Recognizing a Due Process Right to Be Made Aware of Discretionary Relief from Removal for Lawful Permanent Residents

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I. INTRODUCTION

Noncitizens who enter the United States without authorization after a prior deportation order are subject to federal prosecution.[1] Already at an all-time high,

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these prosecutions dramatically increased after former Attorney General Jeff Sessions issued a memorandum in April 2017 instructing federal prosecutors to make entry-related prosecutions a higher priority nationwide.[2] Together, unlawful entry and re-entry prosecutions continue to make up more than half of all federal prosecutions.[3] Concerns that due process violations permeate these prosecutions have been widespread,[4] but another due process issue underlying

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dedicated in memory of my mom, Lisa deFilippis, who was always immensely supportive and encouraging.

[1] 8 U.S.C. §§ 1326(a)(1)–(2) (2012) ("[A]ny alien who has been denied admission, excluded, deported, or removed . . . and thereafter enters, attempts to enter, or is at any time found in, the United States . . . shall be fined under title 18, or imprisoned not more than 2 years, or both.").

[2] *See* OFFICE OF THE ATTORNEY GEN., MEMORANDUM FOR ALL FEDERAL PROSECUTORS: RENEWED COMMITMENT TO CRIMINAL IMMIGRATION ENFORCEMENT 1 (Apr. 11, 2017), https://www.justice.gov/opa/press-release/file/956841/download [https://perma.cc/4F95-8TC2]; *see also* AM. IMMIGRATION COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES 3 (Jan. 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_people_for_coming_to_the_united_states.pdf [https://perma.cc/S8X3-UCYA]; Michelle Mendez, *Attorney General Calls for Increased Prosecution of Immigration-Related Offenses*, CATH. LEGAL IMMIGR. NETWORK, INC. (Apr. 26, 2017), https://cliniclegal.org/resources/attorney-general-calls-increased-prosecution-immigration-related-offenses [https://perma.cc/X6PM-QVAR]. Although these prosecutions make up a substantial percentage of all federal prosecutions, there is no indication that noncitizens who unlawfully re-enter are especially dangerous. *See, e.g.*, Rachel Weiner & John D. Harden, *Federal Judge Criticizes Prosecutors over Increase in Immigration Cases*, WASH. POST (Jan. 10, 2019), https://www.washingtonpost.com/local/public-safety/federal-judge-criticizes-prosecutors-over-increase-in-illegal-immigration-cases/2019/01/10/98d4692e-103c-11e9-84fc-d58c33d6c8c7_story.html?noredirect=on&utm_term=.a5b34c3c732f [https://perma.cc/U6H2-RQJF] ("Most undocumented immigrants convicted of coming back into the country after deportation do not have previous felony or extensive misdemeanor records . . . .").

[3] Mendez, *supra* note 2 ("[F]ederal prosecution for unlawful entry, re-entry, and similar offenses . . . constitutes more than half of all federal criminal charges . . . ."); Press Release, U.S. Dep't of Justice, Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 17, 2019), https://www.justice.gov/opa/pr/department-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year [https://perma.cc/6TDJ-T8HG] (reporting the highest annual number of prosecutions for felony illegal re-entry and misdemeanor improper entry since records on these prosecutions have been kept).

[4] *See* Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 530 (2010) (arguing that many migrants are being deprived of procedural due process when they are prosecuted in group proceedings with as many as eighty defendants appearing before a magistrate at once); Chad R. Doobay, *Operation Streamline—A Failure of Due Process*, NAT'L IMMIGRANT JUST. CTR. (Dec. 11, 2015), https://www.immigrantjustice.org/staff/blog/operation-streamline-failure-due-process [https://perma.cc/H2U7-TRT2] (questioning whether pleas taken in mass—for unlawful entry or re-entry—could really adequately comply with Federal Rules of Criminal Procedure, which require that guilty pleas be entered knowingly, voluntarily, and intelligently); *The Immigration Prosecution Factory*, KINO BORDER INITIATIVE (Nov. 14, 2017), https://www.kinoborderinitiative.org/immigration-prosecution-factory/ [https://

re-entry prosecutions bears consideration—whether many deportation orders on which these prosecutions are based may themselves be invalid.[5] The case of Emilio Estrada serves as a concerning example.

Emilio Estrada was a lawful permanent resident (LPR) for nearly twenty years.[6] He lived with his wife in Tennessee where they were raising four U.S. citizen children.[7] In 2007, Mr. Estrada was stopped by the police on his way home from work.[8] The police found a gun and drugs in Mr. Estrada's car; he was charged with, and ultimately convicted of, possession of a firearm by an unlawful user of a controlled substance.[9] On the basis of that criminal conviction, he faced removal proceedings and was deported in 2009.[10]

Years later, Mr. Estrada re-entered the United States, and in 2015 he was charged with illegal re-entry.[11] Mr. Estrada moved to dismiss the indictment on the ground that his prior deportation order was invalid because the Immigration Judge (IJ) had failed to inform him of his eligibility for a form of discretionary relief from removal, which, if granted, would have allowed him to remain in the United States.[12] Although there is no guarantee Mr. Estrada would have been granted relief, he was deported without ever being informed that he was eligible to apply for relief from deportation.[13] Nevertheless, in December 2017, the United States Sixth Circuit Court of Appeals denied Mr. Estrada's claim that his

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perma.cc/N36W-77HC] ("[D]ue process and the right to a fair hearing [are] get[ting] steamrolled in the onslaught of prosecutions."); AM. IMMIGRATION COUNCIL, *supra* note 2, at 3 (noting that attorneys only have minutes to speak with their client in a public setting and translation services are minimal).

[5] This Note uses the phrases "deportation proceeding" and "removal proceeding" interchangeably. Current law uses the terms "removable" and "removal" to refer to what is colloquially known as "deportable" and "deportation." *See* Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2399 (2013).

[6] Petition for Writ of Certiorari at 1, Estrada v. United States, 138 S. Ct. 2623 (2018) (No. 17-1233), 2018 WL 1175511, at *1.

[7] *Id.*

[8] Brief for Appellant at 5–6, United States v. Estrada, 876 F.3d 885 (6th Cir. 2017) (No. 17-5081).

[9] *Id*. at 6 (stating that Mr. Estrada was convicted under 18 U.S.C. § 922(g)(3)).

[10] *Id.* at 9–10.

[11] Petition for Writ of Certiorari, *supra* note 6, at 6 (stating that Mr. Estrada was prosecuted for illegal re-entry in violation of 8 U.S.C. § 1326(a)).

[12] At the time of his removal hearing, Mr. Estrada was statutorily eligible for relief under Section 212(h) of the Immigration and Nationality Act ("INA"), which grants the Attorney General discretion to waive the noncitizen's inadmissibility if removal "would result in extreme hardship" to their spouse or child, who is a U.S. citizen or LPR. United States v. Estrada, 876 F.3d 885, 888 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2623 (2018); *see* INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B) (2012). The Attorney General vests IJs with the authority to waive inadmissibility. 8 C.F.R. § 1003.10 (2019).

[13] Most forms of relief from removal in the INA have two components: "(1) statutory eligibility criteria that form the threshold for a grant . . . and (2) a favorable exercise of discretion, after the threshold criteria are met, to determine whether to grant or deny the specific relief." T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 725–26 (8th ed. 2016).

prior deportation order was invalid.[14] The court held that noncitizens in removal proceedings have no constitutionally protected right to be informed of discretionary relief from removal.[15]

In so holding, the Sixth Circuit deepened an existing circuit split. The Sixth Circuit joined the majority of its sister circuits, which have held that noncitizens do not have a due process right to be made aware of eligibility for discretionary relief by an IJ or by counsel in removal proceedings.[16] In contrast, two federal circuit courts have held that noncitizens in removal proceedings do have a constitutional right to be made aware of discretionary relief from removal.[17]

Being made aware of relief from removal is essential to avoiding deportation because, as even a cursory look at the Immigration and Nationality Act (INA) demonstrates, immigration law is complex. Noncitizens often are unrepresented in removal proceedings and do not know what forms of relief might be available to them.[18] IJs play an essential role in filling this void.

The role of an IJ is quite unlike most judges in other judicial settings—their responsibilities extend far beyond fact-finding and adjudicating.[19] IJs not only determine whether noncitizens are removable,[20] they also must determine if a noncitizen is statutorily eligible for relief from removal.[21] And, IJs have the responsibility of deciding whether noncitizens merit favorable grants of discretionary relief.[22]

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[14] *Estrada*, 876 F.3d at 889.

[15] *Id.* at 888.

[16] *See* United States v. Santiago-Ochoa, 447 F.3d 1015, 1020 (7th Cir. 2006); Bonhometre v. Gonzales, 414 F.3d 442, 448 (3d Cir. 2005); United States v. Aguirre-Tello, 353 F.3d 1199, 1205 (10th Cir. 2004); United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002); Smith v. Ashcroft, 295 F.3d 425, 430 (4th Cir. 2002); Oguejiofor v. Att'y Gen., 277 F.3d 1305, 1309 (11th Cir. 2002); Escudero-Corona v. INS, 244 F.3d 608, 615 (8th Cir. 2001).

[17] United States v. Lopez-Velasquez, 629 F.3d 894, 897 (9th Cir. 2010); United States v. Copeland, 376 F.3d 61, 71 (2d Cir. 2004). Notably, the Second and Ninth Circuits collectively resolve nearly three-quarters of all immigration appeals. *See* Petition for Writ of Certiorari, *supra* note 6, at 9.

[18] Esther Yu Hsi Lee, *Only 37 Percent of Immigrants Have Legal Representation*, THINKPROGRESS (Sept. 29, 2016), https://thinkprogress.org/immigrants-legal-representation-39a5f7dbd434/ [https://perma.cc/7NT5-DYTG].

[19] *See* INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1) (2012) ("The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses."); *see also Copeland*, 376 F.3d at 71.

[20] *See* Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1805 (2013) (explaining that removability is a "threshold question of whether the government has legal authority to attempt to deport someone"). If a noncitizen contests removability and succeeds, the IJ must terminate the proceedings. *Id.* at 1806. However, there are very few grounds on which removal can be contested; for example, noncitizens with colorable claims to U.S. citizenship. *See id.* at 1810.

[21] 8 C.F.R. § 1240.11(a)(2) (2012) (requiring IJs to inform aliens of "apparent eligibility" for relief and to consider any applications for relief).

[22] Koh, *supra* note 20, at 1813.

Notably, throughout these proceedings, noncitizens are afforded general procedural due process rights.[23] However, the majority of federal circuit courts stop short of recognizing a procedural due process right to be made aware of discretionary relief from removal.[24] This is a critical issue because nearly all forms of relief from removal are discretionary.[25] Essentially, if there is no right to be informed of discretionary relief, effectively there is no right to be informed of any relief. And realistically, the ability of noncitizens to pursue relief from removal and remain in the United States, without a right at least to be made aware of relief, is extremely limited. But, beyond this recognition, evaluating procedural due process jurisprudence in this context leads to the conclusion that deportable LPRs[26] have the right to be made aware of their eligibility for relief from removal.[27]

This Note explores the issue of whether LPRs in removal proceedings have a due process right to be made aware of discretionary relief from removal. Part II provides a general overview of immigration proceedings and procedural due process rights in the immigration context. Part III discusses the circuit split, focusing particularly on the Sixth Circuit's holding in *United States v. Estrada* as the most recent case deepening the split. Part IV discusses LPRs' liberty interests and uses the framework of *Mathews v. Eldridge* to support the

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[23] *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

[24] *See* United States v. Santiago-Ochoa, 447 F.3d 1015, 1020 (7th Cir. 2006); Bonhometre v. Gonzales, 414 F.3d 442, 448 (3d Cir. 2005); United States v. Aguirre-Tello, 353 F.3d 1199, 1205 (10th Cir. 2004); United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002); Smith v. Ashcroft, 295 F.3d 425, 430 (4th Cir. 2002); Oguejiofor v. Att'y Gen., 277 F.3d 1305, 1309 (11th Cir. 2002); Escudero-Corona v. INS, 244 F.3d 608, 615 (8th Cir. 2001).

[25] *See, e.g.*, INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2012) (asylum); INA § 212(h), 8 U.S.C. § 1182(h) (2012) (waiver of admissibility); INA § 240A(a), 8 U.S.C. § 1229b (2012) (cancellation of removal). Despite that nearly all forms of relief from removal are discretionary, at least one form of relief is not—withholding of removal. *See* 8 C.F.R. § 1208.16 (2019). However, withholding of removal provides only a bare minimum of relief—the noncitizen avoids deportation to the country where they fear persecution, but they have no pathway to LPR status or citizenship, and may be deported to a country other than the one from which they were granted withholding of removal. *Withholding of Removal and CAT*, IMMIGR. EQUALITY, https://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/withholding-of-removal-and-cat/#.XHBfda2ZPeQ [https://perma.cc/657J-D7DQ].

[26] *See* INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2012) (defining "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws").

[27] LPRs are "the group of noncitizens most likely to have the strongest legal entitlement to remain in, as well as the likelihood of having the deepest community ties to, the United States." Johnson, *supra* note 5, at 2397.

argument that LPRs in removal proceedings have a procedural due process right to be made aware of discretionary relief from removal by an IJ and briefly sketches how to protect this right. Part V briefly concludes that following existing procedural due process jurisprudence, LPRs have the right to be made aware of their eligibility for discretionary relief from removal.

II. IMMIGRATION PROCEEDINGS & DUE PROCESS

On the most basic level, when the government wants to deport a noncitizen it must first initiate removal proceedings in an immigration court, a very different setting from an Article III court.[28] Removal proceedings are considered civil (not criminal) proceedings; thus, many of the constitutional safeguards in place in the criminal context for citizens and noncitizens alike do not apply in immigration proceedings.[29] However, it is now well established that removal proceedings must comport with general procedural due process protections.[30]

Part II.A provides a brief general overview of removal proceedings. Part II.B discusses collateral attacks of prior deportation orders based on due process violations.

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[28] Koh, *supra* note 20, at 1813; United States v. Copeland, 376 F.3d 61, 71 (2d Cir. 2004) (quoting Yang v. McElroy, 277 F.3d 158, 162 (2d Cir. 2002)) ("[T]he IJ . . . unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record.").

[29] *See* Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1311–12 (2011) (describing the explicit application of the civil label to deportation proceedings by the Supreme Court in 1893). Though the civil label has endured, repeatedly being relied upon for a hundred-plus years, Professor Markowitz argues that deportation proceedings are not truly civil, nor criminal. *Id.* at 1301. He argues, instead, that noncitizens' rights in deportation proceedings must be determined by evaluating both constitutional protections afforded in criminal proceedings and balancing interests under the *Mathews v. Eldridge* test used in civil proceedings. *Id.* at 1307; *see also* 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, 309–10 (2000) (noting that courts have held that a person facing deportation does not have a constitutionally protected right to the assistance of counsel, the Eighth Amendment's prohibition against cruel and unusual punishment are irrelevant, and there are no limits to deportation imposed by virtue of the Double Jeopardy Clause). Professor Pauw argues that in many cases, deportation is a punishment as a matter of law; it is not merely a remedial measure. *Id.* at 307.

[30] Pauw, *supra* note 29, at 310 (citing Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903)) (the Court held in *Yamataya* that the government may not arbitrarily deport an alien without giving him or her the right to answer why the deportation is improper); *see* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1632–52 (1992) (discussing the evolution of procedural due process rights in immigration proceedings). In 1976, the Supreme Court decided *Mathews v. Eldridge*, establishing the contemporary standard for procedural due process inquiries. *Id.* at 1652. In the immigration context, *Landon v. Plasencia* "marked the arrival of the due process revolution in immigration law." *Id.*

A. *Removal Proceedings*

Immigration removal proceedings involve a two-fold inquiry: (1) whether the noncitizen is removable; and, if so, (2) whether the noncitizen qualifies for any form of relief from removal.[31] First, under the INA, any noncitizen who the government wishes to deport must be found removable by an IJ.[32] Removability is determined through close analysis of various statutory provisions, and the applicable definition of removability depends on whether a noncitizen is subject to grounds of "inadmissibility" or "deportability."[33] Although the grounds are not identical, they each generally describe categories of behavior that can lead to removal, including immigration-related offenses, criminal conduct, and national security grounds, to name a few.[34]

After the IJ has determined that a noncitizen is removable, the second part of the inquiry is whether the noncitizen qualifies for any form of relief from removal that would allow the noncitizen to remain in the United States.[35] There are varied forms of relief from removal that a noncitizen may be statutorily eligible for, but the forms of relief most relevant for LPRs are cancellation of removal for permanent residents[36] and waivers of inadmissibility[37]—the form of relief at issue in the circuit split.

If, following an IJ's determination that a noncitizen is removable, no successful applications for relief from removal are filed, the noncitizen is ordered to be removed from the United States.[38] A removal order generally makes a noncitizen inadmissible for a period of ten or twenty years, depending on the circumstances of their removal.[39]

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[31] Koh, *supra* note 20, at 1813–14.

[32] INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1) (2012).

[33] *See* Koh, *supra* note 20, at 1815. The INA contains the relevant provisions, but they are also located in parallel sections in Title 8 of the U.S. Code. This Note cites to both sources but refers to forms of relief according to their section in the INA.

[34] *Id.* at 1814 (describing "admission" as term of art). A noncitizen is admitted only after inspection by an immigration officer; if a noncitizen was admitted and then put in removal proceedings, deportability grounds apply. *Id.* However, noncitizens who enter without inspection by an immigration officer and then are put in removal proceedings are generally subject to inadmissibility grounds. *Id.* Though the grounds for removal are similar, they contain some differences in impermissible conduct that render noncitizens removable. *Id.* at 1815.

[35] *Id.* at 1813–14.

[36] INA § 240(a), 8 U.S.C. § 1229b(a). An alien who has been lawfully admitted for permanent residence for not less than five years, has resided in the United States continuously for seven years after having been admitted, and has not been convicted of any aggravated felony, is eligible for cancellation of removal. *Id.*

[37] INA § 212(h), 8 U.S.C. § 1182(h) (2012).

[38] INA § 240(c)(1)(A), 8 U.S.C. § 1229a(c)(1)(A) ("At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States.").

[39] Removal not as an arriving alien bars a noncitizen from admission for ten years. INA § 212(a)(9)(A)(ii)(I), 8 U.S.C. § 1182(a)(9)(A)(ii)(I). Removal for an aggravated felony or

B. *Collateral Attacks Based on Due Process Violations*

For some noncitizens, being deported ends their connection to the United States, but many LPRs like Mr. Estrada in particular, leave behind spouses, children, parents, and other loved ones.[40] And, because noncitizens who have been deported generally face at least a ten-year bar on lawful entry to the United States, many noncitizens attempt to re-enter unlawfully.[41] When a noncitizen re-enters after a removal order, they face harsh penalties and have few possible grounds to defend against the charge of illegal re-entry.[42] One of the few available defenses under these circumstances is to collaterally attack the prior removal order on the ground that there was a due process violation in the earlier proceeding.[43] In order to succeed on a collateral attack, the noncitizen must demonstrate that they (1) exhausted administrative remedies, (2) that the underlying proceedings "improperly deprived" them of judicial review, and (3) that "entry of the order was fundamentally unfair."[44]

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after a previous removal order bars a noncitizen from admission for twenty years. INA § 212(a)(9)(A)(ii)(II), 8 U.S.C. § 1182(a)(9)(A)(ii)(II).

[40] LPRs are particularly likely to have family members in the United States because many LPRs are eligible for that status on the basis of a family relationship. *See* ALEINIKOFF ET AL., *supra* note 13, at 271 ("The highest numbers of immigrant admissions are based on family ties. . . . [They are] based on specified relationships to citizens or lawful permanent residents.").

[41] Under INA § 212(a)(9)(A)(ii)(I), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), a noncitizen who was previously ordered removed, not as an arriving alien, is barred from admission for ten years. INA § 212(a)(9)(A)(ii)(I), 8 U.S.C. § 1182(a)(9)(A)(ii)(I). A noncitizen who has two previous removal orders or was removed on the basis of an aggravated felony conviction is barred from admission for twenty years. *Id.*; *see also* Mendez, *supra* note 2 (discussing the high rate of federal prosecutions for unlawful re-entry).

[42] *See* Doug Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 65, 115 (2012). The statutory criminal penalty for unlawful re-entry after a prior removal is two years or less in prison, but if the noncitizen was previously removed due to a criminal conviction, the noncitizen could face between ten to twenty years. 8 U.S.C. §§ 1326(a)(2)–(b)(2) (2012). From an immigration standpoint, unlawful re-entry after a prior removal leads to a permanent bar to admission to the United States. *See* INA § 212(a)(9)(C), 8 U.S.C. § 1182(a)(9)(C).

[43] Keller, *supra* note 42, at 116; *see also* Koh, s*upra* note 20, at 1819 (discussing that a noncitizen may seek to collaterally attack a prior removal order not only as a defense to deportation, but also to avoid sentencing enhancements in the illegal re-entry context).

[44] 8 U.S.C. § 1326(d). The Supreme Court held in *United States v. Mendoza-Lopez*, 481 U.S. 828, 837–38 (1987), that in a criminal re-entry prosecution, a collateral attack on the earlier deportation order is allowed when the prior proceeding was fundamentally unfair, and the respondent was effectively denied the opportunity for meaningful judicial review. Congress essentially codified *Mendoza-Lopez* in 1996, establishing the three-factor standard found in 8 U.S.C. § 1326(d). The circuit courts, however, continue to apply varying standards to determine whether the noncitizen was prejudiced or prevented from obtaining meaningful judicial review. For a survey of circuit decisions on this issue, see IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 310–19 (2014).

The Supreme Court case, *United States v. Mendoza-Lopez*, which established the three-part test for collateral attacks on prior deportation orders, also provides an example of a due process violation that led to a successful collateral attack.[45] In *Mendoza-Lopez*, the IJ had improperly told Mr. Mendoza-Lopez that no relief was available, leading him to waive his right to seek relief and waive his appeal rights.[46] As a result, Mr. Mendoza-Lopez was able to successfully attack his prior deportation order because the proceedings did not comport with due process.[47] Another example of a due process violation that led to a successful collateral attack was the denial of the right to counsel coupled with the failure to advise a noncitizen of his rights in a language he could understand.[48]

Some noncitizens are deported even though they would have been eligible for relief from removal because they were not made aware of their eligibility for relief. But noncitizens who attack prior deportation orders in a subsequent proceeding on this basis seldom succeed. Collateral attacks under these circumstances have proven to be nearly impossible because the majority of circuit courts do not recognize a due process violation, as will be discussed in Part III. Thus, noncitizens cannot establish that the deportation order was "fundamentally unfair."[49]

III. CIRCUIT SPLIT: DUE PROCESS & DISCRETIONARY RELIEF FROM REMOVAL

The federal circuit courts are split over whether noncitizens in removal proceedings have a due process right to be made aware of discretionary relief from removal.[50] The majority of circuit courts have held that there is no

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[45] *Mendoza-Lopez*, 481 U.S. at 839–40.

[46] *Id.*

[47] *Id.* at 837.

[48] *See* United States v. Reyes-Bonilla, 671 F.3d 1036, 1052 (9th Cir. 2012) (holding that although the noncitizen's due process rights were violated in his prior removal proceedings, he could not demonstrate actual prejudice resulting from the violations, thus his prior removal order was not fundamentally unfair).

[49] *See* Brent S. Wible, *The Strange Afterlife of Section 212(C) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After* St. Cyr, 19 GEO. IMMIGR. L.J. 455, 465–66 (2005) ("[T]he majority of circuits, while allowing collateral attacks in section 1326 prosecutions . . . find that no due process violation exists in a deportation proceeding if the IJ erroneously failed to consider an alien's eligibility for discretionary relief.").

[50] *See supra* Part I. Although the form of discretionary relief at issue in most of the circuit cases, Section 212(c) relief, is different from the discretionary relief at issue in *Estrada*, Section 212(h) relief, the distinction is irrelevant for the purposes of evaluating procedural due process rights because both forms of relief are available only to LPRs, or those applying to be LPRs. *See* IMMIGRANT LEGAL RES. CTR., IMMIGRATION RELIEF TOOLKIT FOR CRIMINAL DEFENDERS 11, 23 (July 2018), https://www.ilrc.org/sites/default/files/resources/relief_toolkit-20180827.pdf [https://perma.cc/G7M6-CYSY]. In contrast, if one of the forms of relief at issue was not available to LPRs, the procedural due process

protectable liberty or property interest in being informed of discretionary relief, because it is discretionary.[51] Thus, the majority of circuits have rejected that due process violations occur when IJs or counsel fail to inform noncitizens of their eligibility for discretionary relief.[52] A minority of circuit courts, however, have recognized a due process right to be made aware of discretionary relief from removal.[53] The right is recognized because these courts have found a protectable liberty or property interest in being made aware of the relief—they distinguish between a right to be granted relief, which is wholly discretionary, from a right to be informed of the relief, which is not.[54] The circuit courts have long been divided on this issue, but with the Sixth Circuit's recent holding in *United States v. Estrada*,[55] the issue has received renewed attention.[56] Notably, none of the circuit court decisions distinguish between LPRs and other noncitizens in terms of due process protections.[57]

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analysis would be impacted because LPRs may have a cognizable liberty interest that noncitizens do not. *See infra* Part IV.A. Notably, Section 212(c) and Section 212(h) relief likely occupy the circuit split due to their complexity—the more complex the relief, the more likely the failure to advise noncitizens of their eligibility. Section 212(c) relief has a particularly vexing history. In 1996, Congress amended the INA and eliminated Section 212(c) relief, but five years later the Supreme Court held in *INS v. St. Cyr*, 533 U.S. 289 (2001) that the amendment did not eliminate the retroactivity of the relief. Wible, *supra* note 49, at 455 (explaining that *INS v. St. Cyr* overturned an earlier Attorney General opinion, which had come to the opposite conclusion). Relief under Section 212(c) remains a viable form of discretionary relief for noncitizens whose removable conviction occurred prior to 1996, but it occupied a space of considerable ambiguity before *INS v. St. Cyr*. *Id.* at 455–56.

[51] *See infra* Part III.

[52] *See* United States v. Santiago-Ochoa, 447 F.3d 1015, 1020 (7th Cir. 2006); Bonhometre v. Gonzales, 414 F.3d 442, 448 (3d Cir. 2005); United States v. Aguirre-Tello, 353 F.3d 1199, 1205 (10th Cir. 2004); United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002); Smith v. Ashcroft, 295 F.3d 425, 430 (4th Cir. 2002); Oguejiofor v. Att'y Gen., 277 F.3d 1305, 1309 (11th Cir. 2002); Escudero-Corona v. INS, 244 F.3d 608, 615 (8th Cir. 2001).

[53] *See* United States v. Copeland, 376 F.3d 61, 71 (2d Cir. 2004); United States v. Lopez-Velasquez, 629 F.3d 894, 897 (9th Cir. 2010).

[54] *See, e.g.*, *Copeland*, 376 F.3d at 71.

[55] United States v. Estrada, 876 F.3d 885 (6th Cir. 2017).

[56] *See* Amona Al-Refaei, *Undocumented Immigrants Right to Discretionary Relief*, U. CIN. L. REV. BLOG (Aug. 15, 2018), https://uclawreview.org/2018/08/15/undocumented-immigrants-right-to-discretionary-relief/ [https://perma.cc/3CPJ-AAU4]; Rashmi Borah, *Do Potential Deportees Have a Constitutional Right to Be Made Aware of Discretionary Relief from Removal?*, SUNDAY SPLITS (Jan. 29, 2018), http://sundaysplits.com/2018/01/29/do-potential-deportees-have-a-constitutional-right-to-be-made-aware-of-discretionary-relief-from-removal/ [https://perma.cc/JUY7-68PT]; Colleen Fitzharris, *No Right to Try*, SIXTH CIR. BLOG (Dec. 6, 2017), http://circuit6.blogspot.com/2017/12/no-right-to-try.html [https://perma.cc/X93Z-R5E6].

[57] *See Estrada*, 876 F.3d 885 (failing to distinguish between LPRs and other noncitizens in terms of procedural due process rights in removal proceedings); *Lopez-Velasquez*, 629 F.3d 894 (same); *Santiago-Ochoa*, 447 F.3d 1015 (same); *Bonhometre*, 414 F.3d 442 (same); *Copeland*, 376 F.3d 61 (same); *Aguirre-Tello*, 353 F.3d 1199 (same); *Lopez-Ortiz*, 313 F.3d

A. *The Sixth Circuit Holds There Is No Due Process Right to Be Made Aware of Discretionary Relief:* United States v. Estrada

When Mr. Estrada was deported to Mexico, he left behind his wife, four children, and a life he had built for nearly twenty years in the United States.[58] As a result of his deportation and the criminal conviction it was based on, he was barred from lawfully re-entering the United States for a period of twenty years.[59] When he re-entered unlawfully, he faced charges for illegal re-entry, but he presented a reasonable defense—that the failure of his attorney and the IJ to inform him that he had been eligible for Section 212(h) discretionary relief rendered his prior deportation order invalid.[60] Mr. Estrada argued that the prior deportation order was "fundamentally unfair" because he had been deprived of due process.[61]

The Sixth Circuit rejected Mr. Estrada's claim that his deportation order had been fundamentally unfair.[62] The court held that no due process violation could be established because there is no cognizable liberty or property interest in being made aware of discretionary relief, because the relief itself is discretionary.[63] Having concluded there was no liberty or property interest, the court did not evaluate whether Mr. Estrada was denied any process he should have been due.[64] As a result, the failure of counsel or the IJ to inform Mr. Estrada during his removal hearing that he was eligible for relief was condoned as an acceptable proceeding resulting in a valid deportation order.[65] Mr. Estrada was not able to meet the burden of proof required to collaterally attack his prior deportation order; he was left defenseless in his federal prosecution for unlawful re-entry.[66]

The Sixth Circuit's holding reflects a refusal to distinguish between a grant of relief, which is discretionary, and the right to be made aware of eligibility for

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225 (same); *Smith*, 295 F.3d 425 (same); *Oguejiofor*, 277 F.3d 1305 (same); *Escudero-Corona*, 244 F.3d 608 (same).

[58] Petition for Writ of Certiorari, *supra* note 6, at 1.

[59] INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A)(ii)(II) (2012) (outlining that a noncitizen who was removed on the basis of an aggravated felony conviction is barred from seeking admission to the United States for twenty years).

[60] Brief for Appellant, *supra* note 8, at 10.

[61] In order to attack his prior deportation order, Mr. Estrada needed to satisfy the three requirements of 8 U.S.C. § 1326(d), but the bulk of the problem is in demonstrating that the prior order was fundamentally unfair. *See supra* note 44 and accompanying text.

[62] *Estrada*, 876 F.3d at 887 ("To prove the fundamental unfairness of an underlying deportation order, a defendant must show both a due process violation emanating from defects in the underlying deportation proceeding and resulting prejudice.").

[63] *Id.* at 888.

[64] Petition for Writ of Certiorari, *supra* note 6, at 8.

[65] *See id.*

[66] *Estrada*, 876 F.3d at 886.

relief.[67] To contextualize this issue, Mr. Estrada argued he would have qualified in 2009 for a form of discretionary relief that authorizes a waiver of inadmissibility based on criminal convictions, if certain requirements are met.[68] One such requirement is a showing of extreme hardship to a parent, spouse, or child, who is either a U.S. citizen or LPR.[69] To receive Section 212(h) relief, a noncitizen must be statutorily eligible,[70] but that alone is not enough. The IJ must also determine that the noncitizen is deserving of a grant of relief.[71] These two elements are separate inquiries—meeting threshold criteria, on the one hand, and meriting a favorable grant of discretion within the opinion of the IJ, on the other.[72] In contrast to the Sixth Circuit, a minority of circuit courts have found the distinction to be relevant for recognizing a due process right.[73]

B. *Minority Circuits Recognize the Right to Be Made Aware of Discretionary Relief from Removal*

The minority circuit courts have recognized a cognizable liberty or property interest in being made aware of discretionary relief from removal, which the

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[67] The Second Circuit, in contrast, distinguished between a grant of discretionary relief and an interest in being made aware of discretionary relief from removal. United States v. Copeland, 376 F.3d 61, 71–72 (2d Cir. 2004).

[68] INA § 212(h), 8 U.S.C. § 1182(h) (2012). There was some dispute between the parties as to whether Mr. Estrada would have qualified for Section 212(h) relief at the time of his deportation order. Brief for Appellant, *supra* note 8, at 17–18; *cf.* Brief for Appellee at 14–15, United States v. Estrada, 876 F.3d 885 (6th Cir. 2017) (No. 17-5081). Prior to 2008, the consensus among courts was that noncitizens with aggravated felony convictions were generally not eligible for Section 212(h) relief. Brief for Appellant, *supra* note 8, at 18. However, the Fifth Circuit ruled in *Martinez v. Mukasey*, 519 F.3d 532, 546 (5th Cir. 2008), that for noncitizens "who adjust post-entry to LPR status, [Section] 212(h)'s plain language demonstrates unambiguously Congress' intent *not* to bar them from *seeking* a waiver of inadmissibility." This ruling came out about one year prior to Mr. Estrada's deportation hearing. Thus, Mr. Estrada was eligible for Section 212(h) relief under relevant federal precedent because he had adjusted to LPR status in the United States, and his deportation hearing took place in a Louisiana Immigration Court. Brief for Appellant, *supra* note 8, at 17–19; *see also* U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: AN AGENCY GUIDE 1 (Dec. 2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download [https://perma.cc/6KM3-3B63] ("The federal circuit courts may . . . issue precedent decisions on immigration law issues that are then controlling in that particular federal circuit.").

[69] INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B).

[70] A noncitizen is statutorily eligible for Section 212 relief if they can prove that a parent, spouse, son, or daughter, who is a U.S. citizen or an LPR, would suffer extreme hardship if the waiver were denied. INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B).

[71] ALEINIKOFF ET AL., *supra* note 13, at 725–26.

[72] *See supra* note 31 and accompanying text (discussing the two separate components for most forms of relief in the INA).

[73] *See infra* Part III.B. The Supreme Court has also explicitly distinguished between eligibility for relief and favorable grant of such relief. *See* INS v. St. Cyr, 533 U.S. 289, 307–08 (2001).

majority circuit courts have refused to recognize.[74] In *United States v. Copeland*, the Second Circuit explained that the majority circuit courts have refused to recognize the existence of a cognizable interest in this context based on reasoning used in Section 1983 cases concerning discretionary actions taken by state actors.[75] Generally these cases hold that if the official action at issue is discretionary under state law, there is no property right that requires procedural due process protection.[76] But, as the Second Circuit noted, this framework is not pertinent in the removal context because, although the granting of relief is discretionary, the right to be considered for the relief is not.[77]

The Ninth Circuit, unlike the Second Circuit, has not explicitly stated that there is a cognizable liberty or property interest at stake with respect to noncitizens' removal proceedings.[78] Nevertheless, the Ninth Circuit has held that IJs have a duty to inform noncitizens of discretionary relief from removal when there is a reasonable possibility that they are eligible for the relief.[79] And, the court has also held that IJs violate noncitizens' due process rights when they provide incorrect information about the noncitizens' right to seek discretionary relief or appeal their deportation order when they were in fact eligible for discretionary relief.[80] Thus, the Ninth Circuit has implicitly recognized the existence of a cognizable liberty or property interest, even when the relief at issue is discretionary.[81]

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[74] *See, e.g.*, United States v. Copeland, 376 F.3d 61, 71–72 (2d Cir. 2004); *cf.* United States v. Estrada, 876 F.3d 885, 888 (6th Cir. 2017) (quoting Appiah v. INS, 202 F.3d 704, 709 (4th Cir. 2000)) (holding that when "suspension of deportation is discretionary, it does not create a protectable liberty or property interest").

[75] *Copeland*, 376 F.3d at 71 (referring to cases brought under 42 U.S.C. § 1983 against government officials).

[76] In Section 1983 cases, courts look at whether government benefits or employment are discretionary to determine whether there is a due process right to a hearing before the benefits or employment can be terminated. *Id.* at 72. If the official action at issue is discretionary, according to state law, "one's interest in a favorable decision does not rise to the level of a property right entitled to procedural due process protection." *Id.* (citation omitted).

[77] *Id.* (citing 8 C.F.R. § 242.17(a) and 8 C.F.R. § 212.3(e)(1)) ("The decisions holding that a failure to inform an alien about Section 212(c) relief cannot be a fundamental error . . . incorrectly assume that, because the grant of Section 212(c) relief is itself discretionary, the denial of a Section 212(c) hearing cannot be a fundamental procedural error.").

[78] *See, e.g.*, United States v. Lopez-Velasquez, 629 F.3d 894, 901 (9th Cir. 2010) (failing to mention whether there is a liberty or property interest); United States v. Ubaldo-Figueroa, 364 F.3d 1042 (9th Cir. 2004) (same).

[79] *Lopez-Velasquez*, 629 F.3d at 895.

[80] *Ubaldo-Figueroa*, 364 F.3d at 1048 (holding that the noncitizen's due process rights were violated because the IJ did not inform him that he had a right to appeal his removal order).

[81] *See infra* notes 92–93 and accompanying text (discussing that in procedural due process jurisprudence, the threshold question is whether there is a liberty or property interest under the Due Process Clause, and only if such an interest exists will courts consider what process is due).

Having found a cognizable liberty or property interest that gives rise to a due process right, both the Second and Ninth Circuit courts have held that this right is violated when the IJ fails to make a noncitizen aware of their eligibility for discretionary relief from removal.[82] In *Copeland*, the Second Circuit held that the IJ's failure to inform a noncitizen of his right to seek discretionary Section 212(c) relief was a procedural error in violation of the noncitizen's due process rights.[83] The violation would render the deportation order fundamentally unfair so long as the noncitizen was prejudiced by the IJ's failure.[84] The court recognized that:

> Given that IJs have a duty to develop the administrative record, and that many aliens are uncounselled, our removal system relies on IJs to explain the law accurately to *pro se* aliens. Otherwise, such aliens would have no way of knowing what information was relevant to their cases and would be practically foreclosed from making a case against removal.[85]

In *United States v. Lopez-Velasquez*, the Ninth Circuit concluded that although the noncitizen's due process rights were not violated in that case, IJs generally have a duty to inform noncitizens of relief if there is a reasonable possibility that the noncitizen is eligible for relief at the time of the hearing.[86] Mr. Lopez-Velasquez's due process rights were not violated by the IJ's failure to inform him of Section 212(c) relief, however, because he was not statutorily eligible for the relief at the time of his deportation hearing.[87] Instead, on collateral attack, Mr. Lopez-Velasquez argued that had he been made aware of the relief during his removal proceedings, he could have made a colorable claim that he had sufficient residence in the United States to qualify for the relief.[88] Under the circumstances, the court found that the IJ had no duty to inform Mr. Lopez-Velasquez of relief for which he was not eligible.[89] Nevertheless, the court was explicit in stating that, "where the record demonstrates, or at least

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[82] *Lopez-Velasquez*, 629 F.3d at 897; United States v. Copeland, 376 F.3d 61, 71 (2d Cir. 2004) (holding that failure to advise potential deportee of a right to seek Section 212(c) relief can, if prejudicial, be fundamentally unfair); United States v. Sosa, 387 F.3d 131 (2d Cir. 2004) (same); *Ubaldo-Figueroa*, 364 F.3d at 1042 (same).

[83] *Copeland*, 376 F.3d at 75.

[84] *See id.* at 62 (remanding the case for further findings on whether the noncitizen had been prejudiced).

[85] *Id.* at 71.

[86] *Lopez-Velasquez*, 629 F.3d at 895.

[87] *See id.* at 897.

[88] *Id.* Under the law at the time of Mr. Lopez-Velasquez's deportation hearing, Section 212(c) had a seven-year domicile requirement, defined as beginning when the noncitizen was granted LPR status. INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996). Mr. Lopez-Velasquez had only been an LPR for three years at the time of his hearing, however he contended he would have had a colorable claim based on the timing of an earlier application for status he filed. *Lopez-Velasquez*, 629 F.3d at 896. Nevertheless, he still would not have satisfied the domicile requirement. *Id.*

[89] *Id.* at 899.

implies, a factual basis for relief, the IJ's duty is triggered."[90] But, when there is no factual basis for relief in the record, the Ninth Circuit has held that there is no due process violation if the IJ does not notify the noncitizen of a right to apply for relief.[91]

The majority of circuits reject that the failure of an IJ or counsel to inform a noncitizen of their eligibility for discretionary relief from removal constitutes a due process violation. A minority of circuit courts disagree and have concluded that such a failure may violate a noncitizen's due process rights. The courts on both sides of the split, however, have not adequately addressed the threshold question in procedural due process inquiries—whether there is a cognizable liberty or property interest. Additionally, none of the circuit courts have attempted to draw distinctions between LPRs and other noncitizens in answering this threshold question. Part IV will engage in this analysis and then will balance the relevant interests to determine what process is due, assuming the existence of a cognizable interest.

IV. RECOGNIZING A DUE PROCESS RIGHT ON BALANCE: *MATHEWS V. ELDRIDGE* AND THE RIGHT TO BE MADE AWARE OF DISCRETIONARY RELIEF

Procedural due process inquiries begin with the question of whether a claimant possesses a "liberty" or "property" interest under the Fifth Amendment's Due Process Clause.[92] The next step is to determine what process is due.[93] In *Mathews v. Eldridge*, the Supreme Court set forth a balancing test to determine whether administrative adjudications conform to procedural due process protections.[94] In order to determine what process is due, the Court called for a balancing of private interests, the probable value of additional or substitute safeguards, and the government's interests, including the burden of imposing the procedural requirement.[95]

LPRs in removal proceedings, like Mr. Estrada, may never be informed that they are eligible for discretionary relief from removal. This presents a

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[90] *Id.* at 900 (noting that, if the record reveals the noncitizen is an immediate relative of a U.S. citizen or an LPR, this triggers the IJ's duty to inform the alien of possible relief based on that relationship).

[91] Valencia v. Mukasey, 548 F.3d 1261, 1262 (9th Cir. 2008) (holding that the IJ was not required to advise a noncitizen of her right to apply for asylum when there was no reason to think she would have qualified for asylum). This distinction raises another issue. Because IJs have the responsibility to develop the record when the record is inadequately developed, the IJ may not realize that the noncitizen is eligible for relief and thus not inform them of such. This Note, however, does not make a separate procedural due process argument about developing the record because this is already required by the statute. INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1) (2012).

[92] ALEINIKOFF ET AL., *supra* note 13, at 543.

[93] *Id.* at 544.

[94] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[95] *Id.*

procedural due process issue that must be addressed. First, Part IV.A argues that LPRs have a cognizable liberty interest at stake because LPRs rely upon the permanency of their statuses, which are reinforced through social and legal expectations. Next, Part IV.B applies the *Mathews v. Eldridge* test to argue that LPRs in removal proceedings, on balance, are due the process of being made aware of their eligibility for relief. Lastly, Part IV.C argues that the due process right to be made aware of discretionary relief translates to a duty of IJs to personally inform noncitizens of their eligibility for relief. Although one approach would be to recognize this duty as belonging to the attorney-client relationship, this Note argues that in order to fully address the problem, the duty can only properly attach to IJs.

A. *Lawful Permanent Residents Have a Cognizable Liberty Interest*

Although the circuit courts have not distinguished between LPRs and other noncitizens in deciding whether a cognizable liberty interest exists to be made aware of discretionary relief, such a distinction is significant. To draw this distinction, LPR status must first be defined. In statutory terms, LPRs "hav[e] been lawfully accorded the privilege of residing permanently in the United States as . . . immigrant[s] in accordance with the immigration laws, such status not having [been] changed."[96] To obtain this status, a noncitizen must fall within a class of admission designated in the INA—the largest of which is based on a close familial connection to a U.S. citizen or LPR.[97] Once LPR status is attained, it confers responsibilities akin to citizenship—the "ability to reside and work in the United States, the responsibility to pay taxes, and the duty to register for selective service under the Military Selective Service Act"—and is, in fact, the status immediately preceding U.S. citizenship.[98]

Based on this special status, scholars have argued that LPRs have a liberty interest under the Due Process Clause that noncitizens without permanent status do not.[99] This argument is based on an understanding of the permanency of LPR

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[96] INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2012).

[97] *See* U.S. DEP'T HOMELAND SECURITY, *Chapter 2—Lawful Permanent Resident (LPR) Admission for Naturalization*, *in* USCIS POLICY MANUAL: VOLUME 12—CITIZENSHIP AND NATURALIZATION (2020), https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-2 [https://perma.cc/V9BX-B2K6]; WILLIAM A. KANDEL, CONG. RES. SER., U.S. FAMILY-BASED IMMIGRATION POLICY (Feb. 2018), https://fas.org/sgp/crs/homesec/R43145.pdf [https://perma.cc/4MH5-8KC5] ("Of the 1,183,505 foreign nationals admitted to the United States in FY2016 as lawful permanent residents (LPRs), 804,793, or 68%, were admitted on the basis of family ties.").

[98] Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 643–44 (2012) (footnotes omitted) ("For all intents and purposes, lawful permanent residents bear the same duties in American society as U.S. citizens.").

[99] *See* Johnson, *supra* note 5, at 2397, 2414 (arguing that ordinary due process jurisprudence favors recognizing guaranteed counsel for LPRs because they have the strongest legal entitlement to remain in the United States of all noncitizens in removal

status that the statute itself does not bear out.[100] Instead, the argument follows from a social and expectation-based understanding that, as LPRs establish ties that go with permanent residence, "they shift their expectations about where home is," and "chart out life plans in reliance on enduring rights to remain."[101] But it is not merely a matter of social expectation; this understanding is also based on consistent governmental practices setting LPRs apart from other noncitizens.[102] For example, only LPRs are eligible to petition to naturalize and become citizens of the United States.[103] Immigration law also favors LPRs in seeking relief from removal.[104]

The argument follows that the social expectations and government practices treating LPRs as permanent status holders, distinct from other noncitizens, essentially create a reliance interest for LPRs.[105] Although the INA establishes offenses that make LPRs removable notwithstanding their permanent status,[106] considering this status more fully, a liberty interest based on reliance is cognizable.

The Second Circuit's analysis in *Copeland*, without more explanation on why noncitizens have a liberty interest in being informed of their eligibility for discretionary relief from removal, is left wanting.[107] Additionally, the majority

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proceedings); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, *in* THE SUPREME COURT REVIEW 47, 49, 105 (Dennis S. Hutchinson et al. eds., 2001) (arguing that LPRs should enjoy due process constitutional protections on par with citizens because of reliance on both legal and social determinations).

[100] The INA sets forth express conditions that will terminate permanent residence and render a noncitizen deportable, criminal convictions among them. INA § 237(a), 8 U.S.C. § 1227(a) (2012).

[101] Martin, *supra* note 99, at 102, 104.

[102] *See id.* at 104 (noting that the "permanent" label is placed on official documents and on the very card issued to LPRs by the government).

[103] Johnson, *supra* note 5, at 2405 ("U.S. immigration laws in many respects favor lawful permanent residents over other categories of noncitizens.").

[104] For example, to qualify for cancellation of removal, LPRs need to satisfy fewer years of residence in the United States compared to other noncitizens. *Compare* INA § 240A(a)(2), 8 U.S.C. § 1229b(a)(2) (2012) (seven years of residence for LPRs), *with* INA § 240A(b)(1)(A), 8 U.S.C. § 1229b(b)(1)(A) (2012) (ten years of residence for non-LPRs).

[105] Although arising under different circumstances, not based in statutory authority, the recent lawsuits concerning Deferred Action for Childhood Arrivals (DACA) have considered arguments that deferred action created a reliance interest for beneficiaries. *See* NAACP v. Trump, 298 F. Supp. 3d 209, 240 (D.D.C. 2018) (stating that the creation of DACA engendered "the reliance of hundreds of thousands of beneficiaries, many of whom had structured their education, employment, and other life activities on the assumption that they would be able to renew their DACA benefits.").

[106] *See* Koh, *supra* note 20, at 1815 (discussing that LPRs are generally subject to deportability grounds under Section 237, but may face removal under the Section 212 grounds for inadmissibility "if, for instance, they traveled abroad and sought re-admission at the border").

[107] *See supra* Part III.B (discussing the Second Circuit's holding in *Copeland* that noncitizens have a liberty or property interest under the Due Process Clause).

of circuits deny that such an interest exists without even discussing whether LPRs in particular may have such an interest.[108] But this interest is discernable if lawful permanent residency is understood more fully than its statutory definition. Finding such an interest is, of course, only the first step. Whether proceedings in which the IJ does not make an LPR aware of their eligibility for discretionary relief from removal meet adequate due process must be answered through the *Mathews v. Eldridge* framework.

B. *Procedural Due Process Balancing Test*

In *Mathews v. Eldridge*, the Supreme Court set forth a balancing test that is now the dominant approach through which courts evaluate whether federal and state administrative adjudications comport with the Fifth and Fourteenth Amendments' Due Process Clause guarantees.[109] This balancing test has previously been employed to evaluate due process claims in the immigration context.[110] To determine what process is due, the *Mathews* test involves an evaluation and balancing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function

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[108] *See supra* note 57 and accompanying text.

[109] Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Ramanujan Nadadur, Note, *Beyond "Crimigration" and the Civil-Criminal Dichotomy—Applying* Mathews v. Eldridge *in the Immigration Context*, 16 YALE HUM. RTS. & DEV. L.J. 141, 148 (2013). Although *Mathews v. Eldridge* traditionally provides the framework for analyzing due process claims in the context of administrative adjudications, it has also been applied to adjudicate criminal procedural rights. *See, e.g.*, United States v. Ruiz, 536 U.S. 622, 631, 633 (2002) (using *Mathews* to evaluate whether the state was constitutionally required to disclose material impeachment evidence prior to a plea agreement with a criminal defendant). The Supreme Court has also applied the balancing test in civil proceedings. *See, e.g.*, United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993) (applying the test to a civil case involving the state's seizure of property under a forfeiture statute). For a further analysis of instances in which courts have applied *Mathews*, see Nadadur, *supra* note 109, at 152–53 (surveying other categories of cases where *Mathews* has been applied).

[110] In *Landon v. Plasencia*, the Supreme Court held that returning LPRs—those who have left the United States and then seek re-admission—have due process rights available to them in exclusion proceedings. 459 U.S. 21, 34–36 (1982). Historically, immigration proceedings consisted of two distinct forms: exclusion—for arriving aliens, with fewer procedural protections available—and, deportation proceedings, which afforded greater procedural protections. *Id.* at 25. Thus, recognizing procedural protections in exclusion proceedings demonstrated an expansion of due process protections in the immigration context. *See, e.g.*, Johnson, *supra* note 5, at 2404 (noting that the Supreme Court applied the *Mathews v. Eldridge* test in a "pathbreaking decision" in *Landon v. Plasencia*); Motomura, *supra* note 30, at 1652 (discussing *Plasencia* as "mark[ing] the arrival of the due process revolution in immigration law").

> involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[111]

This section will consider each factor in turn and ultimately argue that on balance, LPRs are due the process of being informed of their eligibility for discretionary relief.

1. *LPRs Have an Individual Interest in Being Informed of Their Eligibility for Relief*

Generally, noncitizens in removal proceedings have considerable individual interests in being informed of their eligibility for discretionary relief because this information directly impacts their ability to remain in the United States. The interest can be cast in different ways—very narrowly, as a right to remain, or more generally, as an interest born out of family ties, property, and the life the noncitizen established in the United States.[112] Though the relative strength of the individual interest may vary for each noncitizen in removal,[113] some base level of interest undoubtedly exists given what is at stake—removal from a country where someone seeks to remain.[114]

In *Landon v. Plasencia*, a groundbreaking decision recognizing due process protections for noncitizens, the Supreme Court identified individual interests for LPRs that include family ties, property, and a life created in the United States.[115] The Court recognized that Mrs. Plasencia's interest in staying, living, working, and rejoining her immediate family in the United States were important and high-ranking individual interests.[116]

Another way of conceptualizing what is at stake, which the Supreme Court has done on several occasions, is the right to be free from banishment.[117]

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[111] *Mathews*, 424 U.S. at 335.

[112] Nadadur, *supra* note 109, at 153 (arguing that the strength of the procedural right may depend on how the individual interest is cast, with the more general conception favoring stronger procedural rights).

[113] Other lines could be drawn between groups of noncitizens' varied interests in seeking discretionary relief. For example, certain noncitizens are subject to expedited removal. ALEINIKOFF ET AL., *supra* note 13, at 947 (explaining that arriving aliens and those apprehended within 100 miles of the border within fourteen days of entry are subject to expedited removal proceedings). In theory, noncitizens who are subject to expedited removal have a lesser interest in remaining in the United States due to their short presence in the United States.

[114] Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.").

[115] *Plasencia*, 459 U.S. at 34.

[116] *Id.* (categorizing Plasencia's individual interest as a "weighty one").

[117] The Supreme Court has recognized that deportation can be "the equivalent of banishment or exile." Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject

Though not always the case, many noncitizens who are removed are forced to start over in a country where they have no family, may not speak the language, and may face serious persecution or even death.[118] Understanding the individual interests to be such, the stakes are high, but they are especially "weighty" for LPRs, who have *permanent* status that they retain indefinitely, unless they commit a removable offense or naturalize.[119]

The first factor of the *Mathews* test requires a consideration of the private interest that will be affected by the official action.[120] The individual interests in being made aware of eligibility for discretionary relief from removal potentially could take many forms, including the right to be reunited with family or be free from banishment. But, however the individual interests are cast, they are undoubtedly weighty.

2. *There Is a High Risk of an Erroneous Deprivation of Individual Interests*

The second *Mathews v. Eldridge* factor that demands analysis in this context is whether the absence of the right to be made aware of discretionary relief will generally, instead of infrequently, affect the outcome of removal proceedings.[121] Without being made aware of eligibility for discretionary relief from removal, there is a serious risk that noncitizens will be erroneously deprived of the legal right to be considered for any relief from removal in deportation proceedings for three reasons: the well-recognized complexity of immigration law,[122] the widespread lack of counsel in removal proceedings,[123]

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to death or persecution if forced to return to his or her home country."). Deportation, even when no fear of persecution is present, is recognized as a "particularly severe penalty." Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1671–73 (2011) (summarizing case law on the subject).

[118] Markowitz, *supra* note 29, at 1301–02; *see also* 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, 295, 313–23, 338, 346 (2008) (discussing the serious deprivation of liberty that accompanies deportation and discussing the history of "banishment" as form of criminal punishment).

[119] *See* Johnson, *supra* note 5, at 2405. Family and/or employment ties are likely to be pertinent for LPRs because familial and employment relationships are frequently the basis on which LPRs obtain that status. *See supra* note 40 and accompanying text.

[120] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[121] *Id.*

[122] *See, e.g.*, Markowitz, *supra* note 29, at 1302; Nadadur, *supra* note 109, at 141–42; *see also* Stuart Anderson, *Only Takes 2,000 (or 3,000) Pages to Explain U.S. Immigration Rules*, FORBES (July 24, 2011), https://www.forbes.com/sites/stuartanderson/2011/07/24/only-takes-2000-or-3000-pages-to-explain-u-s-immigration-rules/#2d74045c67db [https://perma.cc/55DN-9U35] (explaining the complexity of immigration law).

[123] Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court [https://perma.cc/RJ4W-5S35] (estimating that nationally only

and the fact that nearly all relief from removal is discretionary.[124] Additionally, substitute procedural safeguards are inadequate.

Immigration law is notoriously complicated. The INA has been said to be "second only to the Internal Revenue Code in complexity."[125] Given the complexity, having an attorney to navigate and advise in the process is crucial, yet most noncitizens face removal proceedings without the assistance of counsel.[126] Despite frequent and numerous calls for government-appointed counsel in removal proceedings, such a right remains elusive.[127] Because most noncitizens are unrepresented in removal proceedings, IJs' responsibilities to consider noncitizens' eligibility for relief from removal is ever more important.

Additionally, nearly all forms of relief from removal are discretionary.[128] Effectively, if there is no right to be informed of discretionary relief, there is no right to be informed of relief at all. Therefore, not recognizing a right to be made aware of discretionary relief from removal means there is a serious risk that noncitizens will be erroneously deprived of their potential right to remain—they have no other hope for relief.

The second factor in the *Mathews* test also requires consideration of the probable value, if any, of substitute procedural safeguards.[129] An alternative procedural safeguard—instead of requiring IJs to inform noncitizens of their eligibility for relief—would be to provide noncitizens with written materials

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37% of non-detained noncitizens in removal proceedings have counsel, and that only 14% of detained noncitizens have counsel).

[124] *See, e.g.*, INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2012) (asylum); INA § 212(h), 8 U.S.C. § 1182(h) (2012) (waiver of admissibility); INA § 240A(a), 8 U.S.C. § 1229b(a) (2012) (cancellation of removal). Of course, the right to be made aware of relief is distinct from actually being granted discretionary relief, and the Supreme Court has explicitly separated these notions. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 307–08 (2001) ("Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand."). Still, knowing about the potential for relief is surely the first step on the path to a grant of relief.

[125] Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) (internal citations omitted); *see also* Padilla v. Kentucky, 559 U.S. 356, 369 (2010) ("Immigration law can be complex, and it is a legal specialty of its own.").

[126] *See, e.g.*, Johnson, *supra* note 5, at 2403, 2407. The reality remains that most noncitizens face immigration court alone, confused, and vulnerable.

[127] *See id.* at 2401. There is a great deal of scholarship arguing for government-provided counsel in removal proceedings; nevertheless, no change has been made, with the exception of appointed counsel for mentally incompetent immigrant detainees. *See* Press Release, U.S. Dep't of Justice, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), https://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented [https://perma.cc/N8VZ-24A6].

[128] *See supra* note 25 and accompanying text.

[129] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

outlining the forms of relief and statutory eligibility requirements.[130] This approach would relieve IJs of the duty to inform each noncitizen before them of their statutory eligibility for relief, but it would be an inadequate safeguard. As discussed above, immigration law is especially complex, and written notification of statutory requirements would be insufficient to inform noncitizens of their eligibility for relief.[131] Additionally, written notice would be inadequate in light of the recognition that noncitizens must be personally informed of the opportunity to avoid deportation in criminal proceedings.[132] Of course, immigration proceedings are not subject to the same standards as criminal proceedings,[133] but the principle is the same—for information about avoiding deportation to be of any value to noncitizens, they must be personally informed during their proceedings.

Without being made aware of their eligibility for discretionary relief from removal, there is a serious risk that noncitizens who are statutorily eligible for a form of discretionary relief will be deprived of their right to be considered for relief from removal.[134] The erroneous deprivation of their rights is likely due to

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[130] For example, noncitizens in removal proceedings are issued a notice identifying free or low-cost legal service providers in their area. *See* Exec. Office of Immigration Review, *If You Are in Removal Proceedings*, U.S. DEP'T JUST. (July 12, 2018), https://www.justice.gov/eoir/pro-bono-legal-service-providers-if-in-immigration-proceedings [https://perma.cc/Q9XX-DP82]. Another possible substitute safeguard would be to place the duty on counsel to inform noncitizens of their eligibility for relief, but that too would be inadequate, as discussed in *infra* Part IV.C.

[131] *See supra* notes 124–25 and accompanying text.

[132] In 2010, the Supreme Court held in *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010), that noncitizen defendants in criminal proceedings must be informed by defense counsel of possible immigration consequences before entering a guilty plea. The obligation to personally inform noncitizen defendants about immigration consequences was later applied to judges as well. *See* FED. R. CRIM. P. 11(b)(1)(O) (2014) (requiring that in criminal proceedings, before the court accepts a guilty plea, the court must address the defendant and personally inform him "that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future"). Many states also have statutes requiring judges to advise noncitizen defendants of the potential immigration consequences of a criminal conviction. *See* NIKKI REISCH & SARA ROSELL, IMMIGRANT DEF. PROJECT & N.Y.U SCH. OF LAW, JUDICIAL OBLIGATIONS AFTER *PADILLA V. KENTUCKY* 12 (Oct. 2011), http://www.immigrantdefenseproject.org/wp-content/uploads/2011/05/postpadillaFINALnew.pdf [https://perma.cc/4E6Y-9GAC].

[133] *See supra* note 29 and accompanying text.

[134] The Supreme Court recently ruled on a related issue concerning the notice that initiates removal proceedings. Pereira v. Sessions, 138 S. Ct. 2105, 2111 (2018). At issue in *Pereira* was whether a noncitizen served with a document labeled "notice to appear," but which fails to include a time or place of the removal proceedings, was adequate notice. *Id.* The Court held that such a notice obviously does not adequately inform a noncitizen of the proceedings, as is necessary to constitute a "notice to appear" under 8 U.S.C. 1229(a). *Id.* Although Justice Sotomayor concluded that the issue could be resolved on statutory interpretation alone, she also noted that common sense led unambiguously to the conclusion that a "notice to appear," without a time or place of removal proceedings, was no notice at

the complexity of immigration law, that most noncitizens do not have counsel to assist them in this process, and because nearly all forms of relief from removal are categorized as "discretionary." As a result, LPRs have no hope of relief without at least being made aware that they are eligible to apply for relief. Additionally, substitute procedural safeguards, such as issuing noncitizens written notice, are inadequate.

3. *The Government's Interest in Accurate Adjudications*

The third factor in the *Mathews v. Eldridge* test is a consideration of the government's interests, including fiscal and administrative burdens that the procedural requirements would entail.[135] In *Landon v. Plasencia*, the government's interest in controlling immigration matters was identified as "a sovereign prerogative, largely within the control of the Executive and the Legislature."[136] The role of the judiciary was identified as limited to "determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy."[137] Thus, consideration of both the legislative prerogative and judicial control over discretionary relief are relevant.

The legislature's imperative, as it relates to this issue, is the creation of forms of discretionary relief enumerated in the INA. Congress has passed legislation providing for various forms of relief from removal for LPRs who, although they are otherwise removable, warrant consideration to remain in the United States.[138] Noncitizens who are statutorily eligible for relief therefore are deserving of consideration for relief per legislative prerogative, even though they may ultimately not be granted relief.

The government's interest, more generally, is in accurate adjudications.[139] To ensure accurate adjudications, the INA vests great power in IJs, including the responsibility of considering noncitizens' eligibility for relief from removal.[140] Making noncitizens aware of discretionary relief from removal for

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all. *Id.* at 2114–15. The Court thus has recognized that not providing a noncitizen with adequate information undermines the credibility of the proceeding. *Id.* Here, such a commonsense conclusion is also warranted.

[135] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[136] Landon v. Plasencia, 459 U.S. 21, 34 (1982).

[137] *Id.* at 34–35.

[138] Several forms of discretionary relief are based on hardship to U.S. citizen or LPR relatives in the United States. *See, e.g.*, INA § 240A(b), 8 U.S.C. § 1229b(b) (2012). Additionally, statutory eligibility for discretionary relief sometimes hinges on length of residence in the United States. For example, cancellation of removal requires seven years of residence for LPRs. INA § 240A(a)(2), 8 U.S.C. § 1229b(a)(2). Creating length of residence requirements signals Congress's intent that those who have established a life in the United States are worthy of consideration that they may remain.

[139] Nadadur, *supra* note 109, at 166.

[140] 8 C.F.R. § 1240.11(a)(2) (2012).

which they are statutorily eligible would seem to follow from a responsibility to consider the noncitizen's eligibility. Nevertheless, the government's interest in efficient administration of cases may cut against such a conclusion. IJs face enormous caseloads and the argument could certainly be made that identifying additional procedural safeguards with which they must comply would unacceptably increase the IJs' burden.[141] However, while this places a burden on already overburdened IJs, it is a burden clearly contemplated by the statutory framework that vests IJs with great responsibility over discretionary relief.[142]

Though recognizing a due process right here may impact efficiency, no additional costs to the government are immediately apparent.[143] Making noncitizens aware of their eligibility for relief from removal would merely require the IJ to personally inform the noncitizen of their eligibility for relief during a proceeding that is already underway.

The government's interest in removal proceedings includes ensuring that adjudications are accurate. It is in the government's interest that LPRs who are statutorily eligible for relief—thus fitting within Congress's priorities for who merits relief—are considered for such relief. Although ensuring procedural safeguards will always come with administrative efficiency concerns, here, where the safeguard involves no additional proceedings nor any significant additional expense to the government, this concern should be minimal.

Analyzing this issue within the framework of the *Mathews v. Eldridge* balancing test, then, shows that there is, on balance, a due process violation if

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[141] *Immigration Court Backlog Surpasses One Million Cases*, TRAC IMMIGR. (Nov. 6, 2018), https://trac.syr.edu/immigration/reports/536/ [https://perma.cc/98VH-XY74] (reporting a backlog of 768,257 pending deportation cases). In light of the backlog, in 2018, then-Attorney General Jeff Sessions imposed quotas on IJs, directing them to clear at least 700 cases a year. Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NPR (Apr. 3, 2018), https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges [https://perma.cc/WWC9-AX28]. Imposing quotas demonstrates the backlog of immigration cases, but also reflects due process concerns, which IJs themselves have raised. *See, e.g.*, Audie Cornish, *Immigration Judge Says Quota Will Cripple Already Overburdened System*, NPR (Apr. 4, 2018), https://www.npr.org/2018/04/04/599579225/immigration-judge-says-case-quota-will-affect-impartiality-in-the-courtroom [https://perma.cc/2WRQ-2Z32].

[142] IJs must develop the record, consider noncitizens eligibility for relief, and decide whether they merit favorable grants of relief. *See infra* notes 145–47 and accompanying text. Additionally, some regulations impose additional obligations on IJs. *See* Moran-Enriquez v. INS, 884 F.2d 420, 423 (9th Cir. 1989) ("We read the 'apparent eligibility' standard of 8 C.F.R. § 242.17(a) to mean that where the record, fairly reviewed by an individual who is intimately familiar with the immigration laws—as IJs no doubt are—raises a reasonable possibility that the petitioner may be eligible for relief, the IJ must advise the alien of this possibility and give him the opportunity to develop the issue.").

[143] This procedural safeguard, unlike calls for government-appointed counsel, is not likely to invoke significant concerns for government expense. *See* Nadadur, *supra* note 109, at 165–66 (discussing that opponents of heightened safeguards in removal proceedings often cite government expense as a factor weighing against implementation of the procedure, and that appointed counsel would likely be very costly).

an LPR who is eligible for a form of discretionary relief is not made aware of their eligibility in removal proceedings. The individual interests, no matter how they are cast, are undoubtedly weighty. The likelihood of erroneous deprivation of these interests is also weighty, given the complexity of immigration law, widespread lack of counsel, and the reality that discretionary relief is essentially the only relief available. And, the government's interest supports recognition of this due process right in that the government wants accurate adjudications. Finally, the government factors weighing against this right—primarily administrative efficiency and cost—are not especially pertinent in this instance. Thus, on balance, LPRs in removal proceedings are due the process of being made aware of discretionary relief for which they are eligible.

C. *Immigration Judges, as Opposed to Counsel, Have a Duty to Make LPRs Aware of Discretionary Relief from Removal*

The role of IJs is a special one, and one that is not easily comprehended from the vantage point of other judicial systems.[144] IJs have the responsibility to develop the record, interrogate, examine, and cross-examine the noncitizen and any witnesses.[145] Most importantly in this context, IJs consider the noncitizen's eligibility for discretionary relief from removal.[146] The nature of IJs' responsibilities in removal proceedings is such that they consider the noncitizen's eligibility for relief and make the ultimate determination of the noncitizen's fate.[147] This responsibility positions IJs to make noncitizens aware of their eligibility for relief or wholly deny noncitizens this information.

The argument could be made, and has been made, by Mr. Estrada and others, that counsel's failure to advise them of their eligibility for discretionary relief was a violation of their due process rights.[148] Unquestionably, as a matter of professional responsibility, counsel should always inform and advise clients about their potential eligibility for relief from removal.[149] However, given the nature of immigration proceedings, counsels' shortcomings under such

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[144] IJs certainly differ from Article III judges in a variety of ways, ranging from appointments, tenure, and responsibilities. *See* Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1526, 1542 (2010). But they also differ significantly from Administrative Law Judges both in appointments and responsibilities. *See* Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467, 472–75 (2008) (discussing the Attorney General's role in appointments of IJs and the power and control the Attorney General has over IJs).

[145] INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1) (2012); *see also* United States v. Lopez-Velasquez, 629 F.3d 894, 896, 900 (9th Cir. 2010) (discussing the role of IJs).

[146] Koh, *supra* note 20, at 1813.

[147] Benedetto, *supra* note 144, at 475–76.

[148] Brief for Appellant, *supra* note 8, at 11.

[149] This should be so as a matter of professional responsibility. *See* MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018).

circumstances do not necessarily give rise to a due process violation. The issue stems from the lack of a guaranteed right to counsel in removal proceedings.[150]

Although noncitizens in removal proceedings have the right to retain counsel for the proceedings,[151] there is no right to appointed counsel.[152] The majority of noncitizens are unrepresented in removal proceedings and thus are without counsel to make any advisement about their eligibility for relief.[153]

But beyond the reality that a lack of representation in effect means there is often no attorney to advise noncitizens of their eligibility for relief from removal, the absence of a right to guaranteed counsel means that a noncitizen's ability to establish a due process violation based on ineffective assistance of counsel in the immigration context is by no means guaranteed. In the criminal context, the Sixth Amendment guarantees the right to effective assistance of counsel, and when counsel performs deficiently in a prejudicial manner, the defendant can prove a violation of their constitutional right.[154] But, when the Sixth Amendment right to counsel does not apply, the Supreme Court has held that counsel's errors do not constitute ineffective assistance of counsel.[155]

Imagining this due process issue in the criminal context, where the Sixth Amendment applies, it seems obvious that the duty to inform would properly be one owed from counsel to client; and a failure to make a client aware of relief would properly give way to a claim of ineffective assistance of counsel.[156] The

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[150] *See supra* note 29 and accompanying text (discussing that immigration proceedings are not criminal proceedings).

[151] INA § 292, 8 U.S.C. § 1362 (2012).

[152] *See* Note, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544, 1548–49 (2007) (stating that because the Supreme Court has long held that immigration proceedings are not criminal proceedings, there is no right to court-appointed counsel in removal proceedings).

[153] *See supra* note 123 (citing statistics on the low levels of representation in removal proceedings). The rate of representation for LPRs specifically is not available; even the most comprehensive source of immigration court data does not break down the numbers by immigration status. *See Details on Deportation Proceedings in Immigration Court*, TRAC IMMIGR. (Jan. 2019), https://trac.syr.edu/phptools/immigration/nta/ [https://perma.cc/AR3A-ALXX].

[154] *See* Strickland v. Washington, 466 U.S. 668, 686–87 (1984).

[155] *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 752–54 (1991) (holding that because there was no constitutional right to appointed counsel for an appeal of a state trial court habeas judgment, there was no constitutional basis for a claim of ineffective assistance of counsel); *see also* Wainwright v. Torna, 455 U.S. 586, 587–88 (1982) (holding that "[s]ince respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely"). Despite these holdings, the Board of Immigration Appeals and several federal appeals courts established conflicting precedents on whether there was a constitutional right to effective assistance of counsel in removal proceedings. ALEINIKOFF ET AL., *supra* note 13, at 940–41. The right to effective assistance of counsel in removal proceedings remains murky. *Id.* at 941–42.

[156] For example, the Supreme Court held in *Padilla v. Kentucky* that a criminal defendant was denied effective assistance of counsel when his counsel failed to advise him that his

same simply does not follow in immigration proceedings, in which there is no guaranteed right to effective assistance of counsel.

As a result, attributing the duty to be made aware of discretionary relief from removal to counsel would not adequately protect the due process rights of noncitizens in removal proceedings.[157] But it would also ignore that IJs already have the responsibility to consider noncitizens' eligibility for relief and play a critical role in guiding unrepresented noncitizens through removal proceedings.[158]

If a due process right to be made aware of relief was recognized only to attach to counsel's conduct, the majority of noncitizens in removal proceedings would be left without this due process protection. Beyond this recognition, though, the basic structure of removal proceedings and the statutory responsibilities vested in IJs by the INA suggest that this procedural due process right imposes a duty on IJs to inform noncitizens of their eligibility for discretionary relief from removal.

Resolution of this issue by the Supreme Court in the foreseeable future is unlikely.[159] Unfortunately, so too is congressional action.[160] In the meantime, the Department of Justice through the Executive Office for Immigration Review (EOIR)—home of the Immigration Courts—should clarify IJs' responsibilities to inform deportable LPRs of their eligibility to apply for discretionary relief from removal. This can be accomplished in two ways. First, EOIR should issue a policy memorandum instructing IJs to personally inform LPRs who appear eligible for a form of discretionary relief, of their eligibility and ability to apply for relief, in removal proceedings.[161] Second, EOIR should update the Immigration Judge Benchbook, which serves as a reference guide for IJs on how

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guilty plea to a drug-related charge made him subject to mandatory deportation. Padilla v. Kentucky, 559 U.S. 356, 368–69 (2010).

[157] Although noncitizens have a right to counsel in removal proceedings, they have no constitutionally protected right to appointed counsel. *See* Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting* Franco-Gonzalez, 90 ST. JOHN'S L. REV. 915, 917, 922, 925 (2017) (arguing that there should be a right to appointed counsel in immigration proceedings); *see, e.g.*, Johnson, *supra* note 5, at 2399, 2414 (arguing that LPRs should be afforded government-appointed counsel).

[158] *See, e.g.*, United States v. Lopez-Velasquez, 629 F.3d 894, 896, 900 (9th Cir. 2010) (discussing the role of IJs).

[159] Estrada v. United States, 138 S. Ct. 2623 (2018) (denying petition for writ of certiorari).

[160] *See generally* Elaine Kamarck & Christine Stenglein, *Can Immigration Reform Happen? A Look Back*, BROOKINGS INST. (Feb. 11, 2019), https://www.brookings.edu/blog/fixgov/2019/02/11/can-immigration-reform-happen-a-look-back/ [https://perma.cc/B978-YA94] (describing gridlock on immigration reform for the last three decades).

[161] The EOIR Office of Policy issues memoranda concerning Immigration Court policies. *See* Exec. Office of Immigration Review, *Office of Policy*, U.S. DEP'T JUST. (Feb. 21, 2020), https://www.justice.gov/eoir/office-of-policy [https://perma.cc/QXR6-AGFK].

to conduct proceedings, to include this duty.[162] These reforms will provide IJs with clarity as to their responsibilities to LPRs in removal proceedings.

This issue also must be addressed from the perspective of collateral attacks on prior deportation orders that lacked this procedural due process protection. Courts must recognize these orders to be "fundamentally unfair" and allow noncitizens like Mr. Estrada to challenge their prior deportation orders on this basis.[163] Otherwise, due process violations will continue to permeate re-entry prosecutions and removal proceedings alike.

V. CONCLUSION

The number of noncitizens in deportation proceedings is at historic highs. The same is true of prosecutions for unlawful re-entry. Now more than ever, ensuring that noncitizens receive due process protections is critical. Deporting LPRs who are eligible for relief from removal without even informing them of this relief should not pass constitutional muster—such orders are fundamentally unfair. LPRs establish a permanent life in the United States and come to rely upon this status through social and legal expectations. Although LPRs who commit certain offenses are removable, they have a protectable liberty interest in remaining in the United States. Balancing private interests, likelihood of deprivation of rights without such safeguards, and the government's interests, it is clear that LPRs in removal proceedings are due the process of being made aware of discretionary relief from removal. IJs must inform LPRs of their eligibility for discretionary relief from removal to ensure this protection.

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[162] *The Immigration Judge Benchbook* was previously publicly available. *See* Press Release, U.S. Dep't of Justice, EOIR Provides Public Access to "Immigration Judge Benchbook" (June 4, 2009) [on file with author]. Presently only an archived version is available. *See* Exec. Office of Immigration Review, *Archived Resources*, U.S. DEP'T JUST. (May 8, 2018), https://www.justice.gov/eoir/archived-resources [https://perma.cc/V4PJ-GULQ].

[163] *See supra* Part II.B.