No. 25-

# In the Supreme Court of the United States

VICTOR MANUEL CASTRO-ALEMAN,
A/K/A ALFREDO QUINONES OLMO,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether an immigration judge's failure to inform an alien of the right to seek discretionary relief from removal violates due process and thus can constitute "fundamental unfairness" under 8 U.S.C. §1326(d).

**RELATED PROCEEDINGS**

United States District Court (E.D. Va.):

*United States* v. *Castro-Aleman*,
No. 3:23-cr-00051 (January 4, 2024)

United States Court of Appeals (4th Cir.):

*United States* v. *Castro-Aleman*,
No. 24-4032 (June 26, 2025)

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Victor Manuel Castro-Aleman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## INTRODUCTION

This petition arises from a deep and acknowledged split of authority concerning the Nation's most frequently charged federal felony—and the most common defense to that charge.

Under federal immigration law, aliens otherwise subject to removal have the right to petition the Attorney General for several forms of discretionary relief, such as asylum and cancellation of removal. Many aliens who would be eligible for such relief face an uphill

battle: a language barrier, lack of legal representation, and unfamiliarity with the American legal system are just the beginning. Recognizing those barriers, the law imposes a special, affirmative duty on immigration judges (IJs) to develop the record in removal proceedings and to inform aliens otherwise subject to removal of the availability of discretionary relief.

This Court has long held that, when an alien is prejudiced by the government's failure in removal proceedings to comply with the requirements of due process, those proceedings are "fundamentally unfair," and so cannot be the basis for a subsequent prosecution for illegal reentry. See *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987). Congress subsequently codified that holding into the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, authorizing a defendant facing an illegal-reentry charge to bring a collateral attack on his prior removal proceeding as "fundamentally unfair." 8 U.S.C. § 1326(d)(3).

But the courts of appeals have sharply split on what that statutory standard means in cases involving the loss of the opportunity to seek discretionary relief. The Second and Ninth Circuits—which together account for over 40% of all illegal-reentry prosecutions—rightly treat an IJ's failure to inform aliens subject to removal of their right to petition for discretionary relief as a due-process violation; thus, such a failure provides a basis for challenging a prior removal order as fundamentally unfair. Other circuits, including the Fourth Circuit here, disagree. They hold that a failure to apprise an alien of his right to pursue discretionary relief cannot violate due process because there is no guarantee that the alien would ultimately *receive* that relief.

The circuit conflict goes to the heart of what due process guarantees in the immigration context and affects tens of thousands of defendants each year. And this case provides an ideal vehicle to resolve it. Petitioner's experience is a prime example of the harm that the Fourth Circuit's standard perpetuates. The court of appeals acknowledged that, in the immigration proceedings leading up to his initial removal, the IJ failed to advise Mr. Castro-Aleman that he had a right to apply for discretionary relief. Mr. Castro-Aleman operated in those proceedings under the mistaken belief that he could apply for asylum *only* if he could produce the death certificate for his father, who was killed in wartime El Salvador half a century ago. Mr. Castro-Aleman would have needed to obtain that certificate within only a few weeks between hearings—and while incarcerated. But the IJ did nothing to correct that misunderstanding or to inform him of his right to apply for asylum regardless.

In the Second and Ninth Circuits, that failure would satisfy Section 1326(d)'s requirement of a due-process violation in Mr. Castro-Aleman's prior removal. He would therefore have had the opportunity to demonstrate prejudice, and thus, "fundamental unfairness." But because his case was governed by the Fourth Circuit's precedent, his collateral attack on his prior removal order was summarily rejected.

The patchwork of conflicting precedent on this issue is untenable. And it runs contrary to the Constitution's directive that the nation be governed by "uniform" immigration laws. U.S. Const. art. I, § 8, cl. 4. Multiple courts of appeals judges have called for this Court to resolve the conflict. It can and should do so in this case.

The petition for a writ of certiorari should be granted.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 141 F.4th 576. The order of the district court on Mr. Castro-Aleman's motion to dismiss the indictment (App., *infra*, 14a-25a) is not published in the Federal Supplement, but is available at 2023 WL 4937304.

## JURISDICTION

The court of appeals entered judgment on June 26, 2025. App., *infra*, 26a. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

**8 U.S.C. § 1326(d)**

**(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

1. In 1973, petitioner Victor Manuel Castro-Aleman's family fled his native El Salvador. App., *infra*, 2a. His father had been killed by the left-wing ruling regime during the country's civil war. *Ibid.* Mr. Castro-Aleman, then only an eight-year-old child, was brought by his family to the United States. *Ibid.* In the early 1980s, he moved to Virginia, where he was issued a work permit and social-security number. *Ibid.*

After serving time in jail for driving under the influence, Mr. Castro-Aleman was arrested for the same offense in 2014. App., *infra*, 3a. While incarcerated for the 2014 offense, Mr. Castro-Aleman was discovered by U.S. Immigration and Customs Enforcement and was served with a Notice to Appear. *Ibid*. The Notice categorized Mr. Castro-Aleman as being deportable for three separate reasons: (1) being present in the U.S. without being admitted or paroled; (2) committing a crime of moral turpitude; and (3) having been convicted of two or more offenses totaling five or more years in incarceration. *Ibid.*

2. Complying with the Notice to Appear, Mr. Castro-Aleman appeared pro se before an IJ in 2016. App., *infra*, 3a. He stated (via a translator) that he feared returning to El Salvador because the left-wing political faction that had killed his father was once again in power. And he stated his desire to apply for asylum. *Ibid.* The IJ, although legally obligated to "develop the record" in order to ensure that Mr. Castro-Aleman received "meaningful review," *Quintero* v. *Garland*, 998 F.3d 612, 622, 625-626, 639 (4th Cir. 2021), delayed further proceedings. But he did not explain anything about the asylum process or what ma-

terials would actually be needed in order to apply. Instead, the IJ told Mr. Castro-Aleman that his odds of succeeding on an asylum claim "[didn't] look real good." App, *infra*, 3a.

At the next hearing, the IJ asked Mr. Castro-Aleman why he had not submitted an asylum application. App., *infra*, 4a. Mr. Castro-Aleman explained that he did not have his father's death certificate. However, the IJ did not inform Mr. Castro-Aleman that the death certificate is not a prerequisite for an asylum claim. He merely asked Mr. Castro-Aleman if he wished to defer proceedings again. *Ibid.* Mr. Castro-Aleman declined, but requested voluntary departure. *Ibid.* The IJ denied that request and instead ordered him removed. *Ibid.*

When the IJ asked Mr. Castro-Aleman if he wanted to appeal his removal, his (translated) answer was ambiguous. Without attempting to clarify whether Mr. Castro-Aleman wished to waive his right to appeal, the IJ simply ended the proceedings. App., *infra*, 4a. The government proceeded with the removal, and Mr. Castro-Aleman did not appeal. *Ibid.*

3. Mr. Castro-Aleman later reentered the United States and was found by the government in Virginia in 2023. App., *infra*, 4a. He was indicted for illegal reentry under 8 U.S.C. § 1326(a), (b)(1). *Id.* at 5a.

Mr. Castro-Aleman moved to dismiss the indictment, arguing (as relevant) that his 2016 removal order was invalid. Specifically, he argued that the IJ had failed to inform him that his asylum claim did not require his father's death certificate and that, with a proper understanding of what was required, he could have proceeded with an asylum application. App., *infra*, 5a.

The district court denied Mr. Castro-Aleman's motion. It observed that, to mount a collateral challenge to a removal order, a defendant must show three things: (1) exhaustion of administrative remedies, (2) deprivation of judicial review, and (3) that entry of the order was "fundamentally unfair." 8 U.S.C. § 1326(d); see App., *infra*, 19a-20a (providing mechanism for collateral challenge to validity of prior removal order); *United States* v. *Palomar-Santiago*, 593 U.S. 321, 324-325 (2021). The court concluded that Mr. Castro-Aleman had failed to demonstrate the first two components of Section 1326(d)—exhaustion and deprivation of judicial review. App., *infra*, 22a-24a. The court did not "assess whether the removal proceeding was also fundamentally unfair." *Id.* at 24a.

4. The Fourth Circuit affirmed, but on a different ground. The court of appeals did not address whether Mr. Castro-Aleman had satisfied the exhaustion and deprivation-of-judicial-review prongs on which the district court relied. Instead, it upheld the denial of his motion to dismiss the indictment based solely on Section 1326(d)(3)'s third requirement—the "fundamental unfairness" inquiry. App., *infra*, 9a-10a. To show "fundamental unfairness," the court held, Mr. Castro-Aleman would have needed to show that (1) his due-process rights were violated and (2) he suffered "prejudice as a result of the defects." *Id.* at 10a (quoting *United States* v. *Fernandez Sanchez*, 46 F.4th 211, 218 (4th Cir. 2022)).

The Fourth Circuit rejected Mr. Castro-Aleman's fundamental-unfairness challenge because, under its precedent, the IJ's "failure to develop the record by informing him that he could apply for asylum" does not constitute "a violation of Castro-Aleman's due process rights." App., *infra*, 10a. His argument was "squarely

foreclosed by [circuit] precedent" holding that "an alien has no constitutional right to be advised of his eligibility for discretionary relief." *Id.* at 10a (quoting *United States* v. *Herrera-Pagoada*, 14 F.4th 311, 322 (4th Cir. 2021)). Under that existing precedent, an IJ's failure to apprise an alien of his right to seek asylum cannot violate due process because an award of asylum is always at the government's discretion, not an entitlement. See *Herrera-Pagoada*, 14 F.4th at 320 ("'Discretionary statutory rights do not create liberty or property interests protected by the Due Process Clause' because there's no '*entitlement* to the benefit.'" (citation omitted)). The Fourth Circuit acknowledged that the INA imposes an "affirmative duty to develop the record on available relief, particularly for *pro se* aliens." App., *infra*, 10a-11a. But it concluded that a violation of that "statutory duty cannot help Castro-Aleman show that his *due process* rights were violated." *Id.* at 11a (internal quotation marks omitted).

## REASONS FOR GRANTING THE PETITION

This Court held in *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987), that an illegal-reentry charge under 8 U.S.C. § 1326 cannot be premised on reentry following a removal order that was "fundamentally unfair" and "violated due process." *Id.* at 839-840 (1987). *Mendoza-Lopez* specifically held that the standard was satisfied where the government "deprived" aliens "of judicial review" by, among other things, "fail[ing] to advise [them] properly of their eligibility to apply for suspension of deportation." *Id.* at 840. Congress codified that holding in the INA, expressly authorizing a defendant in a Section 1326 prosecution to "challenge the validity of the deportation order" if the alien exhausted administrative remedies, was improperly deprived of judicial review, and

"entry of the order was fundamentally unfair." 8 U.S.C. § 1326(d).

**Split.** It is common ground that a defendant collaterally challenging a removal under Section 1326(d) as fundamentally unfair must show a violation of due process and prejudice. The courts of appeals are sharply divided, however, on what due process demands in this context. The circuits have split over whether an IJ's failure to inform an alien of his eligibility for discretionary relief is a due process violation and thus can provide a basis for a Section 1326(d) challenge. This Court should grant review to resolve that entrenched conflict and to reject the misguided view the Fourth Circuit followed here.

The circuit conflict is deep and acknowledged. The Second and Ninth Circuits correctly hold that failure to inform an alien of his eligibility for discretionary relief violates due process, and thus *can* support a Section 1326(d) claim—which will succeed if (and only if) the alien (i) demonstrates prejudice and (ii) satisfies the statute's other requirements. Seven other circuits—including the Fourth Circuit below—reject that conclusion and hold that an IJ's failure to inform the alien of that entitlement to apply for discretionary relief cannot violate due process and so can never support a Section 1326(d) defense. And still another circuit takes an idiosyncratic mixed approach.

The existence of the split is undisputed. The Fourth Circuit itself has acknowledged the circuit split on the question, *United States* v. *Herrera-Pagoada*, 14 F.4th 311, 320-321 & n.9 (4th Cir. 2021), as have other courts. And that conflict cannot self-correct. The Ninth and Tenth Circuits, for example, have already considered the question en banc, but reached

different outcomes. Meanwhile, multiple judges have called on this Court to resolve the dispute.

**Error below.** The Fourth Circuit's answer to the question presented is also wrong. The court has reasoned that an alien has no right to be advised of his entitlement to *apply* for discretionary relief because he has no entitlement to *receive* such relief. *Herrera-Pagoada*, 14 F.4th at 320. But those entitlements are distinct and fundamentally different. Congress, by statute, has expressly granted aliens the right to seek specific forms of relief and imposed on IJs "an affirmative duty to develop the record on available relief." App., *infra*, 10a-11a; see also 8 U.S.C. § 1229a(b)(1). Failing to apprise aliens of that opportunity to seek relief can violate due process, and be "fundamentally unfair," whether or not the alien could ultimately prevail in obtaining that relief. *Mendoza-Lopez*, 481 U.S. at 839.

The Fourth Circuit has also perplexingly reasoned that failing to advise the alien of his right to seek relief "cannot help [the alien] show that his *due process* rights were violated" because the IJ's duty is "grounded in the Immigration and Nationality Act." App., *infra*, 11a. Yet this Court has described the government's failure to honor its own regulations establishing aliens' procedural rights in removal proceedings as violating "due process." *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 268 (1954). The Due Process Clause derives from the Magna Carta's pledge that rights will not be infringed except by the law of the land. And the INA's provision authorizing collateral attacks on removal orders as "fundamentally unfair," 8 U.S.C. § 1326(d)(3), codified a decision of this Court holding that failure to apprise an alien of his right to seek discretionary relief

(among other things) violated "due process" and entitled the alien to attack the order collaterally. *Mendoza-Lopez*, 481 U.S. at 839. The Fourth Circuit's view turns Congress's decision to cement that constitutional rule in the INA upside-down.

**Importance.** The question presented is exceptionally important. It concerns the most frequently charged felony under federal law—and the most common defense to it. It can arise in thousands of cases every year. Allowing inconsistency across circuits to persist invites arbitrary and unfair variation in outcomes based on vagaries of venue, and is irreconcilable with the Constitution's mandate of uniformity in this area.

**Vehicle.** This case is an ideal vehicle to resolve the conflict and correct the mistaken approach the Fourth Circuit followed here. The question presented was pressed and passed upon in a published decision and was its only basis for rejecting Mr. Castro-Aleman's challenge to the indictment based on the IJ's failure to advise him of his right to seek asylum. The decision below rests squarely on the legal rule—settled by circuit precedent—that such a failure categorically cannot violate due process, not on any case-specific fact.

The petition should be granted.

## I. THE QUESTION PRESENTED IMPLICATES AN ENTRENCHED AND ACKNOWLEDGED CONFLICT

The Fourth Circuit's decision confirms a deep and acknowledged split that nearly every circuit has now addressed. The Second and Ninth Circuits hold that a failure to inform an alien of his eligibility for discretionary relief violates due process and thus can support a challenge to an illegal-reentry charge under

8 U.S.C. § 1326. Seven other circuits—including the Fourth Circuit in precedent that it applied here—have held that the failure to inform an alien of eligibility for discretionary relief cannot violate due process. And still another takes a mixed approach. The conflict will not resolve itself; at least one court on each side has confirmed its position sitting en banc. This Court's review is needed to provide uniformity.

### A. The Second And Ninth Circuits Recognize That Failure To Inform An Alien Of His Right To Seek Asylum Violates Due Process

Two circuits—the Second Circuit and the en banc Ninth Circuit—correctly hold that failing to apprise an alien of his right to seek asylum violates due process and so can support a Section 1326(d) challenge. *United States* v. *Copeland*, 376 F.3d 61, 71 (2d Cir. 2004); *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042, 1050 (9th Cir. 2004). The Ninth Circuit held that "failure to so inform the alien of his or her eligibility for relief from removal is a denial of due process that invalidates the underlying deportation proceeding." *Ubaldo-Figueroa*, 364 F.3d at 1049-1050 (quoting *United States* v. *Muro-Inclan*, 249 F.3d 1180, 1183 (9th Cir. 2001)). The Second Circuit agreed, holding that "a failure to advise a potential deportee of a right to seek [discretionary] relief can, if prejudicial, be fundamentally unfair within the meaning of Section 1326(d)(3)." *Copeland*, 376 F.3d at 71. They have identified two rationales for that conclusion.

Both circuits recognize an IJ's "special duties" to an alien to establish and develop the record. *See Copeland*, 376 F.3d at 71; *United States* v. *Lopez-Velasquez*, 629 F.3d 894, 897 (9th Cir. 2010) (en banc).

In *Copeland*, the Second Circuit held that an IJ violated an alien's due process rights by misinforming him about his eligibility for discretionary relief. 376 F.3d at 71. The court underscored "the special duties of an IJ to aliens." *Ibid.* "[U]nlike an Article III judge," an IJ "is not merely the fact finder and adjudicator," but "also has an obligation to establish the record." *Ibid.* (internal quotation marks omitted). That duty includes "explain[ing] the law accurately to *pro se* aliens" who would otherwise "have no way of knowing what information was relevant to their cases and would be practically foreclosed from making a case against removal." *Ibid.*

The Ninth Circuit has similarly explained that an IJ's duty to inform an alien of his ability to apply for relief from removal is "mandatory" and that failure to provide that information thus "is a denial of due process." *Ubaldo-Figueroa*, 364 F.3d at 1050; *see also United States* v. *Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) ("We have stated that where the record contains an inference that the petitioner is eligible for relief from deportation, the [IJ] must advise the alien of this possibility and give him the opportunity to develop the issue."); *cf. Agyeman* v. *INS*, 296 F.3d 871, 884 (9th Cir. 2002) ("A pro se alien is deprived of a full and fair hearing when the IJ mis-informs him about the forms of evidence that are permissible to prove his eligibility for relief.").

The Second Circuit has further explained that the contrary approach followed by other circuits improperly conflates an alien's right to *seek* relief with whether the alien is entitled to *receive* the relief sought. In *Copeland*, the Second Circuit observed that other circuits have applied the "property rights

analysis" used in § 1983 cases that "looks to whether government benefits" are "discretionary." 376 F.3d at 71-72. But that approach, the Second Circuit explained, is inapt because an alien has a statutory entitlement to apply for discretionary relief. *Id.* at 72. Focusing on the discretionary nature of the relief "collapse[s]" the distinction that this Court has recognized between "a right to seek relief and the right to that relief itself." *Ibid.* (citing *INS* v. *St. Cyr*, 533 U.S. 289, 307 (2001) ("Traditionally courts have recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand.")).

District courts in both circuits routinely apply this rule. See*, e.g.*, *United States* v. *Young*, 2023 WL 4054527, at *7 (E.D.N.Y. June 16, 2023); *United States* v. *Contreras*, 2023 WL 3569274, at *12 (S.D.N.Y. May 17, 2023) (collecting cases); *United States* v. *Nunez*, 375 F. Supp. 3d 232, 244-245 (E.D.N.Y. 2018); *United States* v. *Davila-Chavez*, 2022 WL 4292965, at *3 (N.D. Cal. Sept. 16, 2022); *United States* v. *Caldera-Lazo*, 535 F. Supp. 3d 1037, 1048-1052 (E.D. Wash. 2021); *United States* v. *Gonzalez-Castro*, 2019 WL 6195069, at *3-4 (D. Nev. Sept. 24, 2019).

Although the Second and Ninth Circuits are a minority in nose-counting terms, they represent an outsized share of immigration cases where the question presented can be implicated. Together they account for nearly three-fourths of all immigration appeals[*]

[*] United States Courts, *U.S. Courts of Appeals — Judicial Business 2024* (last visited Sept. 24, 2025), available at http://bit.ly/42GTGn5 ("Fifty-eight percent of BIA appeals were

and nearly half of illegal-reentry prosecutions. According to an internal analysis of cases by the Federal Public Defenders, those circuits saw more than 40% of illegal-reentry cases in the 12-month period ending June 2025. See Criminal Defendant Filings Dashboard, by Immigration Offenses, Improper Reentry of Alien, During the 12-Month Period Ending June 30, 2025, JNET, Criminal Caseload Tables (showing Fifth and Ninth Circuits as having 10,770 cases of 26,879 total cases).

### B. Seven Circuits Hold That Aliens Have No Due-Process Right To Be Advised Of The Right To Seek Discretionary Relief

The Fourth Circuit, along with the First, Third, Sixth, Seventh, Eighth, and Tenth, have the opposite view. These courts hold that an alien has no due process right to be informed of eligibility for discretionary relief because an alien has no due process interest in being awarded discretionary relief. See, *e.g.*, *Herrera-Pagoda*, 14 F.4th at 320. According to these circuits, "discretionary statutory rights do not create liberty or property interests protected by the Due Process Clause because there's no entitlement to the benefit." *Ibid.* For example:

- The First Circuit has "join[ed]" courts that "have rejected the proposition that there is a constitutional right to be informed of eligibility for—or to be considered for—discretionary relief." *United States* v. *Soto-Mateo*, 799 F.3d 117, 123 (1st Cir. 2015).

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filed in the Ninth Circuit, and 16 percent were filed in the Second Circuit.").

- The Third Circuit holds that, "because discretionary relief is necessarily a matter of grace rather than of right, aliens do not have a due process liberty interest in consideration for such relief." *United States* v. *Torres*, 383 F.3d 92, 104 (3d Cir. 2004). As a result, the Third Circuit has concluded that an alien has "no constitutional right to be informed of possible eligibility for discretionary relief." *Richardson* v. *United States*, 558 F.3d 216, 223 (3d Cir. 2009) (quoting *Bonhometre* v. *Gonzales*, 414 F.3d 442, 448 n.9 (3d Cir. 2005)).

- The Sixth Circuit has also agreed that "an alien has no constitutional right to be informed of eligibility for, or to be considered for, discretionary relief." *United States* v. *Estrada*, 876 F.3d 885, 888 (6th Cir. 2017). The court has reasoned that, "when suspension of deportation is discretionary, it does not create a protectable liberty or property interest." *Ibid.*

- The Seventh Circuit has likewise held that there is no "constitutional right to be informed of eligibility for—or to be considered for—discretionary relief." *United States* v. *Santiago-Ochoa*, 447 F.3d 1015, 1020 (7th Cir. 2006).

- The Eighth Circuit has held that "there is no constitutionally protected liberty or property interest in discretionary relief from removal." *Garcia-Mateo* v. *Keisler*, 503 F.3d 698, 700 (8th Cir. 2007); see also *United States v. Espinal*, 956 F.3d 570 (8th Cir. 2020). It has therefore held that no due-process violation occurs where an IJ fails to inform an alien that she

could pursue voluntary departure. *Garcia-Mateo*, 503 F.3d at 700.

- The Tenth Circuit, sitting en banc, has "agreed with the majority of other circuits," concluding that "there is no constitutional right to be informed of the existence of discretionary relief for which a potential deportee might be eligible." *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004).

None of these circuits disputes an alien's right to be informed of discretionary relief, such as asylum. See App., *infra*, 10a-11a. But in these circuits, an alien later charged with reentering in violation of a removal order tainted by that violation has no recourse. Because these courts hold that no due-process violation occurs, the alien cannot show "fundamental unfairness" and thus cannot collaterally attack the removal order.

### C. The Fifth Circuit Follows Its Own Course

The Fifth Circuit appears to have taken an intermediate approach, agreeing with the majority of circuits for some forms of discretionary relief, but not as to asylum. On the one hand, it has held that an "[i]mmigration [j]udge's error in failing to explain" to an alien his "eligibility" for certain forms of discretionary relief "does not rise to the level of fundamental unfairness." *United States* v. *Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002). The court reasoned that discretionary relief "is not a liberty or property interest warranting due process protection." *Ibid.* Thus, the court has held that various forms of discretionary relief are not protected by the Due Process Clause. *Ibid.* (Section 212(c) relief); *Torres* v. *Garland*, 2023 WL

3300969, at *4 (5th Cir. May 8, 2023) (cancellation of removal); *Assaad* v. *Ashcroft*, 378 F.3d 471, 476 (5th Cir. 2004) (good-faith marriage waiver of removal); *De Hoyos* v. *Mukasey*, 551 F.3d 339, 343 (5th Cir. 2008) (adjustment of status).

On the other hand, the Fifth Circuit appears to recognize the distinction *St. Cyr* drew between the right to seek relief and the right to receive relief when it comes to *asylum* cases. *See Haitian Refugee Center* v. *Smith*, 676 F.2d 1023, 1038-1039 (5th Cir. 1982); see also *Torres*, 2023 WL 3300969, at *6-7 (Dennis, J., specially concurring) (noting the inconsistency). In *Haitian Refugee Center*, the Fifth Circuit held that, while there "is no constitutionally protected right to political asylum itself," "Congress and the executive have created, at a minimum, a constitutionally protected right to *petition* our government for political asylum." 676 F.2d at 1038-1039 (emphasis added). The court accordingly held that "the government violates the fundamental fairness which is the essence of due process when it creates a right to petition and then makes the exercise of that right utterly impossible." *Id.* at 1039. As Judge Dennis explained, the Fifth Circuit has "in fact embraced a liberty interest" in an alien's ability "to seek asylum," even while it has rejected any due-process right in connection with other forms of discretionary relief. See *Torres*, 2023 WL 3300969, at *7 (Dennis, J., specially concurring). In Judge Dennis's view, the Fifth Circuit's approach is "unsound" and "inconsistently applied" and "should be reconsidered." *Id.* at *5.

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The Constitution, Congress, and this Court's precedent agree that immigration law should be uniform. Art. I, § 8, cl. 4; Immigration Reform and Control Act

of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384 (directing that "the immigration laws of the United States should be enforced vigorously and uniformly"); *Arizona* v. *United States*, 567 U.S. 387, 395-396 (2012). But on the question presented, the courts of appeals are sharply divided, yielding starkly divergent standards for illegal-reentry prosecutions depending on where a case happens to be brought.

## II. THE FOURTH CIRCUIT'S DECISION IS WRONG

The majority rule that failing to advise an alien of his right to discretionary relief cannot violate due process is untenable, and the Fourth Circuit's rationales are fatally flawed. The court has reasoned that an alien has no due-process right to be advised of his right to seek discretionary relief because the alien has no right to receive that relief. But that rationale is illogical and contrary to this Court's precedent distinguishing between those two entitlements.

The same is true of the Fourth Circuit's rationale that due process cannot be implicated because Congress has cemented the alien's right to notice in the INA itself. That Congress has chosen to codify a procedural right in the Statutes at Large hardly justifies insulating that entitlement from due-process protections. And the separate statutory provision further authorizing an alien to bring a collateral challenge to a removal order as fundamentally unfair codified a decision of this Court—holding that failure to provide notice of discretionary relief (together with other deprivations) violated due process.

### A. The Majority Rule Conflates A Right To Seek Relief With A Right To Receive It

The majority approach, followed by the Fourth Circuit here, confuses an alien's right to apply for relief with the agency's decision whether to grant it. The majority's premise that aliens have no entitlement to discretionary relief is correct. But its conclusion that no due-process rights can attach to the process does not follow.

In a prior precedential decision that the panel here deemed controlling, the Fourth Circuit held that "discretionary statutory rights do not create liberty or property interests protected by the Due Process Clause because there's no *entitlement* to the benefit." *United States* v. *Herrera-Pagoada*, 14 F.4th 311, 320 (4th Cir. 2021) (internal quotation marks omitted); App., *infra*, 11a. As the Fourth Circuit put it, "'an act of grace that rests in the unfettered discretion of the Attorney General is not a right protected by the Constitution.'" *Herrera-Pagoada*, 14 F.4th at 320 (quoting *Appiah* v. *INS*, 202 F.3d 704, 709 (4th Cir. 2000). From that premise, the Fourth Circuit reasoned that "[a]n agency's denial of, or failure to consider, an alien's application for discretionary relief therefore doesn't violate his due process rights." *Ibid.* It further concluded that "an alien has no constitutional right to be informed of his eligibility for such relief"—relief that the agency (in the court's view) need not grant at all. *Ibid.*

In short, the Fourth Circuit reasons that an alien has no right to be informed about discretionary relief because he has no right to be granted that discretionary relief. This rationale erroneously conflates separate concepts that this Court has distinguished.

In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court stressed the "distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *Id.* at 307. In *St. Cyr*, this Court considered whether two statutes—the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996—had eliminated federal courts' habeas jurisdiction over legal permanent residents facing removal. *Id.* at 296-297, 298. In concluding that courts retain jurisdiction, the Court expressly distinguished between eligibility to request discretionary relief and discretionary relief itself. As the Court explained, "[e]ligibility that was 'governed by specific statutory standards' provided 'a right to a *ruling* on an applicant's eligibility,' even though the *actual granting of relief* was 'not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Id.* at 308-308 (quoting *Jay* v. *Boyd*, 351 U.S. 345, 353-354 (1956) (emphases added)).

The same distinction applies in the asylum context at issue here: An alien's right to seek asylum is guaranteed by law, even though the actual granting of asylum is discretionary. *DHS* v. *Thuraissigiam*, 591 U.S. 103, 109-110 (2020). As the Second Circuit explained in the context of discretionary relief under former Section 212(c), "the right to a Section 212(c) hearing is well established and mandatory, whether or not the ultimate granting of relief is discretionary." *Copeland*, 376 F.3d at 72. Indeed, this distinction between the process and the benefit is codified in the INA itself. Section 208 states in discretionary terms that the Attorney General "may grant asylum to an alien who has applied for asylum," but it mandates that he "shall establish a procedure for the consideration of asylum applications." 8 U.S.C. § 1158(b)(1), (d)(1).

That the choice whether to grant asylum relief lies in the agency's discretion means only that an alien has no entitlement to that relief. It does not affect the alien's legal entitlement to make a request to the agency to exercise its discretion. An IJ's failure to inform an alien of his eligibility to apply for asylum obviates the latter right even though the alien has no constitutionally protected interest in having that application granted.

### B. Violating An Alien's Statutory Right To Notice That He May Seek Discretionary Relief Can Also Violate Due Process

The court below recognized that Mr. Castro-Aleman has a legal right to be informed of his eligibility for asylum. It could hardly do otherwise; the Executive's own regulations require that an IJ "[a]dvise the alien that he or she may apply for asylum in the United States." 8 C.F.R. § 1240.11(c)(1)(i). But the court stated that Mr. Castro-Aleman's right to such notice could not support a Section 1326(d) claim of fundamental unfairness because the right is "grounded in the Immigration and Nationality Act rather than due process." *Castro-Aleman*, 141 F.4th at 581. In the Fourth Circuit's view, a violation of the agency's "statutory duty" to inform an alien of his eligibility for discretionary relief thus categorically cannot establish that the alien's "due process rights were violated." *Ibid.* That conclusion is untenable and at odds with this Court's precedent.

1. The Fourth Circuit and other courts in the majority are correct that Congress, by statute, has commanded the agency to advise aliens of their right to apply for discretionary relief. But their conclusion that defaulting on that duty cannot violate due process does not follow from the premise. That Congress has enshrined a particular entitlement in the statute

hardly puts that right beyond the protection of due process. The Due Process Clause, after all, descends from the Magna Carta's commitment that persons will not be deprived of liberty except "by the law of the land." *Kerry* v. *Din*, 576 U.S. 86, 91 (2015) (plurality opinion) (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855)). At its core, the Clause requires the government to follow the law. Deeming a right unprotected *because* Congress has codified it turns the Clause upside-down.

This Court has long described the government's failure to abide by procedures prescribed by positive law, including an agency's own rules, in due-process terms. In this very context of immigration proceedings, the Court has held that an alien must be "afforded that due process required by the [agency's] regulations." See *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 268 (1954). In *Accardi*, an alien challenged the fairness of his denial of discretionary relief from deportation. *Id.* at 263-264. The alien alleged that the Attorney General had included his name on a list of "unsavory characters" whom he wished to deport, thus "dictating the Board [of Immigration Appeals']" decision on the alien's request for suspension of deportation, without the fair hearing that the agency's regulations required. *Id.* at 267-268.

The *Accardi* Court examined the regulations promulgated by the Attorney General pursuant to the INA and concluded that they required the Board of Immigration Appeals to "exercise its own judgment" and forbade the Attorney General from "dictating the Board's decision." 347 U.S. at 266-267. It concluded that the regulations "accord[ed] petitioner * * * a right" to "a fair hearing" and that, if the alien could prove his allegations, the agency must give him a new

one. The Court acknowledged the Attorney General's discretion on whether to grant relief and "emphasize[d]" that it was not "reviewing and reversing the manner in which discretion was exercised." *Id.* at 268. But it made clear that the alien must be "afforded that due process required by the regulations in such proceedings." *Ibid.*

2. The Fourth Circuit's conclusion that a violation of the specific right at issue here—an alien's entitlement to be advised of his right to seek discretionary relief—cannot violate due process is in even more direct conflict with this Court's precedent. In *Mendoza-Lopez*, the Court held—indeed, the government conceded for purposes of that case—that an IJ's failure to inform aliens of their eligibility for discretionary relief violated the Due Process Clause. 481 U.S. at 839. The aliens in that case were charged with illegal reentry and sought to dismiss their indictments on the ground that their removal proceedings were fundamentally unfair. *Id.* at 830-831. The district court had found that the IJ had failed to adequately explain their eligibility for suspension of deportation (a form of discretionary relief). *Id.* at 831. The Eighth Circuit had agreed "that there was a due process violation." *Id.* at 832.

This Court reached the same conclusion. *Mendoza-Lopez*, 481 U.S. at 839. The Court first held that defendants charged with illegal reentry may collaterally attack the validity of the removal orders entered in their deportation proceedings on the grounds that the proceedings were "fundamentally unfair." *Ibid.*; see *id.* at 837-839. On the merits of that claim, the United States did not dispute that the aliens' "rights to due process were violated by the failure of the Immigration Judge to explain adequately their right to suspension of deportation or their right to appeal." *Id.*

at 839. And, at the government's invitation, it "accept[ed] the legal conclusions of the court below that the deportation hearing *violated due process*." *Id.* at 840 (emphasis added).

By enacting Section 1326(d), Congress expressly ratified this Court's decision to allow collateral challenges to removal orders in illegal-reentry proceedings. That provision etched into the statute aliens' entitlement to defend against an illegal-reentry change by arguing that the removal order stemmed from proceedings that were "fundamentally unfair." 8 U.S.C. § 1326(d)(3). And Congress implicitly endorsed, and at minimum declined to disturb, the Court's determination that an IJ's failure to advise an alien of his right to seek discretionary relief clears that bar.

## III. This Case Is An Excellent Vehicle To Resolve This Important Issue

This petition presents the Court with the opportunity to resolve this important and frequently recurring issue.

The question presented affects thousands of criminal defendants every year. Criminal immigration cases are the single largest category of cases on the federal criminal docket, making up nearly one-third of the entire case load. See United States Sentencing Commission, *2024 Annual Report* 12-13 (2024). And illegal reentry under Section 1326 is the *most commonly-charged felony* in the United States. *Id.* at 16. Last year, nearly 27,000 prosecutions under Section 1326 were reportedly pending nationwide. See Criminal Defendant Filings Dashboard, by Immigration Offenses, Improper Reentry of Alien, During the 12-Month Period Ending June 30, 2025, JNET, Criminal Caseload Tables. The legal standards that govern

Section 1326 cases—including a frequently invoked defense Congress enacted to codify a constitutional holding of this Court—are thus a matter of profound practical significance.

Moreover, given the complexity and "esoteric nature" of asylum law, *Quintero* v. *Garland*, 998 F.3d 612, 632 (4th Cir. 2021), there is increased importance for IJs to explain the availability of such discretionary relief. See *Copeland*, 376 F.3d at 71. So too for voluntary departure, cancellation of removal, and other forms of relief.

This case provides a perfect chance to resolve the issue. No vehicle issues would obstruct this Court's review. The question is squarely presented. It was pressed and passed upon below and would be outcome-determinative of the current appeal. Mr. Castro-Aleman argued that the IJ failed to inform him of his ability to apply for asylum. The panel, applying circuit precedent, held that his position is "squarely foreclosed by [circuit] precedent." App., *infra*, 10a. The court did not rely on the grounds the district court cited in denying Mr. Castro-Aleman's motion to dismiss the indictment. The court's judgment stands or falls based on whether the IJ's failure to inform him of his right to seek asylum violated due process. It did.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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