No. 22-7095

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

PETITIONER'S REPLY

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May 9, 2023

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REPLY

The government agrees that there is a split in authority in the Circuit Courts of Appeals on the question presented – whether a failure to advise an alien of eligibility for discretionary relief can render the proceedings fundamentally unfair under 8 U.S.C. § 1326. And it does not dispute that this issue is implicated in thousands of criminal cases resulting in millenia of imprisonment imposed every year. It argues, though, that Mr. Avila's case is an inappropriate vehicle.

Mr. Avila's case is an appropriate vehicle for the question presented. The government argues that, because the district court found no prejudice, and the Fourth Circuit adopted its holding, his case is hopeless no matter the resolution of the question presented. BIO 12-15. Not so, and irrelevant to boot.

The outcome of this case on a remand is not preordained by "factbound, case-specific holding[s]" as the government claims. BIO 13. The government separates fundamental unfairness into components of due process violations and prejudice, as (Mr. Avila freely admits) do most circuits. Because, it argues, the Fourth Circuit held in the alternative that Mr. Avila failed to show prejudice, there is an independent basis for affirming the denial of his motion to dismiss. This ignores the record and is stingy with the scope of the question presented.

First, the question presented embraces the entire inquiry of whether the removal order is "fundamentally unfair" under 8 U.S.C. § 1326(d)(3). It therefore includes the prejudice issue. But if the Court grants review and clarifies what constitutes an error, that necessarily will modify the scope of what qualifies as prejudice, because, as the government notes, they are causally related. Second, and

more importantly, Mr. Avila consistently argued that a failure to advise of eligibility for relief establishes prejudice *per se*. *United States v. Avila-Flores*, No. 19-4769 (4th Cir.), Doc. 37 at 10, 17-19. The Fourth Circuit had just recently so held in a direct immigration petition, where an IJ violated only the *statutory* duty to develop the record on eligibility for relief. *See generally Quintero v. Garland*, 998 F.3d 612 (4th Cir. 2021). Neither the Fourth Circuit nor the district court addressed this argument, *see generally* Appendix, and it would therefore have to be resolved as *res nova* if the Court were to grant review and remand.

This Court has never required a showing of a certainty of success on all aspects of a claim before granting review on a discrete question – especially one that the courts below treated as a threshold bar which precluded it from reviewing the remaining issues. This is necessarily the case every time this Court remands a case for further consideration, and is no reason to avoid resolving such a longstanding and mature circuit split.

The government asserts in support that "petitioner fails to identify any appellate decision adopting a different construction of Section 1326(d)(3). But he did. As the government itself acknowledged a mere one page before, the Third Circuit has held that a purely statutory violation could suffice to render a proceeding fundamentally unfair. BIO 9-10 n.3; *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.").

Illustrating the extent of the confusion on this issue, and the danger that it could spread to other areas of law, the government appears to deny that the selection of a final sentence in a criminal case is a matter of discretion, but one where due process rights still obtain. BIO 11-12. This Court has held the opposite. *See Beckles v. United States*, 580 U.S. 256, 263-64 (2017) (rejecting vagueness challenge to guidelines specifically because of discretionary nature of sentencing).

CONCLUSION

The government's vehicle concerns are unfounded. The record squarely presents, both factually and as argued below, the issue on which certiorari is requested. The split on the law is deep and mature, and affects thousands of man-years of prison imposed every year. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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