In the Interest of Justice: Presuming Prejudice When the Right to Counsel in Removal Proceedings Is Denied

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ABSTRACT: Individuals who face removal from the United States confront a complex legal landscape and an enormous disadvantage when they lack representation. When a noncitizen is denied their right to counsel during a removal proceeding and seeks judicial review based on this violation, reviewing courts should presume that the denial of counsel prejudiced their case. Circuit courts are divided on whether noncitizens should be required to show prejudice to succeed in a claim that counsel was denied. The Second, Third, Seventh, Ninth, and D.C. Circuit Courts reason that prejudice is not required when noncitizens in removal proceedings are denied counsel because of the statutory and regulatory character of the right to counsel, the administrative principle that agencies are bound to comply with their own regulations, the outsized impact that the denial of counsel can have on all aspects of a case, and judicial efficiency. Conversely, and in a smaller body of case law, the Fourth, Fifth, Eighth, and Tenth Circuits treat the denial of the right to counsel primarily as a due process issue and, accordingly, require a showing of prejudice. Five additional factors weigh in favor of presuming prejudice when counsel is denied, including the high volume of immigration appeals reviewed by the courts that presume prejudice; federal courts' willingness to presume prejudice in analogous contexts; public demand for government-appointed counsel for noncitizens; local and state-level access to counsel initiatives; and the need for equitable enforcement of the right to counsel. Moving forward, federal courts should follow the lead of those circuits that presume prejudice and, in so doing, uphold the fundamental right to counsel.

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I. INTRODUCTION

On September 20, 2018, Ana Ruth Hernandez Lara ("Hernandez") was arrested by immigration officers and detained at the Stafford County Jail in

Dover, New Hampshire.[1] Five years earlier,[2] Hernandez fled her home in El Salvador after the notorious 18th Street Gang insisted she work for them, beat up her brother in prison, and repeatedly threatened to kill her when she refused to join their ranks.[3] The gang threatened her directly and warned her aunt that she "would 'find [Hernandez's] head in a river or a mountain.'"[4] After her arrest, Hernandez remained detained throughout a series of removal proceedings, which culminated in a hearing where she was allowed to seek relief from removal.[5]

Despite diligent efforts to secure counsel while she was detained and although she eventually found an attorney, Hernandez was forced to represent herself at the final hearing when the immigration judge denied her request for a continuance to allow her newly retained attorney to be present.[6] This immigration judge then summarily concluded she was ineligible for asylum or other relief and ordered her removal.[7] Hernandez appealed on the basis that the immigration judge's denial of her request for a continuance violated her statutory right to counsel, but the Board of Immigration Appeals ("BIA") affirmed her removal.[8]

In *Hernandez Lara v. Barr*, a panel of First Circuit judges vacated the BIA's decision.[9] The panel concluded that by denying Hernandez's final request for a continuance to allow her new lawyer to appear with her, the immigration judge had "denied her statutory right to counsel."[10] The three-judge panel highlighted the challenges posed by Hernandez's ongoing detention and her inability to speak, read, or write English as factors that hindered her ability to retain counsel and further justified her requests for continuances throughout the removal proceedings.[11] In addition to this clear denial of the right to counsel, the court found that "the record inescapably show[ed] that Hernandez was prejudiced by the denial."[12] The First Circuit panel stopped short, however, of determining "whether a petitioner who was improperly

1. Hernandez Lara v. Barr, 962 F.3d 45, 47 (1st Cir. 2020).
2. *See id.*
3. *Id.* at 51. *See generally* INT'L CRISIS GRP., LIFE UNDER GANG RULE IN EL SALVADOR (2018), https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/life-under-gang-rule-el-salvador [https://perma.cc/BZ4X-XTQ9] (identifying Barrio 18 (the 18th Street Gang) as one of the two largest gangs in El Salvador and one of the main culprits contributing to the country's record-high murder rate).
4. *Hernandez Lara*, 962 F.3d at 51 (alteration in original).
5. *Id.* at 47.
6. *Id.* at 56.
7. *Id.* at 52.
8. *Id.* at 52–53.
9. *Id.* at 58.
10. *Id.* at 54.
11. *Id.* at 55.
12. *Id.* at 57.

denied counsel in immigration proceedings *must* demonstrate that the denial resulted in prejudice."[13]

In declining to weigh in on this question, the First Circuit left the door open for an ongoing debate with sister circuits. With continuing detentions and deportations amid the COVID-19 pandemic[14] and increased pressure on immigration judges to expedite removals, especially of those already detained,[15] this question presents a pressing issue for courts to consider and on which Congress should act.

This Note argues that reviewing courts should presume prejudice when a noncitizen is improperly denied access to counsel in removal proceedings and seeks relief for that denial.[16] Part II presents the sociopolitical and legal landscape that noncitizens face when confronted with removal. Part III explores the arguments raised by circuit courts regarding whether prejudice is required to obtain relief when counsel is denied.[17] Part IV argues that federal courts should apply the rules and reasoning of the circuit courts that do not require a finding of prejudice and introduces five additional considerations that likewise weigh in favor of eliminating this requirement.

II. BACKGROUND

In assessing how courts treat the denial of counsel in removal proceedings, it is essential to understand what removal entails and the consequences of representation, or lack thereof, as well as the legal framework that underpins the right to counsel in this context.

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13. *Id.* at 56 (emphasis added).

14. *See* Mica Rosenberg & Kristina Cooke, *Amid Pandemic, Sharply Increased U.S. Detention Times Put Migrants at Risk*, REUTERS (Oct. 9, 2020, 6:07 AM), https://www.reuters.com/article/us-usa-immigration-detention-insight/amid-pandemic-sharply-increased-u-s-detention-times-put-migrants-at-risk-idUSKBN26U15Y [https://perma.cc/F57Q-8PJW] ("Amid a global health emergency, immigrants are being held in U.S. Immigration and Customs Enforcement (ICE) detention for longer than any period in at least a decade, according to ICE data on monthly averages analyzed by Reuters. More than 6,400 detainees have contracted COVID-19 in ICE detention centers around the country, and eight have died.").

15. *See Hernandez Lara*, 962 F.3d at 55 n.13.

16. This Note uses the term "noncitizen" to describe foreign nationals who are navigating the U.S. immigration system. For discussion on the significance of this terminology and surrounding debates, see Mihir Zaveri, *This Lawmaker Wants to Remove the Words 'Illegal Alien' From the Law*, N.Y. TIMES (Feb. 16, 2020), https://www.nytimes.com/2020/02/13/us/politics/colorado-illegal-immigrants.html [https://perma.cc/JC7S-QDXH]; *see also Glossary: Noncitizen*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/tools/glossary [https://perma.cc/3GFA-S8DJ] (defining a "noncitizen" as "[a] person without U.S. citizenship or nationality").

17. *See also* Jehanzeb Khan, *Tainted from Their Roots: The Fundamental Unfairness of Depriving Foreign Nationals of Counsel in Immigration Court*, 89 U. CIN. L. REV. 1045, 1059–64 (2021) (presenting an alternative analysis of this circuit split).

A. REMOVAL AND REPRESENTATION

Deportation has long been considered a death sentence.[18] While the Immigration and Nationality Act ("INA") originally mandated deportation procedures for noncitizens who were already present in the United States, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA") consolidated deportation with exclusion procedures, which apply to foreign nationals seeking admission to the country.[19] The term "removal" thus encompasses the consolidated proceedings that prevent foreign nationals from remaining in the United States.[20] Despite these variations in nomenclature, the dire consequences for noncitizens are the same: separation from families,[21] erosion of livelihoods,[22] exile from the only country and language they may know,[23] and often a return to a place of persecution.[24]

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18. *See* Bridges v. Wixon, 326 U.S. 135, 164 (1945) (Murphy, J., concurring) ("The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever[.] Return to his native land may result in poverty, persecution and even death."); *see also* Melissa Crow, *Deportation Is a Death Sentence, and Our Government's Hands Are Bloody*, S. POVERTY L. CTR. (Mar. 3, 2020), https://www.splcenter.org/news/2020/03/03/deportation-death-sentence-and-our-governments-hands-are-bloody [https://perma.cc/A3TM-348H] ("More than 138 innocent people were murdered after being deported by the United States between 2014 and 2018."); Kevin Sieff, *When Death Awaits Deported Asylum Seekers*, WASH. POST (Dec. 26, 2018), https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers [https://perma.cc/3NMR-4G3E] (describing the story of Ronald Acevedo, 20, who was murdered in El Salvador six days after being deported from the United States); Sarah Stillman, *When Deportation Is a Death Sentence*, NEW YORKER (Jan. 8, 2018), https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence [https://perma.cc/FXX5-A5MM] ("No U.S. government body monitors the fate of deportees, and immigrant-aid groups typically lack the resources to document what happens to those who have been sent back.").

19. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546 (1996).

20. *See Beyond Asylum: Deportation Relief During the Trump Administration*, TRAC IMMIGR. (Oct. 29, 2020), https://trac.syr.edu/immigration/reports/631 [https://perma.cc/Q7Z2-6M2T] ("[B]ecause it is still possible to have a client whose case is old enough to be in deportation proceedings rather than removal proceedings, specialists in the field take care to use 'removal proceedings' to refer to the most common form of modern Immigration Court proceedings, even though in common parlance 'deportation' and 'removal' have congruent meanings and most non-specialists use them interchangeably.").

21. *See generally* Deborah A. Boehm, *Separated Families: Barriers to Family Reunification After Deportation*, 5 J. ON MIGRATION & HUM. SEC. 401 (2017) (discussing the challenges of keeping families together in the context of deportation).

22. *See* Andrew Selsky, *Farmers Fear Deportation of Workers Could Hurt Livelihood*, AP NEWS (Apr. 24, 2017), https://apnews.com/article/0d54eac7a67847a39b47ea096a3e952d [https://perma.cc/AAP6-T8BN].

23. *See* Alissa J. Rubin & Nicholas Bogel-Burroughs, *ICE Deported Him to a Country He'd Never Seen. He Died 2 Months Later*, N.Y. TIMES (Aug. 8, 2019), https://www.nytimes.com/2019/08/08/us/iraq-jimmy-aldaoud-deport.html [https://perma.cc/6JXB-UQU7].

24. *See* Sieff, *supra* note 18.

The INA, as amended by IIRAIRA and other laws, is a "labyrinthine" system that outlines several roads to removal.[25] The primary removal procedure falls under INA section 240, which states that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of [a noncitizen]."[26] To be removed under section 240, noncitizens must be charged with grounds of inadmissibility or removability.[27] The U.S. Attorney General can also pursue "special removal proceedings" or expedited removal under sections 235 and 238.[28] Such proceedings are typically used for noncitizens convicted of aggravated felonies[29] or for arriving noncitizens, generally at a border or port of entry, when an immigration officer finds no credible fear of persecution in their home country[30] or identifies "security and related grounds" that bar their admission.[31]

Overall, removals have increased in recent decades.[32] This increase is due in part to a range of legal changes, including the passage of IIRAIRA, that created additional removable offenses while limiting judicial discretion to prevent removal.[33] These changes have made "[t]he 'drastic measure' of deportation or removal . . . now virtually inevitable for a vast number of noncitizens convicted of crimes."[34] More recently, the Trump-Pence administration sought to reshape the U.S. immigration system[35] largely through

25. *See* Usubakunov v. Garland, 16 F.4th 1299, 1300 (9th Cir. 2021) ("For decades, we have described United States immigration law as labyrinthine."); Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005) (describing immigration laws as "a labyrinth that only a lawyer could navigate").

26. Immigration and Nationality Act § 240(1), 8 U.S.C. § 1229a(1) (2018); *see also infra* Section II.B.2 (discussing a noncitizen's right to counsel under the INA in removal proceedings).

27. Immigration and Nationality Act § 240(2). Grounds of inadmissibility are codified in section 212 and grounds of removability are in section 237.

28. *Id.* §§ 235, 238; *see also infra* Section II.B.2. (discussing a noncitizen's right under the INA to challenge an immigration judge's order of removal).

29. Immigration and Nationality Act § 238.

30. *Id.* § 235(b)(1)(B)(iii).

31. *Id.* § 235(c).

32. *See Latest Data: Immigration and Customs Enforcement Removals*, TRAC IMMIGR. (Feb. 2020), https://trac.syr.edu/phptools/immigration/remove [https://perma.cc/4HJH-BKNS].

33. *AILA Press Release on IIRAIRA Reform*, AM. IMMIGR. LAWS. ASS'N (June 4, 1998), https://www.aila.org/infonet/aila-press-release-on-iiraira-reform [https://perma.cc/ZJ8Y-VZVG]; *see also* Ruth Gomberg-Muñoz & Sarah Horton, *IIRAIRA at 20: Still Punitive and Unequal*, HUFFPOST (Oct. 1, 2017), https://www.huffpost.com/entry/iiraira-at-20-still-punit_b_12273198 [https://perma.cc/H2H2-NC6H] (discussing how IIRAIRA reduced immigration judges' discretion when making immigration decisions).

34. Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

35. *See* SARAH PIERCE & JESSICA BOLTER, MIGRATION POL'Y INST., DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY 38–42 (2020), https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf [https://perma.cc/ZG9B-SPK8]. *See generally* Stella Burch Elias, *Law as a Tool of Terror*, 107 IOWA L. REV. 1 (2021) (detailing how the Trump Administration used the law as a weapon to terrorize noncitizens living in the United States).

expansion of "the [p]opulation [s]ubject to [r]emoval"[36] and promotion of aggressive immigration arrests and enforcement.[37] Although the Biden-Harris administration has sought to reverse many of these immigration policies, progress in this regard has been mixed.[38] Moreover, the federal response to the COVID-19 pandemic has further disrupted the immigration system in ways that are counterproductive to public health and inhumane.[39]

Lack of legal representation is a constant challenge for noncitizens in removal proceedings. The first *National Study of Access to Counsel in Immigration Court* found "that only 37% of immigrants were represented by counsel in [removal] cases decided during the six-year period from 2007 to 2012."[40] While the percentage of noncitizens who were represented during removal proceedings grew from 32 to 45 percent during this six-year span, the number of represented noncitizens remained relatively constant.[41] This indicates that the increased rate of representation reflected a decrease in case volume and judicial decisions, rather than improved access to counsel.[42]

This gap in representation is especially alarming due to the correlation between representation and successful claims. The *National Study* confirms long-held assumptions that noncitizens with counsel, even if detained, are more likely to succeed in efforts to remain in the United States than those

36. PIERCE & BOLTER, *supra* note 35, at 38–42; *see* AM. IMMIGR. LAWS. ASS'N, COGS IN THE DEPORTATION MACHINE: HOW POLICY CHANGES BY THE TRUMP ADMINISTRATION HAVE TOUCHED EVERY MAJOR AREA OF ENFORCEMENT 4–5 (2018), https://www.aila.org/infonet/aila-report-cogs-in-the-deportation-machine [https://perma.cc/TE9K-RAKV].

37. *See* AM. IMMIGR. LAWS. ASS'N, *supra* note 36, at 6–11.

38. *See* Elias, *supra* note 35, at 54–57; *see, e.g.*, Muzaffar Chishti & Jessica Bolter, *Court-Ordered Relaunch of Remain in Mexico Policy Tweaks Predecessor Program, but Faces Similar Challenges*, MIGRATION POL'Y INST. (Dec. 2, 2021), https://www.migrationpolicy.org/article/court-order-relaunch-remain-in-mexico [https://perma.cc/SDM7-GD3Z].

39. *See generally* Jorge Loweree, Aaron Reichlin-Melnick & Walter Ewing, *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System*, AM. IMMIGR. COUNCIL (Sept. 30, 2020), https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system [https://perma.cc/CH73-W2HE] (discussing the impact of COVID-19 on the U.S. immigration system); *see also* Emily Kassie & Barbara Marcolini, *'It Was Like a Time Bomb': How ICE Helped Spread the Coronavirus*, N.Y. TIMES (Apr. 25, 2021), https://www.nytimes.com/2020/07/10/us/ice-coronavirus-deportation.html [https://perma.cc/XC5G-XM6N] (discussing "how unsafe conditions and scattershot testing helped turn ICE into a domestic and global [COVID-19] spreader").

40. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 16 (2015).

41. *Id.* at 16–18.

42. *Id.* Factors such as detention status, geography, nationality, and language abilities—among others—all inform the likelihood of securing representation. *Id.* at 34–47; *see also* Patrick G. Lee, *Immigrants in Detention Centers Are Often Hundreds of Miles from Legal Help*, PROPUBLICA (May 16, 2017, 4:00 PM), https://www.propublica.org/article/immigrants-in-detention-centers-are-often-hundreds-of-miles-from-legal-help [https://perma.cc/V8TZ-32BG] ("It's been a strategic move by ICE to construct detention centers in rural areas . . . . [I]t's very difficult to set up a pro bono network when you're geographically three hours away from a big city.").

without counsel.[43] It further shows that it is *nearly impossible* for detained noncitizens to prevail on claims for termination of, or relief from, removal without the assistance of counsel.[44] Indeed, "the very circumstances of detention make [the] right [to counsel] a legal fiction for almost all detained immigrants."[45]

B. THE RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS

The right to counsel in removal proceedings is grounded in the Constitution and the INA, as well as in regulations that were promulgated to support the implementation of this constitutional and statutory right.[46]

1. Constitutional Framework

Courts have contemplated the extent to which there is a constitutional basis for a noncitizen's right to counsel. Most analysis centers on the Sixth Amendment right to appointed counsel and Fifth Amendment due process protections.

Sixth Amendment

The Sixth Amendment guarantees assistance of counsel to criminal defendants in federal prosecutions.[47] However, this constitutional right does not extend to the removal context as individuals in removal proceedings are not considered criminal defendants and removal proceedings are civil in nature.[48] Therefore, even though some courts recognize a right to counsel in

43. Eagly & Shafer *supra* note 40, at 49; *see also* Usubakunov v. Garland, 16 F.4th 1299, 1300 (9th Cir. 2021) ("Navigating the [immigration] system with an attorney is hard enough; navigating it without an attorney is a Herculean task.").

44. Eagly & Shafer *supra* note 40, at 50. The study found that of detained noncitizens who did not secure counsel "99% had their charges sustained and 97% never sought relief from removal." *Id.* at 54.

45. NAT'L IMMIGR. L. CTR., BLAZING A TRAIL: THE FIGHT FOR RIGHT TO COUNSEL IN DETENTION AND BEYOND 1 (2016), https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf [https://perma.cc/Z637-BSQ4].

46. *See generally* Emily Creighton & Robert Pauw, *Right to Counsel Before DHS*, 32ND ANNUAL IMMIGRATION LAW UPDATE SOUTH BEACH (2011), *reprinted in* Am. Immigr. Laws. Ass'n (2011 ed.), https://www.americanimmigrationcouncil.org/sites/default/files/right-to-counsel-before-dhs.pdf [https://perma.cc/28KK-84PT] (exploring the law that governs noncitizens' right to counsel in non-removal settings).

47. U.S. CONST. amend. VI.

48. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country . . . . Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."); Abel v. United States, 362 U.S. 217, 237 (1960) ("[D]eportation proceedings are not subject to the constitutional safeguards for criminal prosecutions."); Lozada v. INS, 857 F.2d 10, 13 (1st Cir. 1988) ("Because deportation proceedings are deemed to be civil, rather than criminal, in nature, petitioners have no constitutional right to counsel under the Sixth Amendment.").

limited civil contexts,[49] courts do not recognize noncitizens as having a Sixth Amendment right to government-funded counsel in removal proceedings.[50] The Supreme Court has justified this limitation by reasoning that an immigration "judge's sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime . . . . [Thus,] the . . . various protections that apply in . . . a criminal trial do not apply in a deportation hearing."[51]

However, the Court has also acknowledged the blurred lines between criminal and immigration matters and recognized that the logic of this Sixth Amendment right can apply in the context of removal proceedings. In *Padilla v. Kentucky*, which clarified defense attorneys' obligations to noncitizen defendants, the Court noted that removal had become "intimately related to the criminal process" because "[U.S.] law has enmeshed criminal convictions and the penalty of deportation for nearly a century."[52] Thus, the Court observed that "as a matter of federal law, deportation is an integral part —indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[53] This logic shapes how the right to counsel in removal proceedings can be understood.

Fifth Amendment

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[54] Because the Constitution does not limit this protection to U.S. citizens, courts recognize an entitlement to "the Fifth Amendment['s guarantee of] due process of law in deportation proceedings."[55] These due process guarantees can include the

49. *See* Benjamin Good, *A Child's Right to Counsel in Removal Proceedings*, 10 STAN. J. CIV. RTS & C.L. 109, 111–12 (2014); *see also, e.g.*, Application of Gault, 387 U.S. 1, 41 (1967) (finding a right to appointed counsel in juvenile delinquency proceedings where child may be subject to institutional commitment).

50. Matthew S. Mulqueen, *Access to Counsel in Immigration Proceedings*, AM. BAR ASS'N (Feb. 20, 2019), https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2019/access-counsel-immigration-proceedings [https://perma.cc/WQ73-J5MB].

51. *Lopez-Mendoza*, 468 U.S. at 1038.

52. Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010).

53. *Id.* at 364 (footnote omitted).

54. U S. CONST. amend. V.

55. Reno v. Flores, 507 U.S. 292, 306 (1993); *see also* Yamataya v. Fisher, 189 U.S. 86, 100 –01 (1903) ("[T]his court has never held . . . that administrative officers . . . may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."); Tawadrus v. Ashcroft, 364 F.3d 1099, 1103 (9th Cir. 2004) ("Congress has recognized [the right to counsel in an immigration hearing] among the rights stemming from the Fifth Amendment guarantee of due process that adhere to individuals that are the subject of removal proceedings." (citing Rios-Berrios v. INS, 776 F.2d 859, 862 (9th Cir. 1985))).

right to counsel, though to date, courts only recognize a right to counsel at the noncitizen's expense.[56]

It remains an open "question . . . whether the Fifth Amendment's general guarantee of due process provides a basis for the *appointment of* counsel during removal proceedings."[57] At least one circuit court posits "that individual [noncitizens] could have a right to counsel at the government's expense on a case-by-case basis because of their specific circumstances."[58] These circumstances, some scholars argue and courts note, may include those of unaccompanied minors,[59] detained lawful permanent residents,[60] and noncitizens who are mentally incompetent.[61] Courts have been especially sympathetic toward noncitizen children "but have thus far declined to determine that immigrant children, as a class, have a due process right to appointed counsel."[62] Indeed, federal courts have so far refused to recognize that the Fifth Amendment guarantees *any* class of noncitizens a right to appointed counsel in removal proceedings.[63]

2. Statutory Framework

In addition to the constitutional underpinnings of the right to counsel, Congress directly addressed the right to counsel in removal proceedings in section 292 of the INA.[64] Section 292 states that "[i]n any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented . . . ."[65] Courts thus interpret the INA as creating a statutory right to counsel in removal proceedings.[66]

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56. KATE M. MANUEL, CONG. RSCH. SERV., R43613, ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 2 & n.10 (2016).

57. Mulqueen, *supra* note 50 (emphasis added).

58. MANUEL, *supra* note 56, at ii; *see, e.g.*, Aguilera-Enriquez v. INS, 516 F.2d 565, 568 n.3 (6th Cir. 1975) ("Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise, 'fundamental fairness' would be violated.").

59. *See* Good, *supra* note 49, at 112 (arguing for "a reconsideration of the complete lack of guaranteed counsel in immigration proceedings involving children").

60. Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. CR. & C.L. 113, 116 (2008).

61. Franco-Gonzales v. Holder, 828 F. Supp. 2d 1133, 1148–50 (C.D. Cal. 2011).

62. Mulqueen, *supra* note 50. *See generally* Good, *supra* note 49 (discussing relevant history and the doctrinal underpinnings of legal representation for children in removal proceedings).

63. *See, e.g.*, United States v. Silvestre-Gregorio, 983 F.3d 848, 850 (6th Cir. 2020) ("[T]here is no constitutional right to government-provided counsel at civil removal proceedings . . . .").

64. *See* Immigration and Nationality Act § 292, 8 U.S.C. § 1362 (2018).

65. *Id.*

66. MANUEL, *supra* note 56, at 4–5; *see also* Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1987) ("The legislative history of this provision confirms that Congress wanted to confer a *right*.").

However, this statutory right does not apply to every type of removal proceeding outlined in the INA. For example, when a court orders the removal of a noncitizen under INA section 240, based on grounds of inadmissibility or removability, the noncitizen has the right to contest the charges at an evidentiary hearing before an immigration judge in which they "shall have the privilege of being represented."[67] They also have the right to challenge an immigration judge's decision by appealing to the BIA and then through judicial review with the U.S. Courts of Appeals. In contrast, under INA sections 235 and 238(b), noncitizens are subject to different forms of "expedited removal," an administrative process without the same guarantees to evidentiary hearings, judicial review, or counsel.[68] This Note focuses on the right to counsel in removal proceedings under INA section 240.

3. Regulatory Framework

The statutory right to counsel is supported by federal regulations that enumerate the specific actions immigration courts and judges must take—or refrain from taking—in removal proceedings.[69] These requirements include, among others, advising the noncitizen of their right to representation, providing information about locally available pro bono legal services, and confirming the noncitizen's receipt of their appeal rights.[70] Courts generally find that a noncitizen's right to counsel is "satisfied if the immigration judge inquires whether the [noncitizen] wishes counsel, gives [them] a reasonable period of time in which to obtain it, and determines that any waivers of this right are knowing and voluntary."[71]

Conversely, the violation of these regulations can constitute the improper denial of the right to counsel. Whether counsel is improperly denied is a fact-specific inquiry. Courts have found the denial of counsel when: (1) an immigration judge failed to advise a noncitizen of their right to counsel in a

67. Immigration and Nationality Act § 240(b)(4)(A).

68. *See* AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL 2 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/primer_on_expedited_removal.pdf [https://perma.cc/S5DJ-CHKG] (describing the basic mechanics of expedited removal); HILLEL R. SMITH, CONG. RSCH. SERV., R45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK 8–11, 40–41 (2019) (discussing implementation and expansion of expedited removal and the treatment of petitions for review of expedited removal proceedings by federal courts).

69. *See, e.g.*, 8 C.F.R. § 292.1–.6 (2022) (dealing with representation and appearances); *id.* § 1240.3 ("The respondent may be represented at the hearing by an attorney or other representative . . . ."); *id.* § 1240.6 ("[T]he immigration judge may grant a reasonable adjournment . . . ."); *id.* § 1240.10(c) ("The immigration judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend . . . .").

70. *Id.* § 1240.10(a).

71. MANUEL, *supra* note 56, at 5.

language they understood;[72] (2) a noncitizen was transferred to a remote facility without notice to their attorney;[73] (3) an immigration judge failed to grant a continuance to permit a noncitizen to secure counsel;[74] (4) an immigration judge exercised "unexplained haste in beginning deportation proceedings" when combined with other factors;[75] (5) an immigration judge prevented a noncitizen from consulting with counsel prior to signing a voluntary departure form;[76] (6) an immigration judge did not explain or confirm that the noncitizen understood free legal resources were available;[77] and (7) an immigration judge denied the noncitizen a change of venue to allow for the retention of counsel.[78]

When an immigration judge improperly deprives a noncitizen of their right to counsel, the noncitizen can seek judicial review of the immigration judge's decision.

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72. *See, e.g.*, United States v. Reyes-Bonilla, 671 F.3d 1036, 1046 (9th Cir. 2012) (finding a denial of counsel when a noncitizen who did not speak or read English was informed of the charges against him and his statutory rights entirely in English); United States v. Ramos, 623 F.3d 672, 683 (9th Cir. 2010) (finding a violation of the right to counsel when a noncitizen "did not receive a competent explanation of his rights in a language he could understand" thereby invalidating his express waiver of the right to counsel).

73. *See, e.g.*, Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 566 (9th Cir. 1990) (affirming the district court's finding that transferring noncitizens to remote detention facilities interfered with attorney-client relationships); *see also generally* HUM. RTS. WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES (2009), https://www.hrw.org/sites/default/files/reports/us1209webwcover_0.pdf [https://perma.cc/7EDN-KB5L] (analyzing the scale and human rights impact of 1.4 million detainee transfers that took place between 1999 and 2008).

74. *See, e.g.*, Hernandez Lara v. Barr, 962 F.3d 45, 56 (1st Cir. 2020) (finding that an immigration judge's denial of a request for a continuance "failed to 'meaningfully effectuate' the statutory right to counsel" (quoting *In re* C-B-, 25 I. & N. Dec 888, 889 (2012))); Biwot v. Gonzales, 403 F.3d 1094, 1100 (9th Cir. 2005) (finding that denial of continuance was equivalent to denial of counsel when noncitizen required continuance to seek an attorney).

75. *See, e.g.*, Rios-Berrios v. INS, 776 F.2d 859, 862–63 (9th Cir. 1985) (finding that "the immigration judge . . . should have continued the hearing so as to provide the petitioner a reasonable time to locate counsel, and permit counsel to prepare for the hearing" and that the petitioner's transfer to a different facility and judge's "unexplained haste in beginning deportation proceedings, combined with the fact of petitioner's incarceration, his inability to speak English, and his lack of friends in this country, demanded more than lip service to the right of counsel declared in statute and agency regulations").

76. *See, e.g.*, *Orantes-Hernandez*, 919 F.2d at 565 (affirming district court finding that when immigration agents prevented petitioners from consulting with counsel before agreeing to voluntary departure, they impeded petitioners' right to counsel).

77. *See, e.g.*, Leslie v. Att'y Gen., 611 F.3d 171, 175 (3d Cir. 2010) (finding denial of counsel when immigration judge did not "advise [noncitizen] of the availability of free legal services and neglected to confirm [their] receipt of the list of these programs").

78. *See, e.g.*, Castro-O'Ryan v. INS, 847 F.2d 1307, 1313 (9th Cir. 1987) (finding an effective denial of counsel when an immigration judge declined to grant a request for a change of venue from Arizona to California where the petitioner had material witnesses and an attorney whom he could not afford to bring to Arizona).

C. *Judicial Review of Removal Orders*

The INA established the circumstances and procedures by which a noncitizen may seek judicial review of a removal order by a federal court of appeals.[79] A petition for judicial review can only be filed after all administrative remedies are exhausted.[80] But this is no easy task. Although petitioners "can receive effective relief for their alleged violations of the right to counsel simply by navigating the channels deliberately dredged by Congress,"[81] maneuvering through the requisite administrative procedures and appeals processes is far from "simple." Challenging a removal order is especially arduous when the right to counsel is denied at any stage of the process.[82] Further complicating matters is inconsistency in what courts require to grant relief when counsel is improperly denied.

III. Circuit Split over Whether Denial of Counsel Claims in Removal Proceedings Require a Showing of Prejudice

Circuit courts are divided on whether respondents who petition for judicial review of removal orders on the basis that they were denied their right to counsel should be required to prove that the denial of counsel resulted in prejudice to their case. Typically, courts define prejudice in relation to the result or outcome of the proceedings, rather than to the proceeding's quality or character.[83] Accordingly, when a noncitizen is ordered removed as the result of a hearing in which their right to counsel was denied, four circuits withhold relief unless the noncitizen shows that legal representation would have changed the outcome. Five circuits, on the other hand, presume that a

79. Immigration and Nationality Act § 242, 8 U.S.C. § 1252 (2018). Constitutional claims and questions of law—such as denial of the right to counsel—are reviewable under 8 U.S.C. § 1252(a)(2)(D); *see also generally* Yule Kim, Cong. Rsch. Serv., RL34444, Removing Aliens from the United States: Judicial Review of Removal Orders (2009) (discussing the legal framework and procedures that guide how removal orders are reviewed by federal courts).

80. Immigration and Nationality Act § 242(d)(1).

81. Aguilar v. ICE, 510 F.3d 1, 14 (1st Cir. 2007); *see also* J.E.F.M. v. Lynch, 837 F.3d 1026, 1030 (9th Cir. 2016) ("[G]enerally, an immigrant who has been placed in removal proceedings can challenge those proceedings only after exhausting administrative remedies and filing a petition for review (PFR) in a federal court of appeals.").

82. *See J.E.F.M.*, 837 F.3d at 1031–38 (discussing challenges of securing judicial review for unaccompanied minors).

83. According to the Eighth Circuit, "[a]ctual prejudice exists where defects in the deportation proceedings 'may well have resulted in a deportation that would not otherwise have occurred.'" United States v. Torres-Sanchez, 68 F.3d 227, 230 (8th Cir. 1995) (quoting United States v. Santos–Vanegas, 878 F.2d 247, 251 (8th Cir.1989)). The Ninth Circuit has referred to prejudice as an error that "potentially . . . affects the outcome of the proceedings." Agyeman v. INS, 296 F.3d 871, 884 (9th Cir. 2002) (omission in original) (emphasis omitted) (quoting Perez-Lastor v. INS, 208 F.3d 773, 780 (9th Cir. 2000)). Similarly, the Seventh Circuit has referred to prejudice as an error that "'had the potential for affecting' the outcome of the hearing." Ambati v. Reno, 233 F.3d 1054, 1061 (7th Cir. 2000) (quoting Kuciemba v. INS, 92 F.3d 496, 501 (7th Cir. 1996)).

violation of the right to counsel prejudices a noncitizen and their case, regardless of the outcome. In *Hernandez Lara*, the First Circuit acknowledged this split, but since prejudice was clearly established by the immigration judge's denial of Hernandez's right to counsel, the three-judge panel did not address the question directly.[84] This marked one of the latest contributions to "an ongoing debate over 'the boundaries of prejudice' resulting from due process violations during removal proceedings."[85] This Part reviews the arguments on both sides of the issue.

A. ARGUMENTS FOR PRESUMING PREJUDICE

To date, the Second, Third, Seventh, Ninth, and D.C. Circuit Courts do not require a showing of prejudice for petitioners whose right to counsel was denied in removal proceedings. In his concurrence to *Hernandez Lara*, Judge Lipez concluded that the First Circuit should likewise recognize the significance of the statutory right to counsel and refrain from requiring a showing of prejudice when that right is denied.[86] These Circuits base their reasoning on administrative and constitutional law, and they point to the denial of counsel as a statutory and regulatory violation of a fundamental right, the significant and immeasurable harm of its denial, and the need to allocate judicial resources efficiently.

1. Denial of Counsel Violates Regulations that Were Designed to Uphold a Fundamental Right

The Second, Third, and Ninth Circuits have concluded that it is inappropriate to require a showing of prejudice when the denial of counsel results from an agency's failure to follow a regulation that was designed to uphold a fundamental constitutional or statutory right. This position is grounded in the notions that an agency must comply with its own regulations and the "duty to enforce an agency regulation is most evident when compliance . . . is mandated by the Constitution or federal law."[87]

The Second Circuit has leaned heavily on administrative law principles when assessing denial of counsel claims. In *Montilla v. Immigration and Naturalization Service*, when the court found that an immigration judge had violated a regulation and, in so doing, denied a noncitizen's right to counsel, it drew on the *Accardi* Doctrine—which provides that an agency must follow its own rules—to demand "reversal irrespective of whether a new hearing

84. *See* Hernandez Lara v. Barr, 962 F.3d 45, 56–57 (1st Cir. 2020).

85. United States v. Reyes-Bonilla, 671 F.3d 1036, 1039 (9th Cir. 2012).

86. *Hernandez Lara*, 962 F.3d at 58 (Lipez, J., concurring) ("[W]e should join the majority of circuits by holding that a showing of prejudice is not required to succeed on a claim asserting a denial of the statutory right to counsel.").

87. United States v. Caceres, 440 U.S. 741, 749 (1979).

would produce the same result."[88] The court reasoned that a remand would encourage the immigration agency to comply with its own rules[89] and warned that "[c]areless observance by an agency of its own administrative processes weakens its effectiveness in the eyes of the public."[90] Subsequently, in *Waldron v. Immigration and Naturalization Service*, the court held "that when a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute, [like the right to counsel,] and the [immigration agency] fails to adhere to it, the challenged deportation proceeding is invalid and a remand to the agency is required."[91] These cases have informed similar deliberations in other circuits.

For example, in *Leslie v. Attorney General of the United States*, when an immigration judge failed to advise a noncitizen in removal proceedings of available free legal services, the Third Circuit rejected the prejudice requirement because the regulation in question plainly "protects a [noncitizen's] right to counsel at removal hearings, which is manifestly a statutory right."[92] The *Leslie* court held "that violations of regulations promulgated to protect fundamental statutory or constitutional rights need not be accompanied by a showing of prejudice to warrant judicial relief."[93] It also justified its decision by noting that an agency's "[f]ailure to comply [with its own regulations] will merit invalidation of the challenged agency action without regard to whether the alleged violation has substantially prejudiced the complaining party."[94]

Similarly, in *Montes-Lopez v. Holder*, the Ninth Circuit distinguished denial of counsel claims from other due process violations, noting that they are "based not only on the Fifth Amendment's general right to a full and fair hearing, *but on the specific law and regulations that give [noncitizens] a right to be represented* by the attorney of their choice."[95] Accordingly, when the Ninth Circuit found that a lower court incorrectly applied controlling law, it concluded

88. Montilla v. INS, 926 F.2d 162, 170 (2d Cir. 1991); *see also* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954), *superseded by statute*, Immigration and Nationality Act, § 241(a)(1)–(2), 8 U.S.C. § 1229(a)(1) (2018), *as recognized in* Dep't Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020) (overturning decision in which the BIA failed to follow its own regulations).

89. *See Montilla*, 926 F.2d at 170 ("[W]e must remand because Montilla's right to counsel was obviously affected by the failure of the immigration agency to comply with its own regulation. A lawyer might well have made a difference in the earlier proceeding—they usually do.").

90. *Id.* at 169.

91. Waldron v. INS, 17 F.3d 511, 518 (2d Cir. 1994).

92. Leslie v. Att'y Gen. of the U.S., 611 F.3d 171, 180 (3d Cir. 2010) (referring to 8 C.F.R. § 1240.10(a)(2)–(3) (2010)).

93. *Id.* at 178.

94. *Id.* at 180.

95. Montes-Lopez v. Holder, 694 F.3d 1085, 1092 (9th Cir. 2012) (emphasis added).

that remand was appropriate, regardless of how the error affected the case outcome.[96]

These cases reflect the circuits' intent to hold agencies accountable for failing to follow their own regulations, regardless of the outcome, and particularly when those regulations relate to a fundamental statutory right.

2. Denial of Counsel Is Inherently Harmful and Incalculably Prejudicial

In declining to require a showing of prejudice in denial of counsel claims, the D.C., Seventh, and Ninth Circuits have reasoned that a violation of the right to counsel fundamentally affects the entire removal proceeding, making it impossible to calculate the prejudice and inappropriate to treat it as harmless error.[97]

In one of the first cases to broach this issue, the D.C. Circuit cautioned that "the doctrine of harmless error . . . must be used gingerly, if at all, when basic procedural rights are at stake."[98] In *Yiu Fong Cheung v. Immigration and Naturalization Service*, the court reasoned "that some rights, like the assistance of counsel, are so basic to a fair trial that their infraction can never be treated as harmless error."[99] Even if a removal order is inevitable, counsel can still provide advice about "where to be deported[,] . . . . seek more time for a voluntary departure, . . . make arrangements to process a claim for a preference, and for departure to another country . . . [and] arrange interim bail."[100] Given the varied roles that counsel plays in removal proceedings, the D.C. Circuit concluded that it was "in the interest of justice to" refrain from requiring a showing of prejudice.[101]

In *Castaneda-Delgado v. Immigration and Naturalization Service*, the Seventh Circuit similarly concluded that "the right [of noncitizens] to be represented by counsel of their choice . . . is too important and fundamental a right to be circumscribed by a harmless error rule."[102] It compared the denial of counsel

96. *See id.*

97. In an unpublished opinion, the Eleventh Circuit also dipped a toe into this debate. After an immigration judge denied a noncitizen's request for a continuance to allow time for their counsel to appear, leaving the noncitizen without any legal assistance, and the judge made no effort to find out why counsel was delayed, the Eleventh Circuit noted that "[i]f this error were made in a criminal proceeding, it would *demand* reversal." Pennant v. U.S. Att'y Gen., 766 F. App'x 937, 941 (11th Cir. 2019) (emphasis added). Even the Fourth Circuit, which requires a showing of prejudice when counsel is denied, recognizes the inordinate challenges faced by noncitizens who lack representation in immigration proceedings and "deem[ed] it unreasonable and fundamentally unfair to expect *pro se* [noncitizens]—many of whom suffer from the effects of trauma and lack literacy, English proficiency, formal education, and relevant legal knowledge—to . . . fully appreciate which facts may be relevant to their claims." Quintero v. Garland, 998 F.3d 612, 632 (4th Cir. 2021). *See infra* text accompanying notes 129–30.

98. Yiu Fong Cheung v. INS, 418 F.2d 460, 464 (D.C. Cir. 1969) (footnote omitted).

99. *Id.*

100. *Id.* (footnote omitted).

101. *Id.* at 465.

102. Castaneda-Delgado v. INS, 525 F.2d 1295, 1300 (7th Cir. 1975).

in removal proceedings with the denial of counsel in criminal trials, arguing that it is as impossible to calculate prejudice when noncitizens are denied their right to counsel as when the Sixth Amendment right to counsel is denied to criminal defendants.[103] The Ninth Circuit likewise refrained from requiring a showing of prejudice in *Montes-Lopez v. Holder* when it "concluded that denial of counsel in an immigration proceeding is serious enough to be reversible without a showing of error."[104] The court highlighted that even when counsel is not denied but "is so ineffective as to amount to a constructive denial of counsel, prejudice is presumed."[105] When counsel is actually denied in removal proceedings, all facets of a case are affected, since "the absence of counsel can change [a noncitizen's] strategic decisions, prevent him or her from making potentially-meritorious legal arguments, and limit the evidence [they can] include in the record."[106] As such, the Ninth Circuit recognizes that the "denial of counsel more fundamentally affects the whole of a proceeding than ineffective assistance of counsel," and therefore, prejudice should be presumed.[107]

3. Judicial Economy Demands Abandoning Prejudice Requirement

The Second and Ninth Circuits have also suggested that a prejudice requirement is unnecessarily costly and inefficient in the context of denial of counsel claims. In *Montilla*, the Second Circuit urged that "the efficient use of scarce judicial resources" called for rejecting the prejudice test and that requiring it would unduly burden a reviewing court.[108] Similarly, in *Montes-Lopez*, the Ninth Circuit suggested that it would be "impractical for courts to determine whether prejudice accompanied a particular denial of counsel."[109] Judge Lipez underscored these concerns in *Hernandez Lara*, cautioning that "[i]n immigration proceedings, just as in criminal proceedings, prejudice from a denial of counsel is so likely 'that case-by-case inquiry into prejudice is not worth the cost.'"[110]

103. *See id.* at 1301–02. The court held that "[w]hen no lawyer appears to represent the defendant, and his request for legal representation is wholly denied, the proceedings are tainted from their roots, and there is no room for 'nice calculations as to the amount of prejudice' flowing from the denial." *Id.* at 1301 (quoting United States v. Robinson, 502 F.2d 894, 896 (7th Cir. 1974)).

104. Montes-Lopez v. Holder, 694 F.3d 1085, 1093 (9th Cir. 2012).

105. *Id.* at 1092.

106. *Id.*

107. *Id.*

108. Montilla v. INS, 926 F.2d 162, 169 (2d Cir. 1991).

109. *Montes-Lopez*, 694 F.3d at 1092.

110. Hernandez Lara v. Barr, 962 F.3d 45, 59 (1st Cir. 2020) (Lipez, J., concurring) (quoting Strickland v. Washington, 466 U.S. 668, 692 (1984)).

B. ARGUMENTS IN FAVOR OF PREJUDICE REQUIREMENT

To date, the Fourth, Fifth, Eighth, and Tenth Circuit Courts require a showing of prejudice to provide relief when the right to counsel is denied. In contrast with the majority of circuits, these four courts have primarily considered the denial of counsel in terms of due process, rather than as a statutory or regulatory violation. The case law from these circuits is sparse, however, and largely comprised of cases in which the courts did not find that the right to counsel was improperly denied, and prejudice was not a deciding factor. For example, in *Farrokhi v. Immigration and Naturalization Service,* the Fourth Circuit found that the right to counsel was not denied when Farrokhi chose to represent himself and explicitly waived his right to counsel.[111] Although the court maintained that even if Farrokhi had not waived his right, "he would still have to demonstrate prejudice resulting from that decision" for a due process violation, this case did not offer the facts necessary to adequately consider the denial of counsel as a statutory violation.[112] Likewise, in *Ogbemudia v. Immigration and Naturalization Service*, the Fifth Circuit found that an immigration judge's refusal to release Ogbemudia on bond did not deny his right to counsel or prevent him from obtaining representation. Although the court noted that "the absence of an attorney *may* create a due process violation if . . . there was substantial prejudice,"[113] the facts in this case did not warrant further inquiry into whether a statutory right or regulation was violated, nor did the court elaborate on why a showing of prejudice should be required. In contrast, in *Njoroge v. Holder*, the Eighth Circuit assumed without deciding that the denial of a continuance to allow Njoroge's lawyer to be present might have violated the "statutory right to counsel."[114] However, rather than analyze the denial as a statutory violation, the court proceeded directly to a due process analysis and denied the petition because it lacked a separate showing of prejudice.[115] The court did not offer legal justification for the requirement, but simply cited an earlier Eighth Circuit case for the proposition that only "in *some* circumstances, depriving an alien of the right to counsel *may* rise to a due process violation," with prejudice as the determining factor.[116]

Meanwhile, in *Michelson v. Immigration and Naturalization Service*, where a noncitizen's complaint centered on the government's failure to appoint counsel for removal proceedings, the Tenth Circuit concluded that because

111. Farrokhi v. INS, 900 F.2d 697, 701–02 (4th Cir. 1990).

112. *Id.* at 702 (citing Delgado-Corea v. INS., 804. F.2d 261, 263 (4th Cir. 1986)).

113. Ogbemudia v. INS, 988 F.2d 595, 598 (5th Cir. 1993) (citing Patel v. INS, 803 F.2d 804, 807 (5th Cir. 1986)) (emphasis added).

114. Njoroge v. Holder, 753 F.3d 809, 812 (8th Cir. 2014) (finding no denial of counsel when continuance to allow lawyer to be present was denied).

115. *See id.* Interestingly, in doing so, the court cites Eighth and Ninth Circuit cases in which the courts presumed prejudice in the face of other due process violations. *See infra* Section IV.B.

116. United States v. Torres-Sanchez, 68 F.3d 227, 230 (8th Cir. 1995) (emphasis added).

there is no constitutional or statutory right to appointed counsel in removal proceedings, the claim lacked merit.[117] Although the court acknowledged that noncitizens are entitled to due process in removal proceedings, it suggested that "before [it] may intervene based upon a lack of representation, petitioner must demonstrate prejudice which implicates the fundamental fairness of the proceeding."[118]

Thus, although these circuits maintain that a showing of prejudice is required for relief when assessing due process violations, the facts of these cases do not lend themselves to robust analysis or conclusions about statutory and regulatory violations of the right to counsel.

IV. JUSTICE DEMANDS THAT CIRCUIT COURTS PRESUME PREJUDICE WHEN A NONCITIZEN IN REMOVAL PROCEEDINGS IS DENIED COUNSEL

Federal courts should adopt the reasoning of the majority of circuits and rule that prejudice is presumed when a noncitizen is denied their right to counsel in removal proceedings. Although "immigration laws are drafted in a way that makes uniformity an unrealistic aspiration," federal courts can and should engage in consistent legal analysis when reviewing how these immigration laws and regulations are applied by immigration courts and the BIA.[119] In the context of denial of counsel claims, the inconsistency and lack of precision in courts' analyses concerning prejudice confounds rather than clarifies the nature of this fundamental right.[120] This Part contributes five additional considerations to support the argument that when counsel is denied, reviewing courts should presume prejudice.

A. CIRCUITS THAT REVIEW THE MOST REMOVAL CASES SHOULD BE GIVEN DEFERENCE

The circuit courts that do not require a showing of prejudice when counsel is denied deserve deference because they are responsible for the lion's share of judicial review of removal cases. During the 12-month period that ended in March 2020, the Second, Third, Seventh, Ninth, and D.C. Circuits collectively reviewed and terminated approximately 73 percent of the administrative appeals before U.S. Courts of Appeals,[121] where 86 percent of

117. Michelson v. INS, 897 F.2d 465, 467 (10th Cir. 1990).

118. *Id.* at 468.

119. Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J.F. 499, 522 (2014).

120. Inconsistency and arbitrary decision-making have also been a feature of asylum adjudications, with at least one study indicating that the adjudicator's identity can affect the likelihood of being granted asylum. *See id.* at 518 & n.75 (citing Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007)).

121. *See* U.S. CTS., U.S. COURTS OF APPEALS—CASES COMMENCED, TERMINATED, AND PENDING, BY CIRCUIT AND NATURE OF PROCEEDING, DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2020 (2020) [hereinafter U.S. COURTS OF APPEALS], https://www.uscourts.gov/file/28127/download

the administrative appeals were from the BIA.[122] In contrast, the Fourth, Fifth, Eighth, and Tenth Circuits collectively terminated only 16 percent.[123] The majority circuits are in the best position to compare removal cases with and without counsel, to evaluate the power of representation, and to analyze the inherent prejudice of its denial.

B. Federal Courts Presume Prejudice in Analogous Contexts

When reviewing other types of due process violations and denial of counsel claims, federal courts routinely presume prejudice. In doing so, courts apply reasoning that would justify a similar presumption when counsel is denied in removal proceedings.

Most on point is the Supreme Court's recognition that prejudice can be presumed in cases where the right to counsel under the Sixth Amendment is completely or effectively denied.[124] In *United States v. Gonzalez-Lopez*, the Court further expanded the scope of this presumption, concluding that even when a defendant is deprived of the right to counsel *of their choice*, "[n]o additional showing of prejudice is required."[125] It reasoned that this "erroneous deprivation" has "consequences that are necessarily unquantifiable and indeterminate"[126] and "bears directly on the 'framework within which the trial proceeds,'—or indeed on whether it proceeds at all."[127] In addition, several circuit courts presume prejudice when an immigration judge fails to assist a *pro se* noncitizen to develop the record for their immigration case.[128] The Fourth Circuit reasons that this kind of "error is likely to hamper the ability of the reviewing court to assess whether and how the applicant was prejudiced," making it nearly impossible to calculate the harm.[129] Likewise, when an immigration judge's similar "error potentially affected the outcome of the proceedings," the Ninth Circuit opted to presume prejudice rather than require the noncitizen to "produce a record that does not exist" in order to prove it.[130]

[https://perma.cc/BX8K-2KMG] (showing 5,969 total Administrative Agency Appeals terminated by the Circuit Courts, with 398 in D.C. Circuit, 633 in Second Circuit, 340 in Third Circuit, 100 in Seventh Circuit, and 2,866 in Ninth Circuit).

122. *Federal Judicial Caseload Statistics 2020*, U.S. CTS. (2020), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020 [https://perma.cc/T6ED-M7CA].

123. U.S. COURTS OF APPEALS, *supra* note 121 (showing 5,969 total Administrative Agency Appeals terminated by the Circuit Courts, with 203 in Fourth Circuit, 483 in Fifth Circuit, 152 in Eighth Circuit, and 110 in Tenth Circuit).

124. United States v. Cronic, 466 U.S. 648, 658–62 (1984).

125. United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006).

126. *Id.* at 150 (quoting Sullivan v. Louisiana, 508 U.S. 275, 282 (1993)).

127. *Id.* (citation omitted) (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)).

128. *See, e.g.*, Quintero v. Garland, 998 F.3d 612, 642 (4th Cir. 2021); Al Khouri v. Ashcroft, 362 F.3d 461, 467 (8th Cir. 2004); Agyeman v. INS, 296 F.3d 871, 885 (9th Cir. 2002).

129. *Quintero*, 998 F.3d at 643.

130. *Agyeman*, 296 F.3d at 885.

In removal proceedings, the presence of counsel influences every aspect of the case and its outcomes. Courts should therefore apply the same reasoning as they do when presuming prejudice in the face of due process violations in other contexts.

C. *Public Increasingly Demands Government-Appointed Right to Counsel*

Efforts within Congress and public sentiment reflect increased demand for publicly funded counsel for noncitizens in removal proceedings and recognition of its critical role in ensuring due process. In March 2021, Senator Gillibrand of New York reintroduced the Funding Attorneys for Indigent Removal ("FAIR") Proceedings Act, which would guarantee publicly funded counsel during removal proceedings for children and other vulnerable groups.[131] This bill, cosponsored by nine senators and endorsed by nearly 100 immigrant advocacy organizations, reflects an emerging consensus that representation is crucial for ensuring that removal proceedings adhere to due process.[132] Indeed, 67 percent of people in the United States—across demographic groups and political parties—support government-funded representation for noncitizens in removal proceedings,[133] and 75 percent support the same for unaccompanied children.[134]

The White House and various members of Congress have also urged significant budgetary allocations to improve access to counsel in immigration proceedings. The Biden-Harris administration "request[ed] $15 million to provide representation to [noncitizen] families and vulnerable individuals" and "$23 million . . . [for] legal orientation programs" for the 2022 fiscal year budget.[135] In addition, 48 Representatives requested $75 million for legal

131. FAIR Proceeding Act, S. 901, 117th Cong. (2021).

132. *See* Press Release, Kirsten Gillibrand, U.S. Sen. for New York, Gillibrand Introduces Bill to Guarantee Access to Counsel for Children During Immigration Removal Proceedings (Mar. 23, 2021), https://www.gillibrand.senate.gov/news/press/release/gillibrand-introduces-bill-to-guarantee-access-to-counsel-for-children-during-immigration-removal-proceedings [https://perma.cc/C7MV-S6NY].

133. *See* Vera Inst. of Just., Public Support in the United States for Government-Funded Attorneys in Immigration Court 1 (2021), https://www.vera.org/downloads/Publications/taking-the-pulse-national-polling-v2.pdf [https://perma.cc/L4QH-BZFR].

134. *National Polling Finds Overwhelming Public Support for Ensuring Legal Representation of Unaccompanied Children*, KIND (Nov. 3, 2021), https://supportkind.org/resources/national-polling-finds-overwhelming-public-support-for-ensuring-legal-representation-of-unaccompanied-children [https://perma.cc/DC8T-73DS].

135. Press Release, The White House, FACT SHEET: The Biden Administration Blueprint for a Fair, Orderly and Humane Immigration System (July 27, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/27/fact-sheet-the-biden-administration-blueprint-for-a-fair-orderly-and-humane-immigration-system [https://perma.cc/863X-E2YS].

representation for noncitizens in removal proceedings[136] and 20 Senators requested $500 million for programming related to increasing legal representation for vulnerable populations.[137]

Civil society groups have also demanded more resources to meet the need for counsel in removal proceedings. In November 2021, 118 bar associations and organizations that provide legal representation to noncitizens urged Congress to allocate funding for appointed counsel. In their demand, these groups noted "the exceptionally complex nature of immigration law, the fact that it is nearly impossible for immigrants to navigate our complex immigration system without the assistance of an attorney, and the potentially severe consequences associated with deportation."[138]

D. Local and State Jurisdictions Recognize the Right to Appointed Counsel in Removal Proceedings

Many state and local jurisdictions have also endorsed the right to appointed counsel for noncitizens in removal proceedings to address the stark gap between the supply and demand for legal representation. Although there is not yet a federal right to appointed counsel in removal proceedings, "[i]n any other context, the enormous liberty interests at stake, the adversarial framework of the immigration court system, the complexity of the law, and the extreme imbalance of power would almost certainly lead to case law providing for the right to assigned counsel."[139] Many jurisdictions are filling the void with city- and state-wide programs that provide indigent noncitizens with representation. The New York Immigrant Family Unity Project was the first and remains the largest of these programs that provide legal representation to detained and otherwise unrepresented noncitizens facing removal.[140] Similar efforts have launched across the country, such that as of

136. *Members of Congress Send Letter Supporting Funding for Providing Legal Representation to Individuals in Removal Proceedings*, AM. IMMIGR. LAWS. ASS'N (Apr. 28, 2021), https://www.aila.org/infonet/members-of-congress-urge-support-for-funding [https://perma.cc/YW3P-J4R9].

137. *See Senators Request $200 Million for Services Within EOIR to Provide Legal Representation to Vulnerable Individuals*, AM. IMMIGR. LAWS. ASS'N (May 6, 2021), https://www.aila.org/infonet/senators-request-200-million-for-services-within [https://perma.cc/3QVV-AFFJ]; *Senators Urge $300 Million in Funding for Legal Services for Unaccompanied Children*, AM. IMMIGR. LAWS. ASS'N (May 6, 2021), https://www.aila.org/infonet/senators-urge-300-million-in-funding-for-legal [https://perma.cc/9ASU-ZXZH].

138. *AILA and Partners Urge Congress to Provide Funding for Appointed Counsel for Individuals Facing Removal*, AM. IMMIGR. LAWS. ASS'N (Nov. 17, 2021), https://www.aila.org/advo-media/aila-correspondence/2021/aila-and-partners-urge-congress-to-provide [https://perma.cc/S5R3-KPDT].

139. Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. JUST. 169, 175 (2010).

140. *The New York Immigrant Family Unity Project*, VERA INST. JUST. (2022), https://www.vera.org/projects/new-york-immigrant-family-unity-project/learn-more [https://perma.cc/A8LY-GMF7] ("Since 2017, NYIFUP provides legal representation to every detained and unrepresented immigrant in the state of New York whose income does not exceed 200 percent of the federal

June 2021 "more than 50 jurisdictions across 21 states" were funding similar programs to guarantee legal counsel for noncitizens in removal proceedings.[141] The success of these initiatives is well documented[142] and should inform similar efforts at the national level.[143]

E. An Irrebuttable Presumption of Prejudice Would Promote Equitable Enforcement of the Fundamental Right to Counsel

Presuming prejudice when a noncitizen is denied their right to counsel in removal proceedings would advance equal access to justice. The right to counsel is not premised on the strength of a noncitizen's case. Therefore, relief when counsel is denied should not hinge on their ability to detail how the denial affected the case's outcome. Not only is this inquiry irrelevant to whether a fundamental right was denied but, given the crushing caseloads and backlogs facing immigration courts,[144] it is also untenable, unjust, and inefficient to expect immigration judges to discern all arguments and actions that counsel could have pursued. Instead, the presumption of prejudice in these instances should be irrebuttable and allow courts to target limited resources toward guaranteeing one of the most fundamental rights, rather than excusing its denial.

V. Conclusion

Federal courts should grant relief to noncitizens when they are denied their right to counsel in removal proceedings regardless of whether they can prove that representation would have affected the outcome of their case. The Second, Third, Seventh, Ninth, and D.C. Circuits are correct to recognize the statutory and regulatory character of the right to counsel, adhere to the administrative principle that agencies are bound to comply with their own

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poverty guidelines. Representation is also provided for all detained New York City residents whose cases are heard in New Jersey.").

141. *SAFE Initiative*, VERA INST. JUST. (2022), https://www.vera.org/initiatives/safe-initiative [https://perma.cc/JN3S-WK2H].

142. *See generally Rising to the Moment: Advancing the National Movement for Universal Representation*, VERA INST. OF JUST. (Dec. 2020), https://www.vera.org/publications/rising-to-the-moment-for-universal-representation [https://perma.cc/HK8G-VLLZ] (assessing the first three years of the SAFE Initiative, which aims to ensure that all noncitizens facing detention and deportation have access to legal representation); JENNIFER STAVE ET AL., VERA INST. OF JUST., EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY (Nov. 2017) (finding that New York Immigrant Family Unity Project improved the likelihood of successful immigration court outcomes for low income noncitizens facing removal, preserved family unity, improved fairness and the administration of justice, and contributed to federal, state, and local tax revenue).

143. *See* Nicole Narea, *New York Gave Every Detained Immigrant a Lawyer. It Could Serve as a National Model*, VOX (June 9, 2021, 8:00 AM), https://www.vox.com/policy-and-politics/22463009/biden-new-york-immigrant-access-lawyer-court [https://perma.cc/FS33-X3LZ].

144. *See Immigration Court Backlog Tool*, TRAC: IMMIGR. (Feb. 2022), https://trac.syr.edu/phptools/immigration/court_backlog [https://perma.cc/8MLZ-UNLQ].

regulations, acknowledge the outsized harm caused by the denial of counsel, and promote judicial economy. The courts that maintain a prejudice requirement do so at the expense of constitutional, statutory, and regulatory rights. And at a high cost to justice.