No. __-_____

IN THE

Supreme Court of the United States

EFRAIN AVILA-FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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March 21, 2020

QUESTION PRESENTED

Whether a failure to advise an unrepresented alien in removal proceedings about relief for which he is apparently eligible, is a defect that can render a removal order "fundamentally unfair" under 8 U.S.C. § 1326(d), as the Second and Ninth Circuits have held, or not, as the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Efrain Avila-Flores*, No. 19-4769, United States Court of Appeals for the Fourth Circuit. Judgment entered Dec. 21, 2022.

(2) *United States v. Efrain Avila-Flores*, No. 3:18CR152-JAG, United States District Court for the Eastern District of Virginia. Judgment entered September 30, 2019.

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PETITION FOR WRIT OF CERTIORARI

Efrain Avila-Flores respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at pages 1a to 3a of the appendix to the petition and is available at 2022 WL 17831443 (4th Cir. 2022). The district court's memorandum opinion appears at pages 4a to 12a of the appendix, and is available at 2019 WL 2913980 (E.D.Va. 2019).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction under 18 U.S.C. § 3231. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291. That court issued its opinion and judgment on December 21, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person . . . shall be deprived of life, liberty, or property, without due process of law[.]

Title 8, United State Code, Section 1326 provides in relevant part:

> (a) In general Subject to subsection (b), any alien who—
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for

> admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,
>
> shall be fined under title 18, or imprisoned not more than 2 years, or both.

. . .

> (d) **Limitation on collateral attack on underlying deportation order**
>
> In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—
>
> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
>
> (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.

STATEMENT OF THE CASE

Immigration Proceedings

Mr. Avila was born in El Salvador; but he moved to Guatemala when he was one year old after his father was murdered. C.A.J.A. 67. [1] He grew up poor; his mother was unable to pay for schooling, so he quit at age 9 to work. C.A.J.A. 67-68. He came to the United States in 2003 without inspection. C.A.J.A. 27. By 2012, he

[1] "C.A.J.A." refers to the joint appendix filed in the court of appeals. *See* Joint Appendix*, United States v. Avila Flores,* No. 19-4769, Doc. 21 (filed Jan. 7, 2020).

was living in Richmond, Virginia with his uncle; his brothers and cousins also lived in the same city. C.A.J.A. 65, 80.

On March 27, 2012, Mr. Avila was arrested and detained by immigration officers. C.A.J.A. 82. He requested a bond hearing in writing on a form, which was ignored for the rest of the proceedings. C.A.J.A. 27 (transcript). He was taken to Pennsylvania and after a month, saw an immigration judge in York. C.A.J.A. 27. The hearing lasted about three minutes, and as transcribed, took up less than two pages of text. C.A.J.A. 27-28. The immigration judge did not discuss bond. The immigration judge did not advise Mr. Avila of the purpose of the hearing, the charge of removability, his rights to examine evidence, burdens of proof, or any forms of relief. Instead, the judge confirmed that Mr. Avila did not want a continuance to obtain a lawyer, then immediately began asking him questions about his citizenship, illegal entry, and status. C.A.J.A. 27. After eliciting admissions, the immigration judge consulted ICE counsel and determined that Mr. Avila was eligible for voluntary departure under 8 U.S.C. § 1229c. He asked Mr. Avila if anyone in the United States could buy him a ticket, clarified it would be voluntary; then after a pause, Mr. Avila said "No, just deported." C.A.J.A. 27. After the immigration judge signed the order, Mr. Avila asked "in how many years are you allowed to come back in?" C.A.J.A. 28. If granted voluntary departure, a person can apply for a visa immediately; if ordered removed, however, there are years of ineligibility. 8 U.S.C. § 1182(a)(9)(A)(i). Instead of telling Mr. Avila this, the

immigration judge said, "That's a great question for you to appear at the U.S. Embassy in Guatemala City and ask them[.]" C.A.J.A. 28.

Proceedings in the District Court

In his motion to dismiss the indictment, Mr. Avila argued that the immigration officers and judge violated due process by failing to conduct a bond hearing, failing to advise Mr. Avila of his procedural rights or the purpose of the hearing, failing to advise or explain in any meaningful way his right to apply for voluntary departure, and failing to keep a record of the entire proceeding. C.A.J.A. 11-16. He argued that these violations prejudiced him because, absent the violations, voluntary departure in lieu of a removal order was a reasonably probability. C.A.J.A. 17-20. He pointed out that the "reasonable probability" test, according to *Lee v. United States*, 137 S. Ct. 1958 (2017), did not require a reasonable probability of a different *outcome*, but of a different *decision* by the alien. C.A.J.A. 18. In the alternative, he argued, it was reasonably probable he would have received voluntary departure in a properly-conducted hearing. C.A.J.A. 19.

The district court denied the motion to dismiss in a written opinion. App. 4a-12a. The opinion held that Mr. Avila had not satisfied any of the § 1326(d) prongs. App. 12a. Mr. Avila was sentenced to time served with no supervised release. C.A.J.A. 145.

Proceedings in the Court of Appeals

Mr. Avila repeated his arguments in the Court of Appeals. While the appeal was pending and had been fully briefed, the Fourth Circuit decided *United States v.*

Herrera-Pagoada, 14 F.4th 311 (4th Cir. 2021). In that case, the Fourth Circuit held that "an alien has no constitutional right to be advised of his eligibility for discretionary relief." *Id*. at 322. The Fourth Circuit then issued its opinion in this case, relying on *Herrera-Pagoada* and holding that Mr. Avila had failed to demonstrate that his removal order was fundamentally unfair. App. 1a-3a.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented is Important Because There is a Split of Authority on a Fundamental Standard for the Most Common Defense to the Most Common Federal Criminal Charge

The question this case raises is the subject of a decades-long split that has reached maturity. It concerns the most common federal criminal charge, and the most commonly asserted defense to that charge. It concerns the most fundamental aspect of that defense: what renders the entry of a removal order "fundamentally unfair" when under collateral attack according to 8 U.S.C. § 1326(d)?

These issues are important because prior non-criminal adjudications form an element of thousands of federal prosecutions a year, involving mostly illegal reentry, but also failure to pay child support and possession of firearms by those adjudicated mentally defective or committed. A clear rule is needed for both whether and how to evaluate the authority of those issuing such orders before depriving so many defendants of their personal liberty.

A. The Split: A Prejudicial Statutory or Regulatory Violation Makes a Removal Order Fundamentally Unfair in the Second, Third, and Ninth Circuits, but Doesn't in the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits.

Illegal reentry under 8 U.S.C. § 1326 has, as an element of the crime, a prior administrative agency adjudication – the removal order. Under *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), as later limited by 8 U.S.C. § 1326(d), a defendant may collaterally attack the removal order being used against him as an element. The noncitizen must show exhaustion of administrative remedies under § 1326(d)(1) and deprivation of the opportunity for judicial review under § 1326(d)(2). *See United States v. Palomar-Santiago*, 141 S.Ct. 1615 (2021) (holding that § 1326(d)(1) is mandatory).

Last and crucially, the defendant must show that "the entry of the order was fundamentally unfair." 8 U.S.C. § 1326(d)(3). Courts begin to split at this point. In the majority, including the Fourth Circuit, this requires a showing of (1) a constitutional due process violation; and (2) prejudice. App. 2a. *See United States v. Soto-Mateo*, 799 F.3d 117, 123 (1st Cir. 2015);*United States v. Herrera*-Pagoada, 14 F.4th 311 (4th Cir. 2021); *United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002); *United States v. Estrada*, 876 F.3d 885, 888 (6th Cir. 2017); *United States v. Santiago-Ochoa*, 447 F.3d 1015, 1020 (7th Cir. 2006); *Garcia-Mateo v. Keisler*, 503 F.3d 698, 700 (8th Cir. 2007); *United States v. Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc); *see also United States v. Holland*, 876 F.2d 1533, 1537 (11th Cir. 1989). ("Although Holland fleetingly mentions in his brief that he may have been entitled to apply for suspension of deportation, we do not

find that the failure to advise him of this right rendered the proceeding fundamentally unfair.")

In these circuits, because a noncitizen without permission to enter or remain in the United States has no due process liberty interest in discretionary relief (which is characterized as an act of grace), so a failure to advise about such relief is never a due process violation and a removal order is therefore never fundamentally unfair solely due to lack of advice on relief.

But the Second, Third, and Ninth Circuits do not require a constitutional due process violation; prejudicial statutory or regulatory violations can also sometimes qualify. *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004); *United States v. Charleswell*, 456 F.3d 347, 359 (3d Cir. 2006) ("To the extent that it might be argued that, for our Circuit, the sole way to establish fundamental unfairness is through proof of a deprivation of a liberty or property interest, we respectfully disagree.") (holding failure to advise about right to appeal can render order fundamentally unfair, if prejudice shown); *United States v. Vidal-Mendoza*, 705 F.3d 1012, 1015 (9th Cir. 2013) (failure to advise of available discretionary relief was due process violation). Immigration regulations require the immigration judge to "inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing[.]" 8 C.F.R. § 1240.11(a)(2). In these circuits, a respondent who is kept in the dark about his or her apparent eligibility for

discretionary relief has had a "fundamentally unfair" hearing if that failure was prejudicial.

This split of authority is beyond mature; it has ossified. Every single Circuit has looked at this question; the Fourth Circuit was the last bastion of uncertainty to fall and join a side. Published cases taking opposing views have been extant since 2004 or before while § 1326 prosecutions continue to roll through at rates well above other federal crimes. It is well beyond time to resolve this issue: what kind of errors can make a removal hearing "fundamentally unfair?"

B. Removal Orders Are Used As An Element in Thousands of Federal Felony Prosecutions Each Year, Supporting Millenia of Imprisonment Imposed.

These issues are important because they concern "a question of personal liberty," *Estep*, 327 U.S. at 122, for the tens of thousands of people convicted each year of the felony of illegal reentry. Illegal reentry is the most commonly prosecuted federal felony. According to the U.S. Sentencing Commission, out of the 64,142 defendants sentenced in fiscal year 2022, 11,974 were sentenced under the illegal reentry guideline, U.S.S.G § 2L1.2. United States Sentencing Commission, *2022 Annual Report and Sourcebook of Federal Sentencing Statistics* at 130 (available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf). That is 30.7% of all federal sentencings – more than all drug trafficking cases combined, and more than three times more than all federal firearms cases. . The average sentence in fiscal year 2022 was over twelve months,

id. at 137, which means that nearly 12 man-millenia of imprisonment was imposed under this statute in a single year. The continued prosecution of illegal reentry offenses is unlikely to abate. Although it varies, prosecution rates have not dipped below 10,000 per year since before 2013, and reached peaks in 2011 and 2019. *Sourcebook* at 136.

A collateral attack under § 1326(d) is the most common, and often the sole, means of defending against an illegal reentry charge. According to the Bureau of Justice Statistics and Administrative Office of the U.S. Courts data, out of 12,610 defendants whose § 1326 cases ended in Fiscal Year 2021, only 20 (twenty) went to trial.[2] Twenty out of 12,610 is 0.158%. On the other hand, § 1326 charges ended up being dismissed in 200 cases.

The burden of litigation extends to the courts of appeals. According to the Administrative Office of the Courts, almost 6% of federal criminal appeals, year after year, are for immigration offenses generally. And a survey of the caselaw makes clear that a collateral attack on a prior removal order under § 1326(d) is the most commonly asserted defense to an illegal reentry charge. A circuit-level case involving § 1326(d), the collateral attack provision, is issued on average about every 5.4 days over the last 3 years (200 cases).

The questions presented are also important for other federal prosecutions where prior non-criminal adjudications form an element of a federal felony. For

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[2] Burea of Justice Statistics Program website, *FY2021 Outcomes for defendants in cases closed (Results for Title 08 – Aliens and Nationality),* available at https://www.bjs.gov/fjsrc/tsec.cfm (last accessed Mar. 21, 2023).

example, the Child Support Recovery Act ("CSRA"), 18 U.S.C. § 228, provides federal criminal enforcement for failure to pay child support ordered by a state, at which there is no guaranteed right to an attorney. *See United States v. Johnson*, 114 F.3d 476, 483 (4th Cir. 1997) (no right to contest paternity in CSRA prosecution); *id.* at n.4 (expressing "great doubt" that support order could be collaterally attacked even for perjury or fraud). Title 18 U.S. Code § 922(g)(4) makes it a felony to possess a firearm if one has ever been adjudicated a mental defective or committed to any mental institution. At least one Circuit has held that there is no right to collaterally attack the involuntary commitment order, no matter how violative of due process the order was, or whether it was issued by a court or a county board. *See United States v. McIlwain*, 772 F.3d 688, 696-98 (11th Cir. 2014). These are just two more contexts where the use of a prior non-criminal adjudication forms an element of a crime. Thus, the questions raised by this case are important, both to avoid unnecessary litigation and clarify the applicable rule, but also to protect the personal liberty of the thousands each year who are imprisoned for violating administrative agency orders.

II. The Fourth Circuit's Decision was Wrong

First, the plain text of § 1326(d)(3) concerns an order that is "fundamentally unfair." It does not, on its face, require a constitutional due process violation of a vested liberty interest, as the Fourth Circuit and its cohorts have held. This Court has held that unfairness can be established even by an agency's failure to follow its own policy. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954)

(failure of Board of Immigration Appeals to follow its own regulations did not "afford[] that due process required by the regulations").

Second, a noncitizen in removal proceedings – even one who entered illegally – *does* have constitutional due process rights. Liberty is the default; and when an suspected undocumented alien is found inside the United States, it is the government's burden to prove deportability. 8 U.S.C. § 1229a(c)(3). And that liberty interest ends only when the removal order is entered, not when the noncitizen admits grounds of deportability. 8 U.S.C. § 1231(a)(1)(A) (granting authority to physically remove only "when an alien is ordered removed").

One might as well say that a criminal defendant has no liberty interest at a sentencing hearing, because the final sentence (through the statutory maximum) is a matter of the sentencing court's discretion. But one does not carve up the proceedings to pinpoint the moment when the fact sufficient to deprive someone of liberty was proven; the rights extend throughout the proceeding until the entry of an order terminating those rights. This is the fundamental misunderstanding at the heart of the cases refusing to recognize error involving discretionary relief, and this Court should correct it.

III. This Case is a Good Vehicle to Resolve the Issues Raised

This case presents an opportunity to answer the questions presented clearly. First, there is a smorgasbord of errors. Mr. Avila was held in another state without a bond hearing (which he had requested) for months. C.A.J.A. 27. He received none of the advisals that the statute and regulations require (and the Notice to Appear

promises he will receive) at his three-minute hearing. C.A.J.A. 27-28. When he asked the immigration judge a question on an issue that could have been avoided by applying for voluntary departure, he was told to ask at the U.S. Consulate in Guatemala after he got there (too late). C.A.J.A. 28. And to top it all off, the government lost or erased the tape of the end of the hearing, despite a statutory and regulatory obligation to maintain the record. *Id*.

This range of errors runs the gamut, and provides an opportunity to set standards for a wide range of defects that courts frequently confront. The Court can, in one case, and in one fell swoop, address this wide range of violations and whether each is sufficient alone, or in the aggregate, to render a removal order fundamentally unfair.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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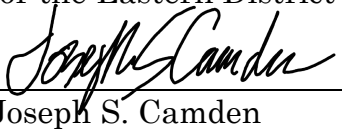

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