No. 15-1498

In the Supreme Court of the United States

LORETTA E. LYNCH,
ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner,

v.

JAMES GARCIA DIMAYA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL IMMIGRATION LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Statutes, Rules and Regulations

Other Authorities

INTEREST OF THE *AMICUS CURIAE*

The National Immigration Law Center ("NILC") is the primary national organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Over the past 35 years, NILC has won landmark legal decisions protecting fundamental rights, and advanced policies that reinforce the values of equality, opportunity, and justice. NILC frequently files *amicus curiae* briefs in this Court and the lower courts addressing legal issues relevant to immigrants and their families.[1]

SUMMARY OF ARGUMENT

The question here is whether the term "crime of violence" in a criminal statute, 18 U.S.C. § 16, is unconstitutionally vague under the analysis applied by this Court in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015).

The government argues that the vagueness inquiry here should be less stringent than in the criminal context. The Court should reject that contention for four reasons.

First, the Court's precedents establish that deportation statutes violate due process if they fail the vagueness standard applicable to criminal laws. In

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Jordan v. *De George*, 341 U.S. 223 (1951), the Court stated that even though the deportation law at issue was "not a criminal statute," it would "we examine the application of the vagueness doctrine to this case." *Id*. at 231. Every court of appeals to address the question has concluded that Jordan requires application of the criminal-law vagueness standard to deportation statutes.

Second, deportation has the severe consequences that trigger strict vagueness review. It is retributive and in addition subjects the individual to the disapproval of the community—he or she is someone whose conduct is so improper as to warrant expulsion from the community. And its consequences are severe: "The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever." *Bridges* v. *Wixon*, 326 U.S. 135, 164 (1945) (Murphy, J., concurring). Moreover, deportation deprives the individual of the liberty guaranteed by the Constitution.

Third, adopting the government's argument would render this Court's decision in *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), a dead letter. The Court there emphasized the importance of informing a noncitizen of the deportation consequences of a criminal conviction. It is therefore critical that deportation statutes pass muster under the void-for-vagueness standard, so that defense counsel can properly counsel the noncitizen.

Fourth, the government's claim that vagueness analysis turns entirely on whether a proceeding is labeled "civil" or "criminal" was squarely rejected by this Court in *Village of Hoffman Estates* v. *Flipside*

Hoffman Estates, Inc., 455 U.S. 489 (1982), which recognized that, although the ordinance "nominally impose[d] only civil penalties," it was "quasi-criminal" because of its "prohibitory and stigmatizing effect"—and therefore necessitated "relatively strict" vagueness analysis. 455 U.S. at 499.

The Court therefore should hold that the statute here is subject to the same vagueness scrutiny applicable to a criminal law.

ARGUMENT

THE VOID-FOR-VAGUENESS DOCTRINE APPLIES TO THE DEPORTATION LAW AT ISSUE HERE.

A. This Court has held the vagueness doctrine applicable to deportation statutes.

The Court has twice recognized that the vagueness doctrine applies to statutes setting standards for deportation. As the lower courts have concluded, those rulings establish that deportation statutes violate due process if they fail the vagueness standard applicable to criminal laws.

The question in *Jordan* v. *De George*, 341 U.S. 223 (1951), was "whether conspiracy to defraud the United States of taxes on distilled spirits is a 'crime involving moral turpitude' within the meaning of" the applicable deportation statute. *Id.* at 224-225. This Court *sua sponte* raised and addressed the question whether the term "crime involving moral turpitude" was unconstitutionally vague. *Id.* at 224; see *id.* at 229.

"Despite the fact that this is not a criminal statute," the Court stated, "we shall nevertheless examine the application of the vagueness doctrine to this case." *Id.* at 231. The Court explained:

> We do this in view of the grave nature of deportation. The Court has stated that "deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty."

Ibid. (alteration omitted) (quoting *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948)).

The Court went on to "test this statute under the established criteria of the 'void for vagueness' doctrine." *Ibid.* That required the Court to assess whether the statute's language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id.* at 231-232.

The *Jordan* majority concluded that "Congress sufficiently forewarned respondent that the statutory consequence of twice conspiring to defraud the [government] is deportation." *Id.* at 232. Justice Jackson dissented, because in his view the phrase "ha[d] no sufficiently definite meaning to be a constitutional standard for deportation." *Ibid.* (Jackson, J., dissenting). No Member of the Court disputed that the penalty of deportation is sufficiently severe to trigger the due process vagueness standard applicable to criminal statutes.

Sixteen years later, in *Boutilier* v. *INS*, 387 U.S. 118, 118 (1967), the Court again applied the vagueness standard in assessing whether Boutilier's deportation on grounds of homosexuality was permissible under a statue excluding aliens "afflicted with psychopathic personality." It expressly reaffirmed that "the 'void for vagueness' doctrine" was applicable notwithstanding the civil nature of deportation proceedings. *Id*. at 123.

The Court went on to reject the vagueness challenge because Boutilier was being deported for "characteristics he possessed at the time of his entry" into the United States: "when petitioner first presented himself at our border for entrance, he was already afflicted with homosexuality. The pattern was cut, and under it he was not admissible." *Ibid*. The vagueness doctrine did not apply to pre-entry conduct, the Court concluded, because—among other reasons—there was no basis for concluding that Boutilier would have looked to U.S. law to obtain "fair notice" regarding the consequences of his extraterritorial conduct.

The Court's analysis makes clear that the vagueness doctrine would have applied if the petitioner's deportation was based on his post-entry conduct. Indeed, it expressly distinguished the two situations: "The petitioner is not being deported for conduct engaged in after his entry into the United States, but rather for characteristics he possessed at the time of his entry." *Id*. at 123. And the Court assessed, and rejected, the petitioner's claim that he was in fact being deported for post-entry conduct, concluding "[w]e do not believe that petitioner's post-entry conduct is the basis for his deportation order." *Id*. at 124. That analysis was necessary because the Court recognized that the vagueness doctrine would apply if the deportation were based on post-entry conduct.

The three courts of appeals to address the issue have concluded that *Jordan* and *Boutilier* require that deportation statutes be assessed under the void-for-vagueness standard applicable to criminal laws when, as here, deportation is based on post-entry conduct. *Shuti* v. *Lynch*, 828 F.3d 440 (6th Cir. 2016) (holding 18 U.S.C. § 16(b)'s "crime of violence" language was unconstitutionally vague and concluding

that *Jordan* establishes that strict vagueness analysis applies to deportation laws); *Alphonsus* v. *Holder*, 705 F.3d 1031, 1042 (9th Cir. 2013) ("entertain[ing]" a vagueness challenge "because of the harsh consequences attached to" the law, relying on *Jordan*); *Beslic* v. *INS*, 265 F.3d 568, 571 (7th Cir. 2001) (citing *Jordan*) (recognizing that "the Supreme Court has made it clear that an alien may bring a vagueness challenge to a deportation statute"); see also *Baptiste* v. *Attorney General*, 841 F.3d 601, 615 n.7 (3d Cir. 2016) (stating that "the Attorney General wisely does not contest [the noncitizen's] assertion that he has a right under the Fifth Amendment's Due Process Clause to bring a void for vagueness challenge" and citing *Jordan*).[2]

Applying the criminal-law vagueness doctrine in this case is therefore consistent with—and required by—this Court's precedents.

B. Deportation based on a criminal law violation is subject to the vagueness standard applicable to criminal laws, because it has the characteristics that trigger that strict vagueness review.

In *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982), this Court explained that "[t]he degree of vagueness that the Constitution tolerates * * * depends in part on the nature of the enactment." It went on to observe

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[2] The Second Circuit held that a vagueness inquiry is required, but reserved the question of the level of scrutiny applicable in such a vagueness challenge. See *Arriaga* v. *Mukasey*, 521 F.3d 219, 223 (2d Cir. 2008) ("We need not decide whether the INA stalking provision should be assessed as a civil or criminal statute because even under the close scrutiny accorded criminal laws, Arriaga's vagueness challenge fails.").

that the Court has generally "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id.* at 498-499.

The government—ignoring the Court's explanation that "the consequences of imprecision are qualitatively less severe"—argues that the "civil" or "criminal" label dictates the proper standard of vagueness review. Pet. Br. 16. But this Court has made clear that the inquiry turns not on labels but on the particular characteristics of the sanction involved. Deportation based on a violation of a criminal statute plainly warrants the same vagueness review as a criminal statute.

1. Strict vagueness analysis applies to civil laws that serve the purposes of criminal punishment or that implicate an individual's right to liberty.

The Court has identified two characteristics of civil laws that trigger strict vagueness analysis: whether the law serves purposes akin to criminal sanctions and whether the law's application infringes on a constitutional right.

In *Hoffman*, for example, the Court observed that although the ordinance "nominally impose[d] only civil penalties," it was "quasi-criminal" because of its "prohibitory and stigmatizing effect." 455 U.S. at 499. For that reason, it "warrant[ed] a relatively strict" vagueness test. *Ibid.*; see also *Champlin Ref. Co.* v. *Corp. Comm'n*, 286 U.S. 210, 241 (1932) (finding a civil statute unconstitutionally vague where the civil penalty was "not consistent with any purpose other than to inflict punishment").

Retribution and publicly branding conduct as harmful to society are characteristics of criminal sanctions. *Kansas* v. *Hendricks*, 521 U.S. 346, 373 (1997); see also *Ewing* v. *California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) (identifying "the penological goal of retribution"). Therefore, strict vagueness review applies to civil statutes whose penalties serve those purposes.

The conclusion that protections typically reserved for the criminal context apply to civil proceedings when the penalty is retributive, and therefore quasi-criminal, is not limited to the vagueness doctrine. In *One 1958 Plymouth Sedan* v. *Pennsylvania*, this Court applied the exclusionary rule, another protection typically confined to criminal proceedings, in a civil forfeiture proceeding because "a forfeiture proceeding is quasi-criminal in character"—"[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law." 380 U.S. 693, 700 (1965).

The Court also applies a strict vagueness standard to civil statutes that involve deprivation of fundamental rights. The *Hoffman* Court explained that "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." 455 U.S. at 499. See also *Gen. Media Commc'ns, Inc.* v. *Cohen*, 131 F.3d 273, 286 (2d Cir. 1997) ("[S]tatutes that implicate constitutionally protected rights * * * are subject to 'more stringent' vagueness analysis." (quoting *Hoffman*, 455 U.S. at 499)).

In *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270, 274 (1940), for example, this Court held a civil commitment statute up to the same

vagueness standard applicable to criminal laws. And in *Aptheker* v. *Sec'y of State*, the Court determined that facial vagueness review was warranted because the statute at issue "severely curtail[ed] personal liberty" by restricting the "freedom of travel." 378 U.S. 500, 516-517 (1964). See also *City of Chicago* v. *Morales*, 527 U.S. 41, 55 (1999) (considering but not deciding "whether the impact of the * * * ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine").[3]

In sum, courts apply strict vagueness review to civil statutes for at least two reasons: because their penalties serve the purposes of criminal punishment; and because their penalties put liberty, or other fundamental rights, at stake. Both reasons apply in the context of deportation for engaging in criminal conduct.

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[3] This Court has most often applied strict vagueness review under this interference-with-fundamental-rights rationale when First Amendment rights are implicated, see *Hoffman*, 455 U.S. at 499 ("If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); see also *Aptheker*, 378 U.S. at 517 (noting that "freedom of travel is a constitutional liberty closely related to rights of free speech and association"), but there is no basis for excluding interference with other fundamental rights. In fact, the Supreme Court of Ohio has explicitly endorsed the notion that vagueness doctrine should apply to civil statutes whenever they substantially affect any of a range of fundamental rights. In finding a takings ordinance void for vagueness, that court observed: "The vagueness doctrine is usually applied in criminal law and First Amendment claims, but neither the rationale underlying the doctrine nor the case law interpreting it suggests that it should not be applied in any case in which the statute challenged substantially affects other fundamental constitutional rights." *Norwood* v. *Horney*, 853 N.E.2d 1115, 1143 (Ohio 2006).

2. Crime-based deportation is a uniquely severe penalty that serves the purposes of criminal punishment and threatens the individual's liberty.

a. ***Crime-based deportation is punitive***. This Court and the lower courts have long recognized the punitive nature of crime-based deportation, and this Court's analysis in *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), makes clear that crime-based deportation constitutes punishment for the commission of an offense.

"The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever." *Bridges* v. *Wixon*, 326 U.S. 135, 164 (1945) (Murphy, J., concurring). Judge Hand called deportation "a dreadful punishment." *United States ex rel. Klonis* v. *Davis*, 13 F.2d 630, 630 (2d Cir. 1926). See generally Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 Harv. C.R.-C.L. L. Rev. 289 (2008).

For that reason, this Court has recognized that viewing crime-based deportation "not as designed to punish [the individual] for the crime" is "highly fictional." *Trop* v. *Dulles*, 356 U.S. 86, 98 (1958). Deportation "may visit great hardship on the alien," resulting in "the loss of all that makes life worth living." *Fiswick* v. *United States*, 329 U.S. 211, 222 n.8 (1946) (quotation marks omitted); accord *Lehmann* v. *Carson*, 353 U.S. 685, 691 (1957) (Black, J., concurring) (describing deportation as "punishment of the most drastic kind whether done at the time when they were convicted or later"); *Fong Yue Ting* v.

United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("[I]t needs no citation of authorities to support the proposition that deportation is punishment. 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."); *id.* at 748 (Field, J., dissenting) (stating it should "never be admitted that the removal of aliens" is "not * * * punishment for an offense").

Indeed, it is particularly obvious that a civil penalty is sufficiently punitive to be labeled "quasi-criminal" when the civil penalty follows conviction for a criminal offense and is itself more severe than the punishment resulting directly from the criminal prosecution. See *One 1958 Plymouth Sedan*, 380 U.S. at 700-701 (finding a civil forfeiture statute "quasi-criminal" because "the forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution").

This Court in *Padilla* expressly recognized that "'[p]reserving [an individual's] right to remain in the United States may be more important to the [individual] than any potential jail sentence.'" 559 U.S. at 368 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 322 (2001)). And it recognized the punitive, "particularly severe" nature of crime-based deportation. 559 U.S. at 365.

The Court explained in detail the extent to which crime-based deportation is uniquely bound up with, and even indistinguishable from, criminal punishment

> Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. 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.

Id. at 365-366 (internal quotation marks and citation omitted).

Thus, "as a matter of federal law, deportation is an integral part—indeed, sometimes the most importance part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* at 364. See also Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 Harv. L. Rev. 1889, 1894 (2000) ("each of these justifications—incapacitation, deterrence, and retribution—is traditionally accepted as part of our criminal law").

Failing to apply the criminal law vagueness standard here would be wholly inconsistent with the Court's decision in *Padilla*.

The *Padilla* Court explained that "a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction." 559 U.S. at 373. It recognized that prosecutors retain tremendous flexibility in deciding which of these charges to offer or threaten in negotiations, and can thereby use "the threat of deportation [to] 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." *Ibid.* And a noncitizen's defense counsel can "bargain creatively with the prosecutor

in order to craft a conviction and sentence that reduce the likelihood of deportation." *Ibid.*[4]

Padilla held that, under the Sixth Amendment, noncitizens in the position of navigating these difficult strategic choices have the right to be adequately informed of the deportation risks that could result from particular pleas. But if noncitizens had no protection against unconstitutionally vague deportation statutes, the right to effective counsel this Court affirmed in *Padilla* would be a dead letter.

Noncitizens' counsel must be able to assess the legal sufficiency of prosecutorial threats and the viability of potential strategies to avoid deportation. But by their very nature, unconstitutionally vague statutes do not provide the degree of predictability necessary for such reasoned legal analysis. A defense attorney cannot provide his or her client with advice if the attorney is unable to determine the deportation consequences of a particular plea. For that reason, application of the criminal-law vagueness test is particularly necessary, and particularly appropriate, in this context.

It is true, as the *Padilla* Court observed, that "immigration law can be complex," and that there are "situations in which the deportation consequences of a particular plea are unclear or uncertain." 559 U.S. at 369. This complexity is not a blank check that excuses Congress from the need to set meaningful legal standards, despite the government's suggestion to the contrary. Pet. Br. 22-23. If anything, the

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[4] As the *Padilla* court noted (559 U.S. at 372), 95% of all convictions result from pleas; these negotiations thus determine the particular conviction that ends up on a noncitizen's record the overwhelming majority of the time.

complexity of immigration law—combined with the "harsh consequences" that can follow if a noncitizen's counsel misunderstands it, *Padilla*, 559 U.S. at 360—*compounds* the importance of applying the vagueness standard in this context.

b. *Interference with constitutional rights*. The second feature that merits strict vagueness review of civil laws—interference with a fundamental constitutional right—also applies to deportation.

This Court has recognized that "[a] deportation hearing involves issues basic to human liberty and happiness." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50 (1950). Indeed, "the liberty of an individual is at stake" because "[t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom." *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945).

That conclusion rests on "the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification." *Woodby* v. *INS*, 385 U.S. 276, 285 (1966). See also *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*, 149 U.S. at 740 (1893) (Brewer, J., dissenting) (deportation involves "a deprival of liberty").

Crime-based deportation, then, warrants strict vagueness review both because it is punitive and quasi-criminal, and because it implicates the right to liberty.

3. The Court should reject the government's label-based approach to vagueness analysis.

The government argues that the particular characteristics of the sanction are irrelevant to vagueness analysis. What counts is whether the proceeding is labeled "civil" or "criminal." Pet. Br. 16. But, as we have discussed, this Court has rejected that approach—including in the *Hoffman* decision on which the government relies. The critical question is the relative severity of the "consequences of imprecision" (*Hoffman*, 455 U.S. at 499)—what is at stake for the potential target of the sanction.[5]

The decisions on which the government relies provide no support for its position.

In *Winters* v. *New York*, 333 U.S. 507, 515 (1948), for example, this Court stated that "[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." Significantly, the Court did not refer to "criminal laws" but rather to "statutes punishing for offenses." In other words, if the

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[5] "Where the penalty imposed by a statute is severe, costs of vagueness are high and vagueness is less tolerable. Removal proceedings exemplify civil proceedings with severe quasi-criminal penalties. Therefore, the severity of deportation demands less tolerance of vagueness." Amy Wolper, *Unconstitutional and Unnecessary: A Cost/Benefit Analysis of "Crimes Involving Moral Turpitude" in the Immigration and Nationality Act*, 31 Cardozo L. Rev. 1907, 1934 (2010). See generally Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 Geo. Immigr. L.J. 115 (1999); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 Admin. L. Rev. 305, 313 (2000).

purpose and effect of the statute is punitive, strict vagueness analysis applies. If, on the other hand, the statute employs a penalty merely to enforce compliance, it is subject to a lower standard of certainty.[6]

The lower courts follow this approach, applying strict vagueness review when the penalty imposed for the law's violation carries the attributes of a criminal sanction or infringes constitutional rights—labels alone are not determinative. See, *e.g.*, *Advance Pharm., Inc.* v. *United States*, 391 F.3d 377, 396 (2d Cir. 2004) ("When a civil statute imposes penalties that, although civil in description, are penal in character, the statute is sometimes deemed 'quasi-criminal' and subjected to stricter vagueness review." (internal quotation marks and citation omitted)); *Clinical Leasing Serv.*, 925 F.2d 120, 122 & n.2 (5th Cir. 1991) (applying a "relatively strict test" for vagueness to a civil penalty provision of the Con-

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[6] Another case relied upon by the government, *Mahler* v. *Eby*, 264 U.S. 32 (1924), is inapposite for two reasons. First, the Court rested its decision in large part on the fact that the statute at issue delegated power to an executive agency—" [t]he rule as to a definite standard of action is not so strict in cases of the delegation of legislative power to executive boards and officers." *Id.* at 41. Second, the Court determined that the standard was not vague:

> As far back as 1802 the naturalization statute of that year prescribed that no alien should be naturalized who did not appear to the court to have behaved during his residence in this country "as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Our history has created a common understanding of the words "undesirable residents" which gives them the quality of a recognized standard.

Id. at 40 (citation omitted).

trolled Substances Act because it "authorizes fines which, although civil in description, are penal in character," making the statute "quasi-criminal").

The government cites *A.B. Small Co.* v. *American Sugar Refining Co.*, in which this Court invalidated a civil statute that was "so indefinite as to be unintelligible," 267 U.S. 233, 240 (1925), and *Giaccio* v. *Pennsylvania*, in which this Court invalidated a law, without labeling it civil or criminal, because it "contain[ed] no standards at all." 382 U.S. 399, 403 (1966). But in *A.B. Small*, the Court applied in the civil context its prior holding that the same statute was unconstitutionally vague and therefore could not support the imposition of criminal liability—which argues for the same, rather than different, standards. 267 U.S. at 238. More fundamentally, these cases do not demonstrate that a lesser standard applies to civil laws; they merely describe a sufficient, but not necessary, condition for invalidation on vagueness grounds.[7]

Indeed, it is far from clear what a "less stringent" vagueness standard would require. As the government acknowledges (Pet. Br. 25), this Court has not addressed that question.

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[7] To the extent the government's cases do suggest that the civil laws they reviewed were held to a less strict standard, *Minnesota ex rel. Pearson* v. *Prob. Court* would equally suggest that the civil statute *it* concerned was held to the standard applied to criminal laws. This Court in *Pearson* made no mention of a lower standard, though the statute at issue was nominally civil; it said only that the statute passed vagueness scrutiny because it set a standard "as susceptible of proof as many of the criteria constantly applied in prosecutions for crime." 309 U.S. 270, 274 (1940).

The government's preferred standard—"a test of unintelligibility" (Pet. Br. 26)—is so undemanding as to be meaningless. *Any* law that is unintelligible should be unenforceable. Whatever its possible merits in other contexts, that low bar should not apply here. Put simply, deportation is no ordinary civil penalty; a less strict standard that applies to ordinary civil statutes should not apply to crime-based deportation statutes.

C. Vagueness review vindicates the due process protections of fair notice and non-arbitrary enforcement, which are critically important for noncitizens facing deportation.

"Vagueness doctrine is an outgrowth * * * of the Due Process Clause." *United States* v. *Williams*, 553 U.S. 285, 304 (2008). Vague statutes violate Due Process because, as this Court explained recently in *Johnson* v. *United States*, 135 S. Ct. 2551, 2557, they "den[y] fair notice to defendants and invit[e] arbitrary enforcement."

There is no doubt that due process applies to deportation proceedings. The Court has explained that "[deportation] may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284-285 (1922); see also *Yamataya* v. *Fisher*, 189 U.S. 86, 100 (1903) (stating that immigration officials could not "disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution").

The government asserts that noncitizens have "no constitutionally grounded expectation of fair notice" because the Ex Post Facto Clause does not apply to deportation statutes. Pet. Br. 10. But the protection from overly vague statutes—which exists precisely to ensure fair notice—is grounded in the Due Process clause, not the Ex Post Facto Clause.

And due process protections, including vagueness review, *have* applied in a wide variety of civil contexts, depending on the nature of the punishment or deprivation. Indeed, it is precisely because the Ex Post Facto Clause does not apply, that makes vagueness review more, not less, essential to protect the due process rights of noncitizens.

In *Galvan* v. *Press*, 347 U.S. 522, 531 (1954), the Court recognized that "since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the ex post facto Clause, even though applicable only to punitive legislation, should be applied to deportation." It declined to take that step because the "view that the ex post facto Clause applies only to prosecutions for crime" had been "undeviatingly enforced" by the Court in a line of cases stretching back to *Calder* v. *Bull*, 3 U.S. 386 (1798). *Galvan*, 347 U.S. at 531 n.4.

But the *Galvan* Court recognized the applicability of due process: "considering what it means to deport an alien who legally became part of the American community * * * an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen." *Id.* at 530.

For those reasons, the due process-based protections requiring fair notice and prohibiting arbitrary deportation apply with full force in this context—and

mandate that the same vagueness standard apply here that applies in assessing criminal statutes.[8]

[8] The same result would obtain under the balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). The private interests at stake are extraordinarily weighty. See pages 10-14, *supra*. And the risk of erroneous deprivation of those extremely important interests is quite serious in the case of an overly vague deportation statute, as a noncitizen might bargain away their entire lives in the United States by "plead[ing] guilty under a mistaken premise." *Padilla*, 559 U.S. at 387 (Alito, J., concurring). The government's countervailing interests do not outweigh the private interests of those facing deportation. The government does have a strong interest in the deportation of criminal aliens. But the application of vagueness review to its deportation statutes would not be likely to result in any particular "fiscal and administrative burdens" beyond, perhaps, the potential for some litigation. *Mathews*, 424 U.S. at 335. If anything, clearer legal standards may make the government's immigration enforcement and adjudication *more* efficient and *less* labor intensive.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[9] The representation of *amicus* by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

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