 458. California Penal Code Section 1016.3(a) requires "[d]efense counsel [to] provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and when consistent with the goals of and with the informed consent of the defendant, and consistent with professional standards, defend against those consequences." Cal. Penal Code 1016.3. New York's standards obligate defense counsel to provide "full information" about "immigration…and other collateral consequences under all possible eventualities" as a condition for accepting the case. 2021 Revised Standards

for Providing Mandated Representation § I-7(e) (N.Y. STATE BAR ASS'N 2021);[4] New York Office of Indigent Legal Services, *ILS Standards for Establishing and Administering Assigned Counsel Programs: Black Letter Standards with Commentaries* § 9.2.l, at 25 (July 1, 2019) (discussing the importance of advising on collateral consequences).[5]

Other states also require defense counsel to advise noncitizen clients of consequences beyond the risk of deportation. *See Araiza v. State*, 481 P.3d 14, 16 (Haw. 2021) (finding deficient performance when counsel failed to advise that conviction precluded discretionary relief from deportation); *State v. Nunez-Diaz*, 444 P.3d 250, 253–54 (Ariz. 2019) (same); *Diaz v. State*, 896 N.W.2d 723, 729, 732 (Iowa 2017) (concluding professional norms require counsel to advise regarding "all" adverse immigration consequences, including bars to relief from removal; stating that "deportation is a broad concept, and the adverse immigration consequences of a criminal conviction to a noncitizen under the immigration statute are not limited to removal from this country," but also includes "consequences associated with removal, such as exclusion, denial of citizenship, immigration

[4] *Available at* https://nysba.org/app/uploads/2020/02/Standards-for-Quality-Mandated-Rep_2021.pdf.
[5] *Available at* https://www.ils.ny.gov/files/ACP%20Standards%20with%20Commentary%20070119.pdf.

detention, and bar to relief from removal"); *Daramola v. State*, 430 P.3d 201, 209 (Or. App. Ct. 2018) (approvingly citing *Diaz*, 896 N.W.2d at 729).

Following *Padilla*, states across the country have expanded resources such as in-house immigration attorneys, on-call experts, and extensive training, in order to support defense counsel in providing accurate and comprehensive advice about the immigration consequences of a criminal conviction. *See* Angie Junck et al., *The Mandate of Padilla*, Crim. Just., 24, 26–27 (Summer 2016). For example, by 2022, sixteen California counties had hired at least one internal immigration expert. *See* Ingrid Eagly et al., *Restructuring Public Defense After Padilla*, 74 Stan. L. Rev. 1, 1, 8 (2022) (surveying the various approaches of California counties after *Padilla*). Many defenders' offices started implementing comprehensive immigration training for their attorneys and hired immigration specialists to ensure they could properly advise their noncitizen clients. *See* Thea Johnson, *Measuring the Creative Plea Bargain*, 92 Ind. L.J. 901, 942 (2017) ("In a post-*Padilla* world, all of the public defenders I spoke to had received training on the intersection of immigration and criminal law."). In Colorado, Washington, and Massachusetts, the "public defender organizations have statewide systems, where line defenders in different counties can call or email a set of attorneys who work on immigration issues for all public defenders in that state." *Id*.

Defense counsel and the immigration attorneys who advise them, including amici, are guided by professional standards and norms to provide as full and complete advice as possible regarding the immigration consequences of criminal convictions. This advice extends beyond a standard proviso that a conviction may carry the risk of deportation and requires predictability as to how an offense will be charged under immigration law.

C. Whether an Offense Constitutes an Attempted Aggravated Felony or Attempted Crime Involving Moral Turpitude is Critical to Defense Counsel's Duty to Provide Accurate Advice Concerning the Immigration Consequences of a Conviction.

The Immigration and Nationality Act attaches consequences to criminal convictions through the grounds of inadmissibility (8 U.S.C. 1182) and deportability (8 U.S.C. 1227). Both a completed CIMT and an attempted CIMT are encompassed by the same grounds of inadmissibility and deportability. 8 U.S.C. 1182(a)(2)(A)(i)(I); *Matter of Vo*, I&N Dec. 426, 429 (BIA 2011). Likewise, a completed aggravated felony and an attempted aggravated felony are covered by a single deportability ground. 8 U.S.C. 1227(a)(2)(A)(iii), 1101(a)(43)(U). These grounds of removal are then cross-referenced throughout the Act to trigger various other consequences. For example, the aggravated felony ground of removal also triggers mandatory detention; bars cancellation of removal, asylum, and naturalization; and confers a permanent bar to re-admission to the United States. 8

U.S.C. 1226(c)(1)(B), 1229b(a)(3), (b)(1)(c), 1158(b)(2)(B)(i), 1101(f)(8), 1427(a)(3), 1182(a)(9)(A). The CIMT inadmissibility ground can also bar cancellation of removal, naturalization, adjustment of status and relief under the Violence Against Women Act, in addition to triggering mandatory detention. 8 U.S.C. 1129b(b)(1)(c), 1101(f)(3), 1427(a)(3), 1182(a)(2)(A)(i)(I), 1255(a)(2), 1226(c)(1)(A).

Because an attempted CIMT and the aggravated felony of attempt are legally equivalent to a completed CIMT and a completed aggravated felony offense, defense counsel and their immigration experts must assess whether a criminal conviction is likely to constitute an attempted CIMT or an attempted aggravated felony in order to provide accurate advice concerning the immigration consequences attendant a guilty plea.

II. BY CIRCUMVENTING THE CATEGORICAL APPROACH, THE BOARD CREATES UNCERTAINTY REGARDING WHICH OFFENSES COULD BE CHARGED AS ATTEMPTED AGGRAVATED FELONIES OR ATTEMPTED CIMTS AND IMPEDES DEFENSE COUNSEL'S ABILITY TO MEET CONSTITUTIONAL AND PROFESSIONAL STANDARDS.

In this case, the Board assumed a set of facts not necessary for conviction when it converted a conviction for Massachusetts Assault with Intent to Rob or Steal, Unarmed, into an aggravated felony attempted theft offense. *See* Pet. Br. 48-57. In doing so, it circumvented the categorical approach regarding the requirements for

attempt and invaded the exclusive role of the criminal trial court to find facts. Additionally, the Board could extend its reasoning to other state statutes across the country. Consequently, the Board's decision injects uncertainty as to the immigration consequences of various criminal convictions and erodes amici's ability to comply with their constitutional duties and professional norms.

A. The Categorical Approach Promotes Administrability, Predictability, and Fairness by Prohibiting Consideration of the Facts Underlying a Conviction.

Courts and immigration adjudicators use the categorical approach to determine whether a state conviction qualifies as an aggravated felony. *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). Under this approach, adjudicators "examine what the state conviction necessarily involved, not the facts underlying the case[.]" *Id.* They must presume the state conviction was based on the least of the acts criminalized, as described by the elements of the offense. *Id.* at 190–91; *Descamps v. United States*, 570 U.S. 254, 267 (2013). "Whether the noncitizen's actual conduct involved such facts 'is quite irrelevant.'" *Moncrieffe,* 569 U.S. at 190 (quoting *United States ex rel. Guarino v. Uhl,* 107 F.2d 399, 400 (2d Cir. 1939) (L. Hand, J.)).

In *Moncrieffe*, the Supreme Court explained that the categorical approach "promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact." *Id.* at 200–01.

Additionally, it promotes fairness, predictability, and uniformity by ensuring that convictions for the same offense carry the same immigration consequence. *Id.* at 201–03.

Defense counsel and those who advise them require predictability and uniformity as to whether an offense meets the definition of an attempt CIMT or attempt aggravated felony in order to accurately advise noncitizen defendants of the immigration consequences of a conviction. Indeed, in *Mellouli v. Lynch*, the Supreme Court recognized that the categorical "approach enables [noncitizens] to anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas [that] do not expose the [noncitizen defendant] to the risk of immigration sanctions." 575 U.S. 798, 806 (2015) (quoting Jennifer L. Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 Geo. Immig. L. J. 257, 307 (2012)) (internal citations omitted).

B. The Federal Definition of Attempt Requires a Detailed Analysis of the Underlying Facts the BIA is Unauthorized to Perform.

The determination that conduct meets the federal definition of attempt is inextricably fact-bound. *United States v. Neal*, 78 F.3d 901, 906 (4th Cir. 1996). The federal definition of attempt requires (1) intent to commit the substantive crime and (2) an overt act that constitutes a substantial step towards completing the substantive

offense. *Neal*, 78 F.3d at 906. A substantial step is a "direct act in a course of conduct planned to culminate in commission of a crime that is strongly corroborative of the defendant's criminal purpose." *United States v. Engle*, 676 F.3d 405, 423 (4th Cir. 2012) (citing *United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003)). Mere preparation is not sufficient to qualify as a substantial step, but the substantial step need not be the last possible act toward the crime's commission. *United States v. Haas*, 986 F.3d 467, 478 (4th Cir. 2021).

"Whether conduct represents a substantial step depends on the 'surrounding factual circumstances' and, therefore, such determinations are necessarily fact specific." *Neal*, 78 F.3d at 906; *see also Pratt*, 351 F.3d at 136 ("[T]he line between mere preparation and a substantial act done toward the commission of a crime is inherently fact-intensive, and it is not always a clear one."). Chief Judge Learned Hand noted that when it comes to the difference between preparation and attempt, "[t]he decisions are too numerous to cite, and would not help much anyway, for there is, and obviously can be, no definite line." *United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950) *cert. denied* 342 U.S. 920 (1952); *Neal*, 78 F.3d at 906 (citing *Coplon*, 185 F.2d at 633).

This Court has repeatedly emphasized the fact-intensive nature of the determination that conduct amounts to a substantial step. In *Engle*, the Court found that "a specific discussion could be so final in nature that it left little doubt that a

crime was intended and would be committed." *Engle*, 676 F.3d at 423. To do so, the Court reviewed the terms discussed, evaluated the past history between two individuals, and decided that the conduct constituted a substantial step based on the totality of the circumstances. *Id*. In *Neal*, after evaluating all the facts, the Court held that the discussion leading to an agreement to engage in crack cocaine transactions, along with corroborative evidence, was a substantial step toward the commission of the drug transaction when the defendant Neal left the discussion with a final, unconditional agreement that he would obtain the crack cocaine. 78 F.3d at 906-07. *See also Pratt*, 351 F.3d at 137 (finding that incidents on three days involved more than mere preparation because an agreement to sell cocaine had been reached and details like the time and place to meet had been established); *United States v. Sutton*, 961 F.2d 476, 478 (4th Cir. 1992) (finding the fact that the defendant agreed on price and quantity separated this case from many others and constituted a substantial step); *United States v. Munoz-Mendez*, 316 F. App'x 273, 274-75 (4th Cir. 2009) (finding, that the evidence as a whole demonstrated that the defendant's actions were a substantial step and that he was guilty of two attempt offenses because he had planned the main details of the robbery, such as attempting to recruit others, assigning roles, scouting the bank and observing the presence of cameras, and assembled bombs the day before the planned offense).

These cases demonstrate that to determine whether conduct amounts to criminal attempt under federal law, courts must evaluate all the facts at hand to decide if an overt act is sufficient to constitute a substantial step toward completing the substantive offense, as opposed to mere preparation that would not in and of itself constitute a crime. But here, the only way the Board could uphold the conviction as an aggravated felony attempted theft is by presuming a set of facts not established by conviction and outside its authority to find. *Matter of Silva-Trevino*, 26 I&N Dec. 826, 831 (BIA 2016) (*Silva-Trevino III*) (precluding consideration of the facts underlying conviction for CIMT determination); *Matter of Chairez*, 26 I&N Dec. 819, 821 (BIA 2016) (*Chairez III*) (same for aggravated felonies) *reconsideration denied by Matter of Chairez*, 27 I&N Dec. 21 (BIA 2017); *see also* 8 C.F.R. 1003.1(d)(3)(iv) (prohibiting fact-finding by the Board).

Due to the fact-intensive nature of attempt determinations, this Court should clarify that the Board cannot independently determine that an offense meets the federal requirements for attempt when the conviction itself does not necessarily establish the element of a substantial step. *See, e.g.*, *Ming Lam Sui v. I.N.S.*, 250 F.3d 105, 119 (2d Cir. 2001) (vacating removal order for aggravated felony attempted fraud because "an understanding of the facts is critical to any consideration of inchoate crimes," and a bright-line rule that convictions for a particular non-attempt

offense are categorically an attempted aggravated felony "would make the underlying facts irrelevant").[6]

C. The Board's Decision Creates Uncertainty for Other Similar State Statutes.

The Court's decision could impact the immigration consequences of criminal convictions in any state. If the BIA's decision is upheld, defense counsel across the country, and immigration experts who advise them, would need to review the criminal offenses in their states and predict which offenses could be charged as attempt aggravated felonies or attempt CIMTs—despite not being charged as attempt offenses or completed aggravated felonies or CIMTs—in order to properly advise their clients of the significant consequences for deportation, detention, naturalization, or relief from removal should they face immigration proceedings governed by the Fourth Circuit.

As illustrated in this case, DHS routinely lodges removal charges based on criminal convictions from states outside the geographic jurisdiction of the federal circuit court that governs the removal proceedings. *See* 8 C.F.R. 1003.20 (stating that venue lies where DHS commences proceedings); *Matter of Garcia*, 28 I&N Dec.

[6] Amici recognize that other circuit courts have upheld the BIA's determination that unauthorized entry to a vehicle with intent to commit a theft is categorically an aggravated felony attempted theft. *See* Pet. Br. at 38 n.6. Setting aside whether these offenses necessarily establish the conduct required under the federal definition of attempt, amici submit that this Court should not extend those decisions to other offenses.

693 (BIA 2023) (explaining that the location of the Immigration Court in which venue lies determines which circuit law controls). The U.S. Courts of Appeals review the removal orders issued by immigration judges within their judicial circuit. 8 U.S.C. 1252(b)(2). The Fourth Circuit has further held that it has jurisdiction over decisions issued by the two Immigration Adjudication Centers within its geographic jurisdiction, thus governing 19 immigration judges who hear thousands of cases from across the country. *Herrera-Alcala v. Garland*, 39 F.4th 233, 241-43 (4th Cir. 2022); Hon. Jeffrey S. Chase: The Fourth Circuit on Jurisdiction, LexisNexis Insights (Aug. 16, 2022). Consequently, the BIA's decision is not limited to criminal offenses committed in states within the geographic confines of the Fourth Circuit.

Other states also criminalize conduct that involves a completed act with intent to commit a separate act. These similarly structured offenses could be the basis for removal orders and ineligibility for relief under the Board's reasoning. In Washington D.C., for example, the offense of carrying a dangerous weapon is not an aggravated felony crime of violence because it does not require the use, attempted use, or threatened use of physical force, 18 U.S.C. 16(a). However, it is unclear whether the Board would consider the offense to be an attempted crime of violence based on the requirement that the defendant intended to use the object as a dangerous weapon. D.C. Code 22-4504; Crim. Jury Instr., Dist. of Columbia, 6.500(C); *see also* Md. Stat. 4-101(c)(2) (criminalizing similar conduct). Numerous Maryland offenses

involving an overt act with intent to defraud could become aggravated felony attempted fraud offenses if the amount that *could have been* but was not defrauded was more than $10,000. *See* 8 U.S.C. 1101(a)(43)(M); *see, e.g.*, Md. Stat. 5-803(a), (b), 8-604, 8-205, 13-1024, 8-301(c)(2). *See also* N.Y. Pen. Law 165.30 (accosting with intent to defraud); N.C. Gen. Stat. 14-367 (misbranding livestock); Kan. Stat. Ann. 21-5813 (damage to property with intent to defraud insurer).

Similarly, multiple states criminalize entering a structure with or without permission with intent to commit another crime therein. *See* N.C. Gen. Stat. 14-54(a), 14-55; Mich. Comp. Laws 750.111, 750.110; Ill. Comp. Stat. 5/19-2. *See also* N.C. Gen. Stat. 14-160.4 (damage to vehicle with intent to steal); Mich. Comp. Laws 750.416 (same). If the intended crime is an aggravated felony, the state offense could be charged as an attempted aggravated felony even though the act actually completed (entering with permission) does not trigger removability and the intended act (alleged aggravated felony theft) was not committed. *See also* Ga. Code Ann. 16-7-20 (possession of burglary tools with intent to commit a theft); Ariz. Rev. Stat. 13-1505 (same); Va. Code Ann. 18-2-94 (possession of burglarious tools with intent to commit a burglary or robbery).

Finally, Maryland prohibits possessing drug paraphernalia with the intent to deliver it if one should reasonably know that the paraphernalia will be used to manufacture a dangerous controlled substance. Md. Stat. 5-619(d)(1). The

punishment for a first violation of the statute is limited to a fine up to $500, *id.* at 5-619(d)(2)(i), and paraphernalia possession offenses are often not removable offenses, *Mellouli*, 575 U.S. 798. Yet, if the BIA employs the logic it used in the decision at bar, it could conclude that a Md. Stat. 5-619(d)(1) conviction is nonetheless an aggravated felony attempted drug trafficking offense because it includes intent to deliver paraphernalia for use in manufacturing controlled substances. *See* 8 U.S.C. 1101(a)(43)(B), (U). *See also* N.J. Stat. 2C:36-2 (possession of drug paraphernalia with intent to manufacture a controlled substance); Ariz. Rev. Stat. 13-3415 (same).

The list of potential offenses highlighted above are merely illustrative of the offenses that might carry immigration consequences under the Board's reasoning and demonstrate the widespread uncertainty that would ensue.

* * *

By assuming the facts necessary to meet the federal definition of attempt, the Board evaded the categorical approach and undermined the predictability that approach promotes. The Board's decision creates additional uncertainty because it could apply its analysis to convictions for completed non-CIMT and non-aggravated felony offenses in other states and render them attempted CIMTs or attempted aggravated felonies with all the relevant consequences under the INA. The reality is, if the Board's decision stands, in every criminal case involving a noncitizen

defendant, defense counsel will now need to consider every potential plea, even for statutes that the Board or a federal court previously concluded were not CIMTs or aggravated felonies. Because it is unclear whether an offense will be charged as an attempted CIMT or attempted aggravated felony, the Board's decision erodes amici's ability to comply with their constitutional duties and professional norms and is contrary to the principles of the categorical approach.

III. THE BOARD'S DECISION WOULD UNDULY BURDEN *PADILLA* ATTORNEYS, DETER PLEA BARGAINING, AND INCREASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

If the Board is permitted to convert a non-attempt offense into the aggravated felony for attempt, it would have adverse consequences for already burdened *Padilla* attorneys as well as the plea-bargaining system. It further could subject defense counsel to ineffective assistance of counsel claims if they incorrectly predict which convictions the Board might convert to attempt CIMTs or attempt aggravated felonies.

A. Defense Counsel and Immigration Attorneys Who Advise Them Would Face Increased Burdens Under the Board's Decision.

Public defender offices and immigration organizations that provide *Padilla* advisals to court-appointed attorneys already face limited capacity to assist noncitizen defendants in navigating the immigration consequences of various charges and pleas. By creating widespread uncertainty concerning the immigration

consequences for an array of offenses, the Board's decision, if upheld, will cause further strain on these attorneys. For example, amicus curiae MOPD has 2 *Padilla* attorneys who advise more than 500 public defenders across the state. Amicus curiae CAIR Coalition receives grant funding from the Virginia Law Foundation to provide *Padilla* consultations to *all* court-appointed attorneys in Virginia. Amicus curiae CPCS has 3 *Padilla* attorneys who advise 3000 public defenders across the state. Aside from the fact that the Board's methodology here is not permitted by law, it imposes a significant additional burden on *Padilla* attorneys who already face an overwhelming caseload and now must reassess and predict whether an offense that involves non-removable conduct could nonetheless be the basis of an attempt removal charge.

B. The Board's Decision Could Derail Plea Bargaining and Thus Disrupt the Criminal Justice System.

In *Padilla*, the Court recognized the importance of plea bargains to the criminal justice system. 559 U.S. at 373. Approximately 13.2 million criminal misdemeanor offenses are filed in the U.S. each year. Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. Rev. 731, 737 (2018). Additionally, "the U.S. criminal legal system processe[s] around five million felony and twelve million misdemeanor cases each year." Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. Cal. L. Rev. 1123, 1128 (2021). Nearly 95% of all criminal convictions end with a plea bargain.

Missouri v. Frye, 566 U.S. 134, 143 (2012). Given the size of the criminal justice system and its reliance on plea bargaining, "even a small increase in the percentage of cases that are taken to trial in a particular jurisdiction would place significant strain on the prosecutor's office and the police." Vida B. Johnson, *Effective Assistance of Counsel and Guilty Pleas—Seven Rules to Follow*, The Champion, 24, 26 (Nov. 2013); *see also Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (stating that our criminal justice system "is for the most part a system of pleas, not a system of trials").

Knowledge of the immigration consequence of a plea offer, in turn, is critical to its acceptance. Indeed, preserving the availability of discretionary relief is one of the main considerations noncitizen defendants will make when deciding whether to enter into a plea bargain. *See Padilla*, 559 U.S. at 368. Furthermore, in *Lee v. United States*, the Supreme Court recognized that it may be rational for a noncitizen defendant to throw a "Hail Mary" and opt for trial on the slim chance he can avoid conviction and the corresponding immigration consequences. 582 U.S. 357, 371 (2017). Accordingly, a "foreseeable consequence of *Padilla* is that noncitizen defendants will be more willing to reject a plea offer." *See* Stephen Lee, *De Facto Immigration Courts*, 101 Calif. L. Rev. 553, 590 (2013).

Noncitizens are even more likely to reject plea offers if the immigration consequences are unpredictable. If the Board can create removable attempt offenses from state convictions that established neither attempt nor a completed removable

act, noncitizens are less likely to plead guilty to these state charges and defense counsel will be less able to identify "safe harbor" pleas. Amicus curiae MOPD noted that in practice, for cases in which there is not a clear answer on immigration consequences, uncertainty in the law tends to lead to an overestimation of potential immigration consequences, and inevitably results in the rejection of otherwise favorable, appropriate, and efficient plea agreements.

C. The Board's Decision Increases the Likelihood of Ineffective Assistance of Counsel Claims.

Finally, the Board's decision increases the risk that defense counsel will face ineffective assistance of counsel claims. Defense attorneys can fall short of their Sixth Amendment obligation to provide effective assistance if they provide "incorrect advice pertinent to the plea." *Frye*, 566 U.S. at 141; *Lafler*, 566 U.S. at 170 (stating that "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences"). If defense counsel fails to predict when immigration officials will determine that a state conviction constitutes "attempt" even when the state offense is not charged as attempt, noncitizens may accept a plea they believe is safe but later is charged as an aggravated felony for immigration purposes. Given the severe consequences that follow, defense counsel may be subject to ineffective assistance claims as a result. *See Padilla*, 559 U.S. at 367, 371 (concluding that because "[i]t is quintessentially the duty of counsel to provide her

client with available advice about an issue like deportation[,] the failure to do so" falls below the prevailing professional norms of effective representation).

CONCLUSION

For the foregoing reasons, the Board erred when it presumed facts not established by conviction and converted a non-attempt state conviction into an aggravated felony attempt offense. The Board's methodology creates uncertainty, undermines defense attorneys' ability to meet their constitutional and professional standards, and could deter plea bargaining more broadly. Accordingly, this Court should vacate the Board's decision.

Dated: April 5, 2024

Respectfully submitted,

/s/ Katherine L. Evans
Katherine L. Evans
Jenny Kim
Grace Embrey, *Supervised Law Student*
DUKE UNIVERSITY SCHOOL OF LAW
IMMIGRANT RIGHTS CLINIC
210 Science Drive, Box 90360
Durham, NC 27708
919-613-7036

CERTIFICATE OF SERVICE

On April 5, 2024, I, Katherine L. Evans, served a copy of this Brief on Petitioner and Respondent through the Court's CM/ECF system.

/s/ Katherine L. Evans
Katherine L. Evans
DUKE UNIVERSITY SCHOOL OF LAW
IMMIGRANT RIGHTS CLINIC
210 Science Drive, Box 90360
Durham, NC 27708
919-613-7036
evans@law.duke.edu

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure the undersigned counsel certifies that this brief:

(i) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word and is set in 14-point Times New Roman font, and

(ii) complies with the length requirement of Rule 29(a)(5) and Rule 32(a)(7)(B), because it is 6,362 words excluding the items exempted by Rule 32(f).

Dated: April 5, 2024

/s/ Katherine L. Evans
Katherine L. Evans
DUKE UNIVERSITY SCHOOL OF LAW
IMMIGRANT RIGHTS CLINIC
210 Science Drive, Box 90360
Durham, NC 27708
919-613-7036
evans@law.duke.edu