DUE PROCESS IN IMMIGRATION PROCEEDINGS

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I. DUE PROCESS

A. Generally

"Immigration proceedings, although not subject to the full range of constitutional protections, must conform to the Fifth Amendment's requirement of due process." *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) (as amended); *see also Grigoryan v. Barr*, 959 F.3d 1233, 1240 (9th Cir. 2020); *Gonzaga-Ortega v. Holder*, 736 F.3d 795, 804 (9th Cir. 2013) (as amended); *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012); *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1045 (9th Cir. 2012); *Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009) (order).

> "[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission ... and those who are within the United States after an entry." *Leng May Ma v. Barber*, [357 U.S. 185, 187] (1958). Aliens "who have once passed through our gates, even illegally," are afforded the full panoply of procedural due process protections, and "may be expelled only after proceedings conforming to traditional standards of fairness." *Shaughnessy v. United States ex rel. Mezei*, [345 U.S. 206, 212] (1953). But those, … , who have never technically "entered" the United States have no such rights. *Id.* For [those who have never technically entered], procedural due process is simply "[w]hatever the procedure authorized by Congress" happens to be. *Id.* (internal quotation marks omitted); *see also Landon v. Plasencia*, [459 U.S. 21, 32] (1982) ("[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application … .").

Angov v. Lynch, 788 F.3d 893, 898 (9th Cir. 2015).

"[A]n alien in civil removal proceedings is not entitled to the same bundle of constitutional rights afforded defendants in criminal proceedings ... various protections that apply in the context of a criminal trial do not apply in a deportation hearing." *Hussain v. Rosen*, 985 F.3d 634, 642 (9th Cir. 2021) (quoting *Valencia v. Mukasey*, 548 F.3d 1261, 1263 (9th Cir. 2008)), *cert. denied sub nom. Hussain v. Garland*, 142 S. Ct. 1121 (2022).

"A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings. … A court will grant a petition on due process grounds only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (citations and quotation marks omitted); *see also Grigoryan*, 959 F.3d at 1240; *Rizo v. Lynch*, 810 F.3d 688, 693 (9th Cir. 2016); *Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002); *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) ("[A]n alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf."). Removing a noncitizen from the United States without any procedural safeguards of a formal hearing may result in a due process violation. *See Salgado-Diaz*, 395 F.3d at 1162–63 ("[F]ailing to afford petitioner an evidentiary hearing on his serious allegations of having been unlawfully stopped and expelled from the United States, aborting his pending immigration proceedings and the relief available to him at the time, violated his right to due process of law.").

The court reviews de novo claims of due process violations. *Benedicto v. Garland*, 12 F.4th 1049, 1058 (9th Cir. 2021); *Grigoryan*, 959 F.3d at 1239; *Liu v. Holder*, 640 F.3d 918, 930 (9th Cir. 2011) (as amended); *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006). "The BIA's decision will be reversed on due process grounds if (1) the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case, and (2) the alien demonstrates prejudice, which means that the outcome of the proceeding may have been affected by the alleged violation." *Ibarra-Flores*, 439 F.3d at 620–21 (internal quotation marks and citations omitted); *see also Grigoryan*, 959 F.3d at 1240; *Zetino v. Holder*, 622 F.3d 1007, 1013 (9th Cir. 2010) (en banc); *Gutierrez v. Holder*, 730 F.3d 900, 903 (9th Cir. 2013) (no due process violation); *Dent v. Holder*, 627 F.3d 365, 373 (9th Cir. 2010); *Hammad v. Holder*, 603 F.3d 536, 545 (9th Cir. 2010) (explaining that although the rules of evidence are not applicable to immigration hearings, proceeding must be conducted in accordance with due process standards of fundamental fairness); *Shin v. Mukasey*, 547 F.3d 1019, 1024 (9th Cir. 2008) (explaining that to successfully attack the conclusions and orders made during removal hearings on due process grounds "it must be shown that the proceedings were manifestly unfair and that the actions of the [immigration judge] were such as to prevent a fair investigation" (internal quotation marks omitted)).

"Where an alien is given a full and fair opportunity to be represented by counsel, prepare an application for … relief, and to present testimony and other evidence in support of the application, he or she has been provided with due process." *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926–27 (9th Cir. 2007).

See also *Guan v. Barr*, 925 F.3d 1022, 1032 (9th Cir. 2019) ("The Due Process Clause of the Fifth Amendment guarantees that aliens in removal proceedings have 'a full and fair opportunity to be represented by counsel, to prepare an application for ... relief, and to present testimony and other evidence in support of [that] application.'" (citation omitted)).

Due process violations have been identified in cases where the IJ delegated his duties to develop an unrepresented applicant's case to the government attorney, *Pangilinan*, 568 F.3d at 709–10, prevented full examination of the applicant, *Colmenar*, 210 F.3d at 972, the IJ stood in moral judgment of the applicant, *Reyes-Melendez v. INS*, 342 F.3d 1001, 1007–09 (9th Cir. 2003), and where the IJ pressured an applicant to drop a claim for relief that he was entitled to pursue, *Cano-Merida*, 311 F.3d at 964–65. The court also has concluded that a petitioner was denied due process where the petitioner was denied a continuance and limitations were placed on her testimony, thereby preventing petitioner from fully and fairly presenting her case. *Cruz Rendon v. Holder*, 603 F.3d 1104, 1111 (9th Cir. 2010).

Although noncitizens are entitled to due process of law, they "must in the first instance possess a liberty or property interest." *Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1330 n.13 (9th Cir. 2006). If a noncitizen was never eligible for the discretionary relief sought, then he does not have a liberty or property interest that can be affected. *See id.* (rejecting due process claim that 8 U.S.C. § 1229b(d)(1)(B) as applied to petitioner's case denied him due process because he was not eligible for discretionary relief, and thus had no liberty or property interest); *see also Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008) (per curiam). The denial of discretionary relief cannot violate a substantive due process interest, because discretionary relief is a privilege created by Congress. *See Lim v. Holder*, 710 F.3d 1074, 1076 (9th Cir. 2013) ("Cancellation of removal is a form of discretionary relief which does not give rise to a substantive interest protected by the Due Process Clause." (internal quotation marks and citation omitted)); *Tovar-Landin v. Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004) (voluntary departure); *Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003) (cancellation of removal). However, note that violations of procedural due process and claims of ineffective assistance of counsel, "which are predicated on the right to a full and fair hearing, are not affected by the nature of the relief sought." *Fernandez v. Gonzales*, 439 F.3d 592, 602 n.8 (9th Cir. 2006) (citation omitted); *see also United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050–51 (9th Cir. 2004) (concluding that petitioner was prejudiced by "the IJ's unconstitutional failure to inform him that he was eligible for § 212(c) relief").

B. Prejudice Requirement

In addition to showing a due process violation, an applicant generally must show prejudice. *See Rodriguez-Jimenez v. Garland*, 20 F.4th 434, 440 (9th Cir. 2021); *Zamorano v. Garland*, 2 F.4th 1213, 1226 (9th Cir. 2021);*Grigoryan v. Barr*, 959 F.3d 1233, 1240 (9th Cir. 2020) ("To prevail on a due process challenge to deportation proceedings, [the Grigoryans] must show error and substantial prejudice."); *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018) ("As a general rule, an individual may obtain relief for a due process violation only if he shows that the violation caused him prejudice, meaning the violation potentially affected the outcome of the immigration proceeding."); *Padilla-Martinez v. Holder*, 770 F.3d 825, 830 (9th Cir. 2014); *Cano-Merida v. INS*, 311 F.3d 960, 965 (9th Cir. 2002). *Cf. Lazaro v. Mukasey*, 527 F.3d 977, 981 (9th Cir. 2008) (explaining that prejudice is not necessary where agency action was *ultra vires*). "An alien bears the burden of proving the alleged violation prejudiced his or her interests." *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011). Prejudice is shown where the violation potentially affected the outcome of the proceedings. *See Flores-Rodriguez v. Garland*, 8 F.4th 1108, 1113 (9th Cir. 2021) ("To warrant reversal for a violation of due process, the petitioner must also show prejudice, which means that the outcome of the proceeding *may* have been affected by the alleged violation.") (internal quotation marks and citation omitted)); *Grigoryan*, 959 F.3d at 1240 ("Substantial prejudice is established when the outcome of the proceeding may have been affected by the alleged violation." (internal quotation marks and citation omitted)); *Dent v. Sessions*, 900 F.3d 1075, 1083 (9th Cir. 2018) (to show prejudice petitioner must show the outcome of proceeding may have been affected by the alleged violation) (internal quotation and citation omitted)); *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 894 (9th Cir. 2018) (due process claim failed where petitioners failed to demonstrate prejudice); *Gomez-Velazco*, 879 F.3d at 993; *Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010); *Cano-Merida*, 311 F.3d at 965.

"The standard does not demand absolute certainty … ." *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1077 (9th Cir. 2005). An applicant "need not explain exactly what evidence he would have presented in support of his application, and [the court] may infer prejudice in the absence of any specific allegation as to what evidence [the applicant] would have presented." *Cano-Merida*, 311 F.3d at 965 (internal quotation marks and citation omitted); *see also Ching v. Mayorkas*, 725 F.3d 1149, 1156–57 (9th Cir. 2013) ("The prejudice standard does not demand absolute certainty; rather prejudice is shown if the violation *potentially* affects the outcome of the proceedings." (internal quotation marks and citation omitted));

Zolotukhin, 417 F.3d at 1077; *Colmenar v. INS*, 210 F.3d 967, 972 (9th Cir. 2000). "'To show prejudice, [a petitioner] must present plausible scenarios in which the outcome of the proceedings would have been different if a more elaborate process were provided.'" *Tamayo-Tamayo v. Holder*, 725 F.3d 950, 954 (9th Cir. 2013) (quoting *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495 (9th Cir. 2007) (en banc)) (discussing prejudice and concluding that petitioner failed to establish prejudice where he failed to show outcome would have been different where no relief was available to him).

Examples of cases where prejudice has been established include: *Flores-Rodriguez v. Garland*, 8 F.4th 1108, 1114 (9th Cir. 2021) (concluding the IJ's failure to put petitioner on notice of central issue in his case potentially affected the outcome of the proceedings, and thus, petitioner suffered prejudice); *Grigoryan*, 959 F.3d at 1240–41 (holding that IJ's admission of and reliance on the record of investigation prepared by the DHS resulted in substantial prejudice); *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) (petitioner prejudiced by counsel's deficient performance); *Bondarenko v. Holder*, 733 F.3d 899, 907 (9th Cir. 2013) (IJ violated due process in not allowing the petitioner a continuance to investigate a forensic report where the government did not provide a reasonable opportunity to investigate the report); *Dent*, 627 F.3d at 374–75 (concluding prejudice was plain where government failed to provide petitioner with documents contained in his Alien File that might show petitioner is a naturalized United States citizen); *Cruz Rendon*, 603 F.3d at 1111 (concluding procedural deficiencies may have affected the outcome of proceedings where IJ denied continuance and limited testimony); *Cinapian v. Holder*, 567 F.3d 1067, 1075–76 (9th Cir. 2009) (concluding petitioners were prejudiced where government failed to disclose DHS forensic reports in advance of the hearing or make the reports' author available for cross-examination); *Circu v. Gonzales*, 450 F.3d 990, 994–95 (9th Cir. 2006) (en banc) (IJ failed to give petitioner advance notice of reliance on State Department country report containing disputable facts that were not in record); *Yeghiazaryan v. Gonzales*, 439 F.3d 994, 1000 (9th Cir. 2006) (BIA refused to consider new evidence submitted with motion to reconsider, and thereby compounded the harm of faulty translation at noncitizen's IJ hearing, which "resulted in the IJ's fatal misunderstanding of a dispositive moment" in the noncitizen's testimony); *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 621 (9th Cir. 2006) (IJ refused to order the government to produce voluntary departure form for petitioner and outcome of proceedings "may have been affected if the requested discovery had been ordered"); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058–59 (9th Cir. 2005) (IJ violated due process in refusing to hear relevant expert testimony regarding

domestic violence, where the testimony could have affected the IJ's assessment of credibility); *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1164 (9th Cir. 2005) (as amended) ("[T]he failure of the IJ to hold an evidentiary hearing prejudiced petitioner by denying him the opportunity to show he would never have been taken out of his deportation proceeding."); *Zolotukhin*, 417 F.3d at 1077 (concluding outcome of case may have been different absent cumulative due process violations); *Kaur v. Ashcroft*, 388 F.3d 734, 737–38 (9th Cir. 2004) (IJ's failure to allow petitioner's son to testify as a corroborating witness resulted in prejudice); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1008–09 (9th Cir. 2003) (IJ's bias prevented IJ from "considering, yet alone weighing, the impact" that the separation of the petitioner from his son would have on hardship); *Agyeman v. INS*, 296 F.3d 871, 884–85 (9th Cir. 2002) (pro se noncitizen was prejudiced by IJ's failure to explain adequately how to prove existence of marriage, and IJ's failure to sufficiently develop the record); *Cano-Merida*, 311 F.3d at 965 (where IJ pressured noncitizen to drop asylum claim before developing facts, and made other decisions indicating he was not interested in hearing evidence or adequately explaining procedures, the "IJ's conduct undercut the normal course of the proceedings," and noncitizen demonstrated prejudice); *Colmenar*, 210 F.3d at 972 (noncitizen prejudiced by IJ preventing a full examination of the noncitizen and prejudging the noncitizen's case). *See also United States v. Valdivia-Flores*, 876 F.3d 1201, 1210 (9th Cir. 2017) (in collateral attack of removal order, the court concluded that Valdivia-Flores was deprived of due process, and that he was prejudiced by his inability to seek judicial review of the underlying removal order).

Examples of cases where prejudice was not established include: *Rodriguez-Jimenez v. Garland*, 20 F.4th 434, 441 (9th Cir. 2021) ("Because Rodriguez-Jimenez does not establish any prejudice from the alleged BIA errors, his due process claim fails."); *Benedicto v. Garland*, 12 F.4th 1049, 1058 (9th Cir. 2021) (petitioner failed to demonstrate prejudice); *Zamorano v. Garland*, 2 F.4th 1213, 1228 (9th Cir. 2021) ("Zamorano fails to show any prejudice that could support his due process claim."); *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 894 (9th Cir. 2018) (due process claim failed where petitioners failed to demonstrate prejudice); *Gomez-Velazco*, 879 F.3d at 996 (even if improperly denied the right to counsel during initial interaction with DHS officers, no showing that the denial prejudiced petitioner); *Pagayon v. Holder*, 675 F.3d 1182, 1191–92 (9th Cir. 2011) (per curiam) (even if there was agency error, petitioner failed to show prejudice); *Bingham v. Holder*, 637 F.3d 1040, 1047 (9th Cir. 2011) (rejecting petitioner's due process claim where petitioner failed to show that alleged unknowing waiver under the Visa Waiver Program resulted in prejudice); *United States v. Ramos*, 623 F.3d

672, 684 (9th Cir. 2010) (although court concluded that DHS violated Ramos's right to due process, he suffered no prejudice where he was not eligible for the relief sought); *Avila-Sanchez v. Mukasey*, 509 F.3d 1037, 1041 (9th Cir. 2007) (even if there were some error resulting from different IJs presiding over portions of separate proceedings, petitioner failed to show prejudice); *Ngongo v. Ashcroft*, 397 F.3d 821, 823–24 (9th Cir. 2005) (no prejudice where witnesses were presented in a different order than originally planned); *United States v. Jimenez-Borja*, 378 F.3d 853, 859 (9th Cir. 2004) (although IJ's failure to advise petitioner of available relief resulted in a due process violation, there was no prejudice because petitioner "could not plausibly demonstrate" eligibility for the relief); *Simeonov v. Ashcroft*, 371 F.3d 532, 538 (9th Cir. 2004) (even assuming a due process violation there was no prejudice because petitioner not eligible for relief as a matter of law).

1. Presumption of Prejudice

"Certain types of ineffective assistance entitle a petitioner to a rebuttable presumption of prejudice." *Montes-Lopez v. Holder*, 694 F.3d 1085, 1090 (9th Cir. 2012). For example, where counsel's error deprives a noncitizen of appellate proceedings, there is a presumption of prejudice. *See Ray v. Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006). *See also Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) ("When a lawyer's error results in an alien being denied his right to appeal altogether, we apply a 'presumption of prejudice.'").

If the noncitizen is entitled to a presumption of prejudice because she was deprived of appellate review, that presumption may be rebutted by the government. *Siong v. INS*, 376 F.3d 1030, 1037 (9th Cir. 2004); *see also Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 826–28 (9th Cir. 2003) (applying presumption of prejudice, but denying petition for review because presumption was rebutted). The presumption is not rebutted if the noncitizen can show plausible grounds for relief. *Siong*, 376 F.3d at 1037; *Ray*, 439 F.3d at 587. To determine if the noncitizen has demonstrated plausible grounds for relief, the court looks to whether "the [IJ or the BIA] could plausibly have held that [the petitioner] was [eligible for relief] based on the record before it." *Ray*, 439 F.3d at 589 (internal quotation marks omitted).

"[W]here … compliance with [a] regulation is mandated by the Constitution, prejudice may be presumed." *Sanchez v. Sessions*, 904 F.3d 643, 652 (9th Cir. 2018) (internal quotation marks and citation omitted) (presuming prejudice where Coast Guard officers failed to abide by regulation that was promulgated for the

benefit of petitioners, and mandated by the Constitution, in case concerning exclusionary rule).

Examples of cases where prejudice was presumed include: *Usubakunov v. Garland*, 16 F.4th 1299, 1307 (9th Cir. 2021) (explaining that because petitioner was wrongly denied assistance of counsel at his merits hearing, he need not show prejudice); *Orozco-Lopez v. Garland*, 11 F.4th 764, 779 (9th Cir. 2021) (because Orozco-Lopez's statutory right to counsel was denied, he did not need to show prejudice); *Sanchez*, 904 F.3d at 652 (presuming prejudice where Coast Guard officers failed to abide by regulation that was promulgated for the benefit of petitioners, and mandated by the Constitution, in case concerning exclusionary rule); *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921–22 (9th Cir. 2015) ("To cause an alien to completely forfeit the right to appeal because of a totally mistaken view on the availability of other relief is an abdication of counsel's duty."); *Ray*, 439 F.3d at 588–89 (multiple attorneys failed to litigate alien's case in timely fashion); *Siong*, 376 F.3d at 1038 (counsel failed to file a timely notice of appeal); *Rojas-Garcia*, 339 F.3d at 826 (counsel failed to file brief with BIA, resulting in summary dismissal of alien's appeal); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000) (counsel failed to file a timely petition for review).

"[I]n *Montes-Lopez v. Holder*, 694 F.3d 1085 (9th Cir. 2012), [the court] carved out an exception to the general rule requiring a showing of prejudice[, holding that where] an individual who is wrongly denied the assistance of counsel at the merits hearing[, prejudice is] conclusively presumed and automatic reversal is required." *Gomez-Velazco*, 879 F.3d at 993. This is due to the difficulty in assessing the effect of the error. *See Gomez-Velazco*, 879 F.3d at 993. However, "not all violations of the right to counsel are treated as structural errors mandating automatic reversal. If the right to counsel has been wrongly denied only at a discrete stage of the proceeding, and an assessment of the error's effect can readily be made, then prejudice must be found to warrant reversal." *Id.* at 993–94 (concluding that petitioner was required to show prejudice where he may have been improperly denied the right to counsel only during his initial interaction with DHS officers). In *Gomez-Velazco*, there was no presumption of prejudice, where although petitioner may have been improperly denied counsel during initial interaction with DHS officers, he was able to consult with counsel before the removal order was executed, and the prejudicial effect could be assessed. *Id.* (distinguishing the case from instances where counsel is precluded from participating in the merits hearing before an immigration judge). The court in *Gomez-Velazco* assumed without deciding that petitioner's right to counsel had been violated. *Id.* at 992.

"[W]hen ineffective assistance leads to in absentia removal, [the court has] 'followed the BIA's usual practice of not requiring a showing of prejudice.'" *Sanchez Rosales v. Barr*, 980 F.3d 716, 720 (9th Cir. 2020) (quoting *Lo v. Ashcroft*, 341 F.3d 934, 939 n.6 (9th Cir. 2003)). In *Sanchez-Rosales*, the court concluded that the "BIA erred by treating Petitioners' failure to show prejudice caused by the alleged ineffective assistance as a basis for denying their motion to reopen proceedings[,]" because "[a] showing of prejudice is not required when ineffective assistance leads to an in absentia order of removal." 980 F.3d at 718–19 (ineffective assistance provided by a non-attorney notario).

C. Exhaustion Requirement

"The exhaustion requirement applies to claims that an alien was denied a full and fair hearing." *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (internal quotation marks and citation omitted). *See also Plancarte Sauceda v. Garland*, 23 F.4th 824, 835 (9th Cir. 2022) (as amended) (holding court lacked jurisdiction to review due process claim because petitioner failed to exhaust it).

For a claim to have been exhausted, petitioner must have raised the claim before the agency such that the agency was sufficiently on notice of the claim, and it had an opportunity to pass on the issue. *Bare v. Barr*, 975 F.3d 952, 960 (9th Cir. 2020) (citing *Zhang v. Ashcroft*, 388 F.3d 713, 721 (9th Cir. 2004) (per curiam)). "A conclusory statement does not apprise the BIA of the particular basis for [the petitioner's] claim nor meaningfully challenge the IJ's decision on appeal." *Amaya v. Garland*, 15 F.4th 976, 986 (9th Cir. 2021) (internal quotation marks and citation omitted) (holding that neither petitioner's notice of appeal nor his attachment thereto made a clear, non-conclusory argument in support of his claim, and thus he failed to exhaust his due process claim of IJ bias). Although a general challenge is insufficient, exhaustion does not require "the issue to have been raised in a precise form during the administrative proceeding. … Rather, the petitioner may raise a general argument in the administrative proceeding and then raise a more specific legal issue on appeal." *Bare*, 975 F.3d at 960 (citations omitted) (holding that petitioner exhausted his legal claims before the BIA).

A due process claim may be sufficiently exhausted even if the phrase "due process" is not used before the agency. *See Agyeman*, 296 F.3d at 877–78 (due process claim was exhausted even though petitioner did not use phrase "due process violation" before the agency). When a petitioner raises his claims before the agency pro se, the court will construe them liberally. *Id.* at 878; *see also Coronado v. Holder*, 759 F.3d 977, 986 (9th Cir. 2014) (holding that ineffective

assistance of counsel claims raised in pro se brief to BIA were sufficient to put BIA on notice of due process claim, but dismissing petition with respect to equal protection claim that was raised for the first time in the petition for review). *Cf.* *Tall v. Mukasey*, 517 F.3d 1115, 1120 (9th Cir. 2008) (concluding that petitioner's claim that he was denied a full and fair hearing was not properly exhausted, where petitioner raised a different procedural claim before the BIA).

"Futility is a traditional exception to judicially created exhaustion requirements because '[i]t makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested.'" *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 895 (9th Cir. 2021) (quoting *Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021)); *see also* *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1073 (9th Cir. 2016) (exhaustion is not required where it would be futile to raise a particular issue before the agency); *Singh v. Ashcroft*, 362 F.3d 1164, 1169 (9th Cir. 2004) ("It is axiomatic that one need not exhaust administrative remedies that would be futile or impossible to exhaust."). The futility exception "to the exhaustion requirement has been carved for constitutional challenges to ... [DHS] procedures." *Iraheta-Martinez v. Garland*, 12 F.4th 942, 949 (9th Cir. 2021). As to due process claims in particular, "[t]he key is to distinguish the procedural errors, constitutional or otherwise, that are correctable by the administrative tribunal from those that lie outside the BIA's ken." *Id.* *See also* *Coyt v. Holder*, 593 F.3d 902, 905 (9th Cir. 2010) (considering challenge to validity of 8 C.F.R. § 1003.2(d) because exhaustion doctrine does not bar review of a question concerning the validity of an INS regulation); *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) ("[T]he principle of exhaustion may exclude certain constitutional challenges that are not within the competence of administrative agencies to decide.").

For example, substantive due process claims that the agency has no power to adjudicate need not be raised before the BIA. *See* *Morgan v. Gonzales*, 495 F.3d 1084, 1089–90 (9th Cir. 2007); *see also* *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 938 (9th Cir. 2005) (per curiam) ("Retroactivity challenges to immigration laws implicate legitimate due process considerations that need not be exhausted in administrative proceedings because the BIA cannot give relief on such claims."); *but see* *Lee v. Holder*, 599 F.3d 973, 976 (9th Cir. 2010) (per curiam) (stating that petitioner's apparent challenge to the validity of the regulations was not at issue, and that the court lacked jurisdiction because it was not exhausted).

D. Discretionary Decisions

The court lacks jurisdiction to review an abuse of discretion argument that is merely recharacterized as a due process argument. *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001) (contention that the agency violated due process by misapplying facts to the applicable law did not state a colorable constitutional claim); *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) (same, post-REAL ID Act); *see also Idrees v. Barr*, 923 F.3d 539, 542–43 & n.3 (9th Cir. 2019) (concluding that BIA's decision not to certify ineffective assistance of counsel claim was committed to agency discretion, and that petitioner's challenge to that decision did not present a colorable due process claim, where there was no legal or constitutional error asserted); *Bazua-Cota v. Gonzales*, 466 F.3d 747, 748–49 (9th Cir. 2006) (per curiam) (order) (claim that BIA violated due process by failing properly to weigh equities before denying adjustment of status application was not a colorable constitutional claim).

However, the court retains jurisdiction to consider both constitutional claims and questions of law raised in a petition for review of a discretionary decision. *See* 8 U.S.C. § 1252(a)(2)(D); *see also Monroy v. Lynch*, 821 F.3d 1175, 1177 (9th Cir. 2016) (recognizing that there was "jurisdiction to review colorable constitutional claims and questions of law raised in a petition for review of a discretionary denial of NACARA cancellation" but concluding no such colorable claims were raised); *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (holding the court had "jurisdiction to review Board decisions denying *sua sponte* reopening for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error"); *Vilchez v. Holder*, 682 F.3d 1195, 1198 (9th Cir. 2012) (the court has jurisdiction to review constitutional claims, including due process claims, raised in a petition for review, however, lacks jurisdiction to review merits of discretionary decision to deny cancellation of removal); *Tovar-Landin v. Ashcroft*, 361 F.3d 1164, 1166 (9th Cir. 2004) (due process and equal protection challenges to voluntary departure regime); *Munoz v. Ashcroft*, 339 F.3d 950, 954–56 (9th Cir. 2003) (due process, ineffective assistance of counsel, and equitable tolling contentions). To invoke the court's jurisdiction, the constitutional claim must be colorable. *See Torres-Aguilar*, 246 F.3d at 1271. "To be colorable in this context, the alleged [constitutional] violation need not be substantial, but the claim must have some possible validity." *Id.* (internal quotation marks and citation omitted); *see also Martinez-Rosas*, 424 F.3d at 930.

A noncitizen's conclusory assertion of a due process violation, without substantiation or any allegation of a specific due process violation, is insufficient to

permit the court to exercise jurisdiction. *See Safaryan v. Barr*, 975 F.3d 976, 989 (9th Cir. 2020) (concluding that the court lacked jurisdiction to consider Safaryan's challenges to the denial of the § 212(h) waiver, explaining that he failed to raise a cognizable legal or constitutional question concerning that determination, where there was only an unsubstantiated assertion of a due process violation was made in his brief).

E. Examples

1. Notice to Appear

"A notice to appear serves as the basis for commencing a grave legal proceeding. … [I]t is like an indictment in a criminal case [or] a complaint in a civil case." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1482 (2021). "The [Notice to Appear] served on an alien in removal proceedings must contain the nature of the proceedings against the alien, the legal authority under which the proceedings are conducted, the acts or conduct alleged to be in violation of the law, and the charges against the alien and the statutory provisions alleged to have been violated." *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006) (citing 8 U.S.C. § 1229(a)(1)) (internal quotation marks omitted). The court has held that "due process does not require inclusion of charges in the [Notice to Appear] that are not grounds for removal but are grounds for denial of relief from removal." *Id.* (rejecting petitioner's claim that his due process rights were violated where he was denied relief from removal based on a conviction that was not alleged in the Notice to Appear as a ground for removal); *see also United States v. Gomez*, 757 F.3d 885, 899 n.9 (9th Cir. 2014) ("[E]ven when the NTA fails to include a reference to an aggravated felony, that omission would not bar the government from introducing such a conviction later in an immigration proceeding as a basis for the IJ to find an alien ineligible for voluntary departure."). Note that the court has held that the failure of the Notice to Appear to designate which subsection of the statute defining aggravated felony was applicable to the noncitizen did not deprive the immigration court of jurisdiction. *See Lazaro v. Mukasey*, 527 F.3d 977, 980 (9th Cir. 2008).

"The Supreme Court's decisions in *Pereira* [*v. Sessions*, 138 S. Ct. 2105 (2018)] and *Niz-Chavez* [*v. Garland*, 141 S. Ct. 1474 (2021)], along with the text and structure of the statutory provisions governing *in absentia* removal orders and Notices to Appear, unambiguously require the government to provide [a noncitizen] with a Notice to Appear as a single document that include[s] all the information set forth in 8 U.S.C. § 1229(a)(1), including the time and date of the

removal proceedings." *Singh v. Garland*, 24 F.4th 1315, 1320 (9th Cir. 2022) (holding that failure to state time or date of noncitizen's removal hearing in notice to appear was not cured by subsequent hearing notices, discussing the Supreme Court's decisions in *Pereira* and *Niz-Chavez*).

Proper service of a notice of hearing amending the date and time of a removal hearing, does *not* establish proper service of an amended notice to appear and the charges therein, where the amended notice to appear replaces the underlying factual allegations lodged against the noncitizen. *See Martinez v. Barr*, 941 F.3d 907, 923 (9th Cir. 2019). In *Martinez*, the record provided no evidence that petitioner was served with the amended notice to appear, as required by regulation and due process. *Id.* (explaining that although petitioner submitted a change of address form, the amended NTA included only petitioner's former address, and the certificate of service section was not completed). As such, the court held that the BIA abused its discretion in failing to reopen proceedings that had a facially apparent due process violation and granted the petition for review, remanding to the BIA with instructions to reopen the removal proceedings. *Id.* at 924.

As a general matter, absent a showing of prejudice, improper service of an NTA can be cured. *B.R. v. Garland*, 26 F.4th 827, 837 (9th Cir. 2022) (as amended). In *B.R. v. Garland*, the panel explained that the statute does not require notice at a particular moment and that nothing in the statute or regulations requires termination in this context. The panel also considered *Aguilar Fermin v. Barr*, 958 F.3d 887 (9th Cir. 2020), where the court addressed the similar issue of the service of a defective NTA. *B.R.*, 26 F.4th at 837–38. There, the court held that the remedy is to provide DHS an opportunity to cure the defect in the NTA rather than to order termination. The panel concluded that it logically proceeds that the remedy for improper service of an NTA is for proper service to be provided at a later time, provided the alien is not prejudiced. *Id.* at 838.

2. Notice of Hearing

Due process requires notice of an immigration hearing that is reasonably calculated to reach the noncitizen. *See Khan v. Ashcroft*, 374 F.3d 825, 829 (9th Cir. 2004); *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155–56 (9th Cir. 2004); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (as amended). If petitioners do not receive actual or constructive notice of deportation proceedings, "it would be a violation of their rights under the Fifth Amendment of the Constitution to deport

them in absentia." *Andia v. Ashcroft*, 359 F.3d 1181, 1185 (9th Cir. 2004) (per curiam). *See generally Jones v. Flowers*, 547 U.S. 220 (2006).

A petitioner does not always "have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied." *Farhoud*, 122 F.3d at 796 (holding with respect to former 8 U.S.C. § 1252b(c)(1) that notice was sufficient where mailed to applicant's last address). *See also Dent v. Sessions*, 900 F.3d 1075, 1084 (9th Cir. 2018) (concluding due process claim failed where INS was not deliberately indifferent to petitioner's adult application for citizenship; even though the INS sent one of the hearing notices to an outdated address and failed to follow several of its usual practices when petitioner was unreachable, the INS attempted to schedule several hearings for petitioner, but petitioner failed to update the INS with changes to his mailing address). *Cf. Dobrota v. INS*, 311 F.3d 1206, 1211–13 (9th Cir. 2002) (remanding where government's efforts to provide petitioner notice were not reasonably calculated to reach petitioner because he reasonably relied on notice being provided to his attorney); *Flores-Chavez*, 362 F.3d at 1162–63 (holding that due process concerns counsel against accepting government's position that regulations do not require notice of proceedings to be given to responsible "adults taking custody of minor aliens").

"Actual notice is, …, sufficient to meet due process requirements." *Khan*, 374 F.3d at 829–30 (holding that a second notice in English was sufficient to advise petitioner of his hearing when petitioner had earlier appeared in response to a notice in English but reserving the question whether due process requires the government to provide translation at a master calendar hearing). *Cf. Sembiring v. Gonzales*, 499 F.3d 981, 988–89 (9th Cir. 2007) (petitioner demonstrated nonreceipt of hearing notice for purpose of rescinding in absentia order).

"[S]ervice of a hearing notice on an alien's counsel, and not on the alien himself, may be a sufficient means of providing notice of the time and location of removal proceedings." *Al Mutarreb v. Holder*, 561 F.3d 1023, 1028 n.6 (9th Cir. 2009). Note that "serving a hearing notice on an alien, but not on the alien's counsel of record, is insufficient when an alien's counsel of record has filed a notice of appearance with the immigration court." *Hamazaspyan v. Holder*, 590 F.3d 744, 749 (9th Cir. 2009).

In *Cruz Pleitez v. Barr*, 938 F.3d 1141, 1142 (9th Cir. 2019), petitioner argued that he did not receive proper notice of the hearing because he was 16 years old at the time and no adult was served with the OSC. The court held that the

notice given to petitioner comported with both regulatory requirements and due process. *Id.* The court recognized that petitioner's interest in receiving notice of proceedings was of grave importance, but that "the burden on the government outweigh[ed] the interest of never-detained minors over the age of 14, … who have filed an affirmative request for relief." *Id.* at 1147 (distinguishing *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1153 (9th Cir. 2004), which held, when a minor is detained for illegally entering the United States and then released into the custody of an adult relative, "the only reasonable interpretation of the regulations at issue requires that the [INS] serve notice to both the 'juvenile' ... and to the person to whom the regulation authorizes release."). *See also Jimenez-Sandoval v. Garland*, 22 F.4th 866, 871 (9th Cir. 2022) (holding that noncitizen received adequate notice of deportation proceedings, even though she was 17 years old and no notice was given to an adult).

3. Hearing Date

This court has found that an IJ's unilateral advancement of a hearing date did not violate the noncitizen's due process rights where a hearing was held and the noncitizen had the opportunity to argue on his behalf, was given an opportunity to explain the circumstances regarding a change in attorneys, and where he was given three months in which to file his applications for relief. *Mendez-Mendez v. Mukasey*, 525 F.3d 828, 835 (9th Cir. 2008).

4. Right to a Neutral Fact-Finder

"A neutral judge is one of the most basic due process protections." *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003) (internal quotation marks omitted). Where an IJ fails to act as a neutral fact-finder, but rather as a partisan adjudicator, the noncitizen's due process rights may be violated. *See Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (due process violation where "the IJ behaved not as a neutral fact-finder interested in hearing the petitioner's evidence, but as a partisan adjudicator seeking to intimidate Colmenar and his counsel"); *see also Jiang v. Holder*, 754 F.3d 733, 741 (9th Cir. 2014) (noncitizen's due process rights may be deprived when the IJ's on-the-record view of the petitioner's personal relationships prevented the IJ from acting as a neutral fact-finder), *overruled on other grounds by Alam v. Garland*, 11 F.4th 1133 (9th Cir. 2021); *Reyes-Melendez*, 342 F.3d at 1006–09 (holding that due process required remand in suspension of deportation case where IJ was "aggressive," "snide," and accused applicant of moral impropriety and that IJ's moral bias against petitioner precluded full consideration of the relevant hardship factors). *Cf. Rivera v. Mukasey*, 508

F.3d 1271, 1276 (9th Cir. 2007) (concluding that the IJ's comments did not rise to the level of prejudgment or a due process violation and that petitioner failed to show "the IJ had a deep-seated favoritism or antagonism that would make fair judgment impossible" (internal quotation marks omitted)); *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926 (9th Cir. 2007) (allegations of bias were undermined by the IJ's professional behavior and the decision considered all issues raised by noncitizen). "A petitioner must show that the denial of his or her right to a neutral fact-finder potentially affected the outcome of the proceedings." *Arrey v. Barr*, 916 F.3d 1149, 1159 (9th Cir. 2019) (internal quotation marks and citation omitted).

An IJ's pre-judgment of the merits of a noncitizen's case has been held to violate a noncitizen's due process rights. *See Zolotukhin v. Gonzales*, 417 F.3d 1073, 1075 (9th Cir. 2005) (due process violation where IJ's pre-judgment, including the exclusion of the testimony of several key witnesses, led to the noncitizen not receiving a full and fair opportunity to present evidence on his behalf); *see also Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058–59 (9th Cir. 2005) (concluding the petitioner's right to due process was violated because "the IJ's disbelief of Petitioner rested on personal speculation, bias, conjecture, and prejudgment" and the IJ refused to allow petitioner to challenge those views by presenting expert testimony); *Cano-Merida v. INS*, 311 F.3d 960, 964–65 (9th Cir. 2002) (noncitizen deprived of neutral judge where IJ indicated that he had "already judged" the pro se noncitizen's asylum claim); *cf. Liu v. Holder*, 640 F.3d 918, 930–31 (9th Cir. 2011) (as amended) (petitioner alleged IJ prejudged merits of her claim; the court concluded even if IJ's initial actions were improper, petitioner failed to establish prejudice).

If the factual record adequately supports the denial of relief, the court cannot conclude that the IJ's alleged bias was the basis for the denial of the application. *See Rivera*, 508 F.3d at 1276.

In cases where a due process violation was established, the court has on occasion directed that a case be reassigned to a new IJ on remand. *See Nuru v. Gonzales*, 404 F.3d 1207, 1229 (9th Cir. 2005) (directing that case be reassigned on remand where some of the IJ's comments during the hearing and in his oral decision were "highly caustic and without substance"); *Smolniakova v. Gonzales*, 422 F.3d 1037, 1054 (9th Cir. 2005) (directing BIA not to return the case to the IJ who originally heard the matter); *Lopez-Umanzor*, 405 F.3d at 1059 (remanding for a new hearing and suggesting it be held before a different IJ); *Perez-Lastor v.*

INS, 208 F.3d 773, 783 (9th Cir. 2000) (suggesting to the BIA that a new hearing be held before a different IJ).

Note that the due process clause does not prevent an IJ from examining a witness. *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1072 (9th Cir. 2003) (rejecting due process claim based on the IJ's aggressive and harsh questioning); *see also Liu*, 640 F.3d at 931 (record failed to show IJ improperly assumed a prosecutorial role, and that active questioning of petitioner did not show a "predisposition to discredit" petitioner's testimony such that IJ's impartiality should be questioned) (internal quotation and citation omitted); *Halaim v. INS*, 358 F.3d 1128, 1137 (9th Cir. 2004) (recognizing that IJ has authority to interrogate, examine and cross-examine the noncitizen and any witnesses, and concluding that the alleged misconduct did not rise to level of intimidation or advocacy for the agency); *Antonio-Cruz v. INS*, 147 F.3d 1129, 1131 (9th Cir. 1998) (rejecting due process claim premised on fact that IJ conducted "the lion's share of cross-examination" in a "harsh manner and tone").

> Although an IJ may "aggressively and sometimes harshly" question a witness, *Melkonian v. Ashcroft*, 320 F.3d 1061, 1072 (9th Cir. 2003), he or she may not become a "partisan adjudicator seeking to intimidate" the petitioner rather than "a neutral fact-finder interested in hearing the petitioner's evidence," *Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000).

Arrey, 916 F.3d at 1158–59. In *Arrey*, the court recognized that although the IJ was rude and harsh to the Arrey, she failed to show that the harshness or rudeness prejudiced her. *Id*. at 1159 (holding that the IJ held a complete hearing and made a thorough decision that fully examined the underlying factual matters). *See also Gonzalez-Veliz v. Garland*, 996 F.3d 942, 949 (9th Cir. 2021) (holding that petitioner was not deprived of right to a neutral arbiter, even if the IJ may have expressed frustration at times).

"[A] mere showing that the IJ was unfriendly, confrontational, or acted in an adversarial manner is not enough to" show that the underlying proceeding was fundamentally unfair, such that the noncitizen was prevented from reasonably presenting his case. *Rizo v. Lynch*, 810 F.3d 688, 693 (9th Cir. 2016) (record indicated IJ conducted hearing in aggressive manner, but IJ did not deny petitioner a fair hearing). Furthermore, "[a]n alien 'is not denied a fair hearing merely because the [IJ] has a point of view about a question of law or policy.'" *Bartolome*

v. Sessions, 904 F.3d 803, 815 (9th Cir. 2018) (quoting *Matter of Exame*, 18 I. & N. Dec. 303, 306 (BIA 1982)).

5. Pressure to Withdraw Application

An IJ's pressuring an applicant to withdraw an application for relief without providing an opportunity to present testimony may result in a due process violation. *See Cano-Merida v. INS*, 311 F.3d 960, 964–65 (9th Cir. 2002) (due process violation where the IJ pressured a pro se asylum applicant to withdraw his application and to accept voluntary departure, without giving him an opportunity to present oral testimony at the hearing).

6. Apparent Eligibility for Relief

"An IJ is required to inform a petitioner subject to removal proceedings of 'apparent eligibility to apply for any of the benefits enumerated in this chapter.' 8 C.F.R. § 1240.11(a)(2)." *C.J.L.G. v. Barr*, 923 F.3d 622, 626 (9th Cir. 2019) (en banc) (granting petition for review where IJ erroneously failed to advise petition about his eligibility for Special Immigrant Juvenile status, as required by regulation, but not addressing due process). *See also Zamorano v. Garland*, 2 F.4th 1213, 1222–23 (9th Cir. 2021) (discussing 8 C.F.R. § 1240.11); *United States v. Lopez-Velasquez*, 629 F.3d 894, 896–97 (9th Cir. 2010) (en banc) (explaining the court has repeatedly held that an IJ's failure to advise the noncitizen of apparent eligibility for relief violates due process and can serve as the basis for a collateral attack to a deportation order). "The 'apparent eligibility' standard of 8 C.F.R. § 1240.11(a)(2) is triggered whenever the facts before the IJ raise a 'reasonable possibility that the petitioner may be eligible for relief.'" *C.J.L.G.*, 923 F.3d at 627 (quoting *Moran-Enriquez v. INS*, 884 F.2d 420, 423 (9th Cir. 1989)). *See also Zamorano*, 2 F.4th at 1223 (concluding the IJ did not have a duty to advise noncitizen of right to apply for or his apparent eligibility for asylum or withholding of removal, where noncitizen did not express a fear of persecution that could support a plausible claim for such relief); *Lopez-Velasquez*, 629 F.3d at 896 ("Apparent eligibility" for relief under immigration laws is a "reasonable possibility that the alien may be eligible for relief."); *see also United States v. Ortiz-Lopez*, 385 F.3d 1202, 1204–05 (9th Cir. 2004) (per curiam) (due process violation where IJ failed to inform noncitizen he was eligible for voluntary departure); *Bui v. INS*, 76 F.3d 268, 270–71 (9th Cir. 1996). *Cf. United States v. Moriel-Luna*, 585 F.3d 1191, 1197–98 (9th Cir. 2009) (concluding there was no due process violation where the noncitizen did "not make the IJ aware of a pending

engagement to a U.S. citizen or the possibility of the alien's parents later filing for citizenship").

"[F]ailure to advise an alien of 'apparent eligibility' to apply for relief is a due process violation." *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1263 (9th Cir. 2013); *see also United States v. Garcia-Santana*, 774 F.3d 528, 533 (9th Cir. 2014) (failure to advise a noncitizen of apparent eligibility for relief from removal, including voluntary departure, violates his due process rights), *abrogated on other grounds as recognized by Yim v Barr*, 972 F.3d 1069 (9th Cir. 2020). "A failure to advise can be excused only when the petitioner's eligibility for relief is not 'plausible.'" *C.J.L.G.*, 923 F.3d at 627. *See also Zamorano*, 2 F.4th at 1223 ("Given that the fear of starting a new life in a new country was his only stated fear, Zamorano did not raise a 'reasonable possibility' that he may be eligible for asylum or withholding of removal that would trigger the IJ's duty to inform Zamorano of his 'apparent eligibility' to apply for such forms of relief under § 1240.11(a)(2).").

"[W]ith narrow exceptions, 'an IJ's duty is limited to informing an alien of a reasonable possibility that the alien is eligible for relief at the time of the hearing.'" *United States v. Guzman-Ibarez*, 792 F.3d 1094, 1101 (9th Cir. 2015) (quoting *United States v. Lopez–Velasquez*, 629 F.3d 894, 895 (9th Cir. 2010) (en banc)). However, an IJ's duty to inform a noncitizen of apparent eligibility does not require anticipation of future changes in law. *See United States v. Vidal-Mendoza*, 705 F.3d 1012, 1017 (9th Cir. 2013); *see also Guzman-Ibarez*, 792 F.3d at 1101 (IJ could not have been expected to know what relief might be possible under the circumstances).

"When the IJ fails to provide the required advice, the appropriate course is to 'grant the petition for review, reverse the BIA's dismissal of [the petitioner's] appeal of the IJ's failure to inform him of this relief, and remand for a new [ ] hearing.'" *C.J.L.G.*, 923 F.3d at 628 (quoting *Bui*, 76 F.3d at 271).

7. Explanation of Procedures

"[T]he IJ must adequately explain the hearing procedures to the alien, including what he must prove to establish his basis for relief." *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (due process violation where IJ failed adequately to explain procedures to pro se applicant; IJ had an obligation to assist the pro se applicant in determining what evidence was relevant, and to explain how he could prove his claims); *see also Zamorano v. Garland*, 2 F.4th 1213, 1225 (9th Cir.

2021) (explaining that the IJ has an obligation to explain what noncitizen must prove to establish the basis for the relief he seeks); *Jacinto v. INS*, 208 F.3d 725, 728 (9th Cir. 2000) (due process violation where noncitizen appeared pro se and IJ failed sufficiently to explain that noncitizen could be a witness even without an attorney, inadequately explained hearing procedures, and failed to explain what the noncitizen had to prove to establish eligibility for asylum).

In *Hussain v. Rosen*, the court held "the IJ provided [petitioner] due process by providing details about the structure of the hearing, the availability of counsel, and asking numerous questions through which Hussain had ample opportunity to develop his testimony. 985 F.3d 634, 645 (9th Cir. 2021), *cert. denied sub nom. Hussain v. Garland*, 142 S. Ct. 1121 (2022).

8. Exclusion of Evidence or Testimony

"[A]n alien who faces deportation is entitled to a ... reasonable opportunity to present evidence on his behalf." *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000); *see also Flores-Rodriguez v. Garland*, 8 F.4th 1108, 1113 (9th Cir. 2021). The IJ's exclusion of proffered evidence may result in a due process violation. *See Flores-Rodriguez*, 8 F.4th at 1113 ("If an IJ's actions prevent the introduction of 'significant testimony,' that generally violates due process."); *Ladha v. INS*, 215 F.3d 889, 905 (9th Cir. 2000) (remanding for clarification of petitioner's due process claims based on the exclusion of two documents), *overruled on other grounds by Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc) (per curiam). However, for the court to determine if a due process violation resulted, the record "must contain a sufficient indication of the content of excluded evidence to allow [the court] to review the exclusion for fundamental fairness." *Ladha*, 215 F.3d at 905.

Preventing a noncitizen from presenting testimony that may corroborate claims of past persecution may also result in a due process violation by depriving the noncitizen of a reasonable opportunity to present evidence in support of his claim. *See Zolotukhin v. Gonzales*, 417 F.3d 1073, 1075–76 (9th Cir. 2005) (petitioner's due process rights violated where the IJ barred him from presenting his mother's testimony, refused to permit family members to develop the record as to the family's persecution, and refused to hear testimony from petitioner's expert witness). "In any contested administrative hearing, admission of a party's testimony is particularly essential to a full and fair hearing where credibility is a determinative factor … ." *Oshodi v. Holder*, 729 F.3d 883, 890 (9th Cir. 2013) (due process right violated at removal hearing where IJ cut off petitioner's

testimony on the events of his alleged past persecution that were the foundation of his withholding of removal and CAT claims). In *Oshodi*, the court explained:

> The importance of an asylum or withholding applicant's testimony cannot be overstated, and the fact that Oshodi submitted a written declaration outlining the facts of his persecution is no response to the IJ's refusal to hear his testimony. An applicant's testimony of past persecution and/or his fear of future persecution stands at the center of his claim and can, if credible, support an eligibility finding without further corroboration. 8 U.S.C. § 1158(b)(1)(B)(ii); 8 C.F.R. § 1208.13(a). Every asylum and withholding applicant is required to be examined under oath as to the contents of his application. 8 C.F.R. § 1240.11(c)(3)(iii).

729 F.3d at 889–90.

"Due process does not mandate the right to present new evidence to an appellate tribunal when a litigant has been afforded a reasonable opportunity to present evidence to the first-instance decision-maker." *Alvarado-Herrera v. Garland*, 993 F.3d 1187, 1195 (9th Cir. 2021) (holding that in expedited removal proceedings, the reasonable fear screening procedures before asylum officer did not violate due process, notwithstanding that the proceedings do not afford noncitizens the right to present new evidence during the review hearing before an immigration judge).

See also Morgan v. Mukasey, 529 F.3d 1202, 1210–11 (9th Cir. 2008) (IJ violated due process by refusing to allow applicants' two children to testify on the basis that they did not appear on the pretrial witness list because the testimony could have corroborated the mother's testimony regarding persecution in Egypt after her credibility had been put in doubt); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058–59 (9th Cir. 2005) (IJ violated due process in refusing to hear relevant expert testimony regarding domestic violence); *Kaur v. Ashcroft*, 388 F.3d 734, 737–38 (9th Cir. 2004) (IJ's failure to allow noncitizen's son to testify as a corroborating witness resulted in prejudice); *Colmenar*, 210 F.3d at 972 (transcript showed the IJ pre-judged case and refused to hear testimony from noncitizen about anything that was in written application, thereby preventing noncitizen from elaborating on fears). *Cf. Pagayon v. Holder*, 675 F.3d 1182, 1191–92 (9th Cir. 2011) (per curiam) (no due process violation where IJ refused to allow telephonic testimony from family and declined to allow petitioner time to submit a letter recapitulating his oral testimony, because petitioner failed to establish prejudice);

Gutierrez v. Holder, 662 F.3d 1083, 1091 (9th Cir. 2011) (no violation of due process rights by excluding telephonic testimony of three witnesses because there were other witnesses present and prepared to testify as to the same character evidence); *Haile v. Holder*, 658 F.3d 1122, 1128 (9th Cir. 2011) ("The sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair." (quotation marks and citation omitted)); *Lanuza v. Holder*, 597 F.3d 970, 972 (9th Cir. 2010) (per curiam) (rejecting contention that IJ deprived petitioner of opportunity to present evidence on her behalf); *Almaghzar v. Gonzales*, 457 F.3d 915, 921 (9th Cir. 2006) (concluding petitioner was not deprived of due process where allowed to present evidence, including expert testimony and country reports, and was able to testify at length).

9. Exclusionary Rule and Admission of Evidence

"The inadmissibility of evidence that undermines fundamental fairness stems from the Fifth Amendment due process guarantee that operates in removal proceedings." *Hong v. Mukasey*, 518 F.3d 1030, 1035 (9th Cir. 2008) (holding that where it did not appear the agency violated its regulations, and any alleged violation would still not have deprived the petitioner of any protected right, the evidence was properly admitted).

The exclusionary rule provides that in criminal proceedings "evidence obtained in violation of a defendant's Fourth Amendment rights may not be introduced to prove the defendant's guilt." *Martinez-Medina v. Holder*, 673 F.3d 1029, 1033 (9th Cir. 2011). "The exclusionary rule is an exceptional remedy typically reserved for violations of constitutional rights." *Hong v. Mukasey*, 518 F.3d 1030, 1034 (9th Cir. 2008) (internal quotation marks omitted).

The exclusionary rule generally does not apply in immigration proceedings. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984); *see also B.R. v. Garland*, 26 F.4th 827, 841 (9th Cir. 2022) (as amended); *Perez Cruz v. Barr*, 926 F.3d 1128, 1137 (9th Cir. 2019); *Sanchez v. Sessions*, 904 F.3d 643, 649 (9th Cir. 2018) (noting it is well-established that the exclusionary rule generally does not apply to removal proceedings); *United States v. Gonzalez-Villalobos*, 724 F.3d 1125, 1129 n.5 (9th Cir. 2013) ("[T]he exclusionary rule generally does not apply in civil deportation proceedings, … ."); *Hong*, 518 F.3d at 1034 (same). "There are, however, two critical exceptions to this rule: (1) when the agency violates a regulation promulgated for the benefit of petitioners and that violation prejudices the petitioner's protected interests, ... ; and (2) when the agency egregiously violates a petitioner's Fourth Amendment rights[.]" *Sanchez*, 904 F.3d at 649

(citations omitted). *See also B.R.*, 26 F.4th at 841 *Perez Cruz*, 926 F.3d at 1137 (holding suppression of evidence was appropriate for evidence gathered as a result of detention that violated regulation).

For more on the exclusionary rule, *see infra* section II.D.

10. Notice of Classified Evidence

"The regulations governing immigration proceedings permit the use of classified information." *Kaur v. Holder*, 561 F.3d 957, 960 (9th Cir. 2009) (citing 8 C.F.R. § 1240.33(c)(4)). However, "the use of secret evidence is cabined by constitutional due process limitations." *Id.* at 962. The court has "long held that there are limits on the admissibility of evidence and that the test for admissibility includes fundamental fairness." *Id.* (internal quotation marks omitted). The evidence must be probative and its use fundamentally fair so as not to violate due process of law. The court has determined that the BIA violated due process by using secret evidence against a petitioner for the first time after she had already been granted CAT relief. *See id.* at 962–63. *See also Zerezghi v. United States Citizenship & Immigr. Servs.*, 955 F.3d 802, 813 (9th Cir. 2020) (holding that because United States citizen and his noncitizen wife received only a vague reference to unspecified 'records,' they had no meaningful opportunity to respond to the undisclosed documents, and thus the USCIS violated due process).

11. Right to Confront and Cross-Examine Witnesses

"Due process requires 'a full and fair hearing,' … , which, at a minimum, includes a reasonable opportunity to present and rebut evidence and to cross-examine witnesses … ." *Grigoryan v. Barr*, 959 F.3d 1233, 1240 (9th Cir. 2020) (citations omitted); *see also Ching v. Mayorkas*, 725 F.3d 1149, 1158–59 (9th Cir. 2013). "The Federal Rules of Evidence, … , do not apply in immigration hearings. Rather, the sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair." *Sanchez v. Holder*, 704 F.3d 1107, 1109 (9th Cir. 2012) (per curiam) (citation and quotation marks omitted) (determining that the IJ did not abuse his discretion by admitting Form I-213, even though the petitioner was not given an opportunity to cross-examine the preparer).

An opportunity to confront and cross examine "is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Ching*, 725 F.3d at 1158

(internal quotation marks and citations omitted) (due process required a hearing with an opportunity for Ching to confront the witnesses against her). *See also* *Angov v. Lynch*, 788 F.3d 893, 899 (9th Cir. 2015) (statutory right to cross-examine witnesses not violated where government made "a reasonable effort to obtain a witness from the Department of State but was prevented from doing so by the State's policy of not releasing follow-up information regarding its overseas investigations");*Owino v. Holder*, 771 F.3d 527 (9th Cir. 2014) (due process claim foreclosed by *Angov*); *Go v. Holder*, 640 F.3d 1047, 1055 (9th Cir. 2011) (rejecting petitioner's due process objection to the admission of evidence because he had the opportunity to cross-examine government's live witness, present contrary evidence, and to impeach testimony); *Hammad v. Holder*, 603 F.3d 536, 545–46 (9th Cir. 2010); *Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681 (9th Cir. 2005); *Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997).

"[T]he government must make a reasonable effort in [immigration] proceedings to afford the alien a reasonable opportunity to confront the witnesses against him or her." *Saidane*, 129 F.3d at 1065 (internal quotation marks omitted); *see also Angov*, 788 F.3d at 899; *Bondarenko v. Holder*, 733 F.3d 899, 907 (9th Cir. 2013) (IJ violated due process in not allowing the petitioner a continuance to investigate a forensic report where the government did not provide the petitioner a reasonable opportunity to investigate the report); *Hammad*, 603 F.3d at 545–46 (no due process violation where government informed petitioner of spouse's testimony two days prior to hearing, and petitioner had opportunity to cross-examine spouse and offer rebuttal witness); *Cinapian v. Holder*, 567 F.3d 1067, 1075 (9th Cir. 2009) (holding "the combination of the government's failure to disclose the DHS forensic reports in advance of the hearing or to make the reports' author available for cross-examination and the IJ's subsequent consideration of the reports under these circumstances denied Petitioners a fair hearing."); *Shin v. Mukasey*, 547 F.3d 1019, 1024–25 (9th Cir. 2008) (admission of deposition testimony from former federal immigration official did not violate due process where official was cross-examined by noncitizen's counsel during the deposition, and official was made available during alien's hearing if additional testimony was needed); *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988).

"Congress has specifically provided that an alien in removal proceedings must be given 'a reasonable opportunity … to cross-examine witnesses presented by the Government,' [and the court has] held that the government deprives the alien of a fundamentally fair hearing when it fails 'to make a good faith effort to afford the alien a reasonable opportunity to confront and to cross-examine the

witness against him.'" *Alcaraz-Enriquez v. Garland*, 19 F.4th 1224, 1231 (9th Cir. 2021) (quoting 8 U.S.C. § 1229a(b)(4)(B) and *Saidane*, 129 F.3d at 1066) (holding that because the BIA failed to make a good-faith effort to let Alcaraz confront the witnesses against him, the BIA's reliance on the probation officer's report was error, and further holding that the error was prejudicial).

"[H]earsay is admissible in immigration proceedings. ... [I]n immigration proceedings the sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair." *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003) (internal quotation marks and citation omitted). Although hearsay is admissible, "the constitutional and statutory guarantees of due process require that the government's choice whether to produce a witness or to use a hearsay statement [not be] wholly unfettered." *Hernandez-Guadarrama*, 394 F.3d at 681 (internal quotation marks omitted) (alteration in original). For example, admission of a hearsay statement of an allegedly unavailable declarant whom the government deported as sole evidence of crime may violate due process. *See id*. at 681–82 (due process violation found where government failed to make any reasonable effort to produce declarant, and where the declarant had been at risk of felony prosecution when he provided the statement); *see also Cinapian*, 567 F.3d at 1075; *Saidane*, 129 F.3d at 1065.

a. Opportunity to Examine and Rebut Evidence

In *Bondarenko v. Holder*, 733 F.3d 899, 907 (9th Cir. 2013), the court held that IJ violated the petitioner's due process rights by not allowing him a continuance to investigate a forensic report where the government did not provide a reasonable opportunity to investigate the report. Comparing the case to *Cinapian v. Holder*, 567 F.3d 1067, 1075 (9th Cir. 2009), the court explained that the "due process right to a timely production of an adverse forensic report goes beyond the inability to cross-examine its author." In *Bondarenko*, the IJ found the petitioner not credible based in large part on the forensic report introduced by the government that concluded a medical document submitted by petitioner was fraudulent. The IJ denied the petitioner an opportunity to investigate the manner in which the forensic report had been prepared and to question the preparer of the report. Concluding the denial of the request violated his due process rights and resulted in prejudice, the court granted the petition for review. *Id*. at 906–07. *Cf. Angov v. Lynch*, 788 F.3d 893, 899 (9th Cir. 2015) (concluding statutory right to examine evidence not violated where record showed he was allowed ample time to examine the evidence and given ample time to produce substantial evidence to rebut it); *Sanchez v. Holder*, 704 F.3d 1107, 1109 (9th Cir. 2012) (per curiam)

(rejecting argument that IJ should have excluded Form I-213 from evidence where the petitioner was not given an opportunity to cross-examine the preparer because there was no evidence of coercion or that the statements in the form were not that of the petitioner).

See also *Grigoryan v. Barr*, 959 F.3d 1233, 1240 (9th Cir. 2020) (holding that IJ's admission of and reliance on a record of investigation prepared by the Department of Homeland Security, as a basis for terminating the Grigoryans' asylum status did not comport with constitutional due process, where the Grigoryans were not afforded a meaningful opportunity to rebut its allegations); *Zerezghi v. United States Citizenship & Immigration Servs.*, 955 F.3d 802, 813 (9th Cir. 2020) (USCIS violated United States citizen husband's due process rights where it failed to disclose document on which it relied in making determination that noncitizen wife had previously committed marriage fraud); *Kaur v. Holder*, 561 F.3d 957, 961 (9th Cir. 2009) (holding the BIA's "use of the secret evidence without giving Kaur a proper summary of that evidence was fundamentally unfair and violated her due process rights[,] noting that she could not rebut what had not been alleged).

12. Production of Documents

An IJ's refusal to order production of documents that may affect the outcome of proceedings may result in a violation of the noncitizen's due process rights. *See* *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620–21 (9th Cir. 2006) (directing IJ on remand to order production of all forms referencing noncitizen's prior departure, because the government's inability to produce a voluntary departure form would be evidence that may affect the outcome of proceedings); *see also* *Flores-Rodriguez v. Garland*, 8 F.4th 1108, 1113 (9th Cir. 2021) ("If an IJ's actions prevent the introduction of 'significant testimony,' that generally violates due process."); *Dent v. Holder*, 627 F.3d 365, 374–75 (9th Cir. 2010) (concluding petitioner was denied the opportunity to fully and fairly litigate his removal and claim of defensive citizenship where government failed to provide petitioner with documents contained in his Alien File that could show he is a naturalized United States citizen).

13. New Country of Deportation

The IJ's last-minute switch of the country of deportation has been found to violate due process where there was lack of proper notice. *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999) (asylum applicant, who had operated under belief

based on instructions on agency forms and from the IJ that he needed to present evidence in support of his claim regarding Azerbaijan, was not informed of designation of Armenia as country of deportation until after the close of evidence).

14. Right to Translation

"Due process requires that an applicant be given competent translation services" if he or she does not speak English. *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003); *see also United States v. Reyes-Bonilla*, 671 F.3d 1036, 1044 (9th Cir. 2012) ("A waiver of rights cannot be found to have been considered or intelligent where there is no evidence that the detainee was first advised of those rights in a language he could understand."); *United States v. Ramos*, 623 F.3d 672, 680 (9th Cir. 2010); *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000). *Cf. Khan v. Ashcroft*, 374 F.3d 825, 829–30 (9th Cir. 2004) (petitioner's due process rights were not violated by IJ's failure to translate proceedings at master calendar hearing, where the petitioner requested and received a continuance, indicating that he was able to protect his interests at the hearing).

"In order to make out a due process violation, ... the alien must show that a better translation would have made a difference in the outcome of the hearing." *Kotasz v. INS*, 31 F.3d 847, 850 n.2 (9th Cir. 1994) (internal quotation marks omitted); *see also Guan v. Barr*, 925 F.3d 1022, 1033 (9th Cir. 2019) (concluding there was no due process violation where petitioner did not explain how the problems with the interpreter affected his testimony or otherwise impacted the hearing's fairness); *Bartolome v. Sessions*, 904 F.3d 803, 811–12 (9th Cir. 2018) (concluding that even if there was error in only providing a Spanish-language interpreter, instead of an interpreter in petitioner's native language of Chuj, petitioner failed to show prejudice, because he was able to ultimately present his whole story to the IJ); *Ramos*, 623 F.3d at 680 (concluding petitioner did not receive a competent Spanish language translation of his waiver of his right to appeal, but ultimately concluding petitioner failed to establish prejudice where he was not eligible for relief); *Aden v. Holder*, 589 F.3d 1040, 1046–47 (9th Cir. 2009) (concluding there was no due process violation where petitioner failed to demonstrate prejudice from alleged errors in translation).

"In evaluating incompetent translation claims, [the court has] identified three types of evidence which tend to prove that a translation was incompetent. These are: direct evidence of incorrectly translated words, unresponsive answers by the witness, and the witness' expression of difficulty understanding what is said to him." *Siong v. INS*, 376 F.3d 1030, 1041 (9th Cir. 2004) (internal quotation marks

and citations omitted). *See also Bartolome*, 904 F.3d at 811–12 (rejecting petitioner's due process claim where petitioner did "not specifically indicate (outside of vague references to his political activities) what evidence he was unable to present[,] … [and the record did] not demonstrate that [petitioner] was prevented (based on the interview in Spanish) from providing the evidence that establishe[d] that he fear[ed] returning to Guatemala").

15. Administrative Notice of Facts

When the agency takes administrative notice of events occurring after the merits hearing, it must provide notice to the parties and, in some cases, an opportunity to respond. *See Circu v. Gonzales*, 450 F.3d 990, 994–95 (9th Cir. 2006) (en banc) (IJ violated due process by taking judicial notice of a new country conditions report without providing noncitizen notice and an opportunity to respond). Notice of intent to take administrative notice is all that is required if extra-record facts and questions are "legislative, indisputable, and general." *Id.* at 993 (internal quotation marks omitted); *see also Gonzales v. INS*, 82 F.3d 903, 911–12 (9th Cir. 1996); *Getachew v. INS*, 25 F.3d 841, 846–47 (9th Cir. 1994); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1027–29 (9th Cir. 1992). However, "more controversial or individualized facts require *both* notice to the [alien] that administrative notice will be taken *and* an opportunity to rebut the extra-record facts or to show cause why administrative notice should not be taken of those facts." *Circu*, 450 F.3d at 993 (emphasis and alteration in original) (internal quotation marks omitted). An example of an indisputable fact is a political party's victory in an election, whereas a controversial fact is whether the election has vitiated any previously well-founded fear of persecution. *Id*. at 994.

If an IJ takes administrative notice of changed country conditions during the hearing, there is no violation of due process because the applicant has an opportunity to respond with rebuttal evidence. *See Kazlauskas v. INS*, 46 F.3d 902, 906 n.4 (9th Cir. 1995); *see also Kotasz v. INS*, 31 F.3d 847, 855 n.13 (9th Cir. 1994) (petitioners "were given ample opportunity to discuss the effect of [political] changes"); *Acewicz v. INS*, 984 F.2d 1056, 1061 (9th Cir. 1993) ("petitioners had ample opportunity to argue before the immigration judges and before the [BIA] that their fear of persecution remained well-founded").

16. Right to Counsel

"Although there is no Sixth Amendment right to counsel in an immigration hearing, Congress has recognized it among the rights stemming from the Fifth

Amendment guarantee of due process that adhere to individuals that are the subject of removal proceedings." *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004); *see also Usubakunov v. Garland*, 16 F.4th 1299, 1303 (9th Cir. 2021) (stating, "noncitizens have the right to counsel in removal proceedings, albeit not the right to counsel paid for by the government."); *Arrey v. Barr*, 916 F.3d 1149, 1157 (9th Cir. 2019) (stating, "Both Congress and our court have recognized the right to retained counsel as being among the rights that due process guarantees to petitioners in immigration proceedings" and citing 8 U.S.C. § 1362); *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018) ("The right to be represented by counsel at one's own expense is protected as an incident of the right to a fair hearing under the Due Process Clause of the Fifth Amendment."); *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041 (9th Cir. 2014) ("No constitutional right to counsel in deportation proceedings, but must be accorded due process under the Fifth Amendment."); *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1044 (9th Cir. 2012) (petitioner denied due process right to counsel during expedited removal proceeding, however, he failed to establish prejudice); *Ram v. Mukasey*, 529 F.3d 1238, 1241 (9th Cir. 2008); *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005); *Baltazar-Alcazar v. INS*, 386 F.3d 940, 944 (9th Cir. 2004).

The right to counsel is codified at 8 U.S.C. § 1362. "[T]he statutory right to counsel exists so that an alien has a competent advocate acting on his or her behalf at removal proceedings." *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 808 (9th Cir. 2007); *see also Arrey*, 916 F.3d at 1157. The court reviews de novo whether the statutory right to counsel was violated. *See Mendoza-Mazariegos v. Mukasey*, 509 F.3d 1074, 1080 (9th Cir. 2007). *See also Zetino v. Holder*, 622 F.3d 1007, 1014–15 (9th Cir. 2010) (rejecting petitioner's contention that the IJ violated his due process rights by failing to advise him of his right to counsel, where the IJ advised petitioner of his procedural rights).

"Non-citizens have no statutory right to counsel at the initial stage of reinstatement proceedings, during which an immigration officer performs the 'ministerial' task of determining whether the non-citizen's prior removal order should be reinstated." *Zuniga v. Barr*, 946 F.3d 464, 465 n.8 (9th Cir. 2019) (per curiam) (as amended) (explaining *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 491, 497 (9th Cir. 2007), and distinguishing it). However, noncitizens subject to expedited removal do have a statutory right to counsel in reasonable fear proceedings before immigration judges. *Zuniga*, 946 F.3d at 469 & n.8 (distinguishing the initial stage of reinstatement proceedings from subsequent reasonable fear review before an IJ).

An IJ's failure to inquire as to whether a petitioner wants an attorney present may violate due process. *See Tawadrus*, 364 F.3d at 1105. For an applicant to appear pro se, there must be a knowing and voluntary waiver of the right to counsel. *Id*. at 1103; *see also Orozco-Lopez v. Garland*, 11 F.4th 764, 779 (9th Cir. 2021). For a waiver to be valid, the IJ must "(1) inquire specifically as to whether petitioner wishes to continue without a lawyer; and (2) receive a knowing and voluntary affirmative response." *Tawadrus*, 364 F.3d at 1103. (internal citations omitted); *see also Arrey*, 916 F.3d at 1157 (concluding petitioner did not explicitly waive her right to counsel); *Hernandez-Gil*, 476 F.3d at 806 (concluding petitioner did not knowingly and voluntarily waive his right to counsel); *United States v. Ramos*, 623 F.3d 672, 682–83 (9th Cir. 2010) (concluding "that [petitioner's] waiver of counsel was invalid and a violation of his due process right to counsel"). Failure to obtain a knowing and voluntary waiver is a denial of the right to counsel and may be an abuse of discretion. *See Hernandez-Gil*, 476 F.3d at 806; *Tawadrus*, 364 F.3d at 1103; *see also Ram*, 529 F.3d at 1242 ("[E]ven for the most competent alien, the IJ has an affirmative duty to assess whether any waiver of counsel is knowing and voluntary."). "If the prejudice is so great as to potentially affect the outcome of the proceedings, the denial of counsel amounts to a violation of due process." *Tawadrus*, 364 F.3d at 1103; *see also Ram*, 529 F.3d at 1242. Whether a petitioner is competent may affect the inquiry of whether waiver of counsel is knowing and voluntary. *See Calderon-Rodriguez v. Sessions*, 878 F.3d 1179, 1184 (9th Cir. 2018) (declining to address the waiver of counsel argument because a determination whether petitioner was competent may affect the inquiry).

In *Orozco-Lopez*, the court held that Orozco-Lopez could not possibly have waived his statutory right to counsel, because the IJ did not mention the possibility of legal representation at the hearing. 11 F.4th at 779. In contrast, the court has held that an "IJ's denial of [a] request for a continuance to find a lawyer did not amount to a denial of [petitioner's] statutory right to counsel." *Id.* (holding that petitioner Gonzalez's right to counsel was not denied).

Where a "a non-citizen's statutory right to counsel has been denied, …, he need not show prejudice." *Orozco-Lopez*, 11 F.4th at 779.

"When a petitioner does not waive the right to counsel, 'IJs must provide [the petitioner] with reasonable time to locate counsel and permit counsel to prepare for the hearing.'" *Arrey*, 916 F.3d at 1158 (quoting *Biwot v. Gonzales*, 403 F.3d 1094, 1098–99 (9th Cir. 2005)). A petitioner is not denied the right to counsel where continuing the hearing would be futile or where the IJ has done

everything he reasonably could to permit the petitioner to obtain counsel. *Arrey*, 916 F.3d at 1158. In *Arrey*, the court held that although petitioner did not waive the right to counsel, the IJ had provided her with reasonable time to locate counsel, and therefore, she was not deprived of her due process right to retained counsel. *Id*. at 1157–58.

"When an immigrant has engaged counsel and the IJ is aware of the representation, if counsel fails to appear, the IJ must take reasonable steps to ensure that the immigrant's statutory right to counsel is honored." *Hernandez-Gil*, 476 F.3d at 808 (concluding petitioner was denied his statutory right to counsel); *see also Mendoza-Mazariegos*, 509 F.3d at 1084 (same).

"An alien who shows that he has been denied the statutory right to be represented by counsel in an immigration proceeding need not also show that he was prejudiced by the absence of the attorney." *Montes-Lopez v. Holder*, 694 F.3d 1085, 1090–94 (9th Cir. 2012) (deciding previously open question in the circuit concerning whether prejudice is an element of a claim that counsel has been denied in an immigration proceeding). *See also Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018) (recognizing that *Montes-Lopez* "carved out an exception to the general rule requiring a showing of prejudice" and that where "an individual who is wrongly denied the assistance of counsel at the merits hearing[, prejudice is] conclusively presumed and automatic reversal is required."). In *Montes-Lopez*, the court held that petitioner's right to counsel was violated where the IJ required petitioner to proceed with the hearing, although his retained attorney was suspended from practice. *See Montes-Lopez*, 694 F.3d at 1089 (noting there was no basis to conclude that the petitioner had been aware of his attorney's suspension for very long or was derelict in responding to it).

Although "an individual who is wrongly denied the assistance of counsel at the merits hearing need not show prejudice in order to prevail[,]" "not all violations of the right to counsel are treated as structural errors mandating automatic reversal." *Gomez-Velazco*, 879 F.3d at 993 (referencing the rule set out in *Montes-Lopez*, 694 F.3d at 1090). Rather, "[i]f the right to counsel has been wrongly denied only at a discrete stage of the proceeding, and an assessment of the error's effect can readily be made, then prejudice must be found to warrant reversal." *Gomez-Velazco*, 879 F.3d at 993–94 (holding that petitioner failed to show denial of right to counsel caused him any prejudice). In *Gomez-Velazco*, there was no presumption of prejudice, where petitioner was denied right to counsel during initial interaction with DHS officers, but was able to consult with counsel before the removal order was executed, and the prejudicial effect could be

assessed. *Id.* (distinguishing the case from instances where counsel is precluded from participating in the merits hearing before an immigration judge).

The court has held that the written advisement that "applicants may be represented by counsel" on the I-589 asylum application form is sufficient to advise the applicant of the privilege of being represented by counsel, as required by 8 U.S.C. § 1158(d)(4)(A). *Cheema v. Holder*, 693 F.3d 1045, 1049–50 (9th Cir. 2012).

See also Gonzaga-Ortega v. Holder, 736 F.3d 795, 804 (9th Cir. 2013) (as amended) (holding that the petitioner, a lawful permanent resident, did not have a right to counsel at secondary inspection when entering the country under 8 C.F.R. § 292.5(b) where he fell within the express exception to the regulation as an applicant for admission who had not become the focus of a criminal investigation).

17. Ineffective Assistance of Counsel

> The right to effective assistance of counsel in immigration proceedings stems from the Fifth Amendment's guarantee of due process. *See Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005). As in a criminal case, a lawyer's performance in an immigration proceeding is not measured using "specific guidelines," *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), but is instead a context-dependent inquiry into whether the attorney acted with "sufficient competence," *Mohammed*, 400 F.3d at 793. And just as a criminal defendant can establish prejudice without showing that a competent lawyer definitely would have earned an acquittal, *see Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an alien's burden is to demonstrate that his lawyer's errors "may have affected the outcome of the proceedings," *Mohammed*, 400 F.3d at 794 & n. 11 (quoting *Iturribarria v. I.N.S.*, 321 F.3d 889, 900 (9th Cir. 2003)).

Salazar-Gonzalez v. Lynch, 798 F.3d 917, 921 (9th Cir. 2015) (concluding that Salazar-Gonzalez demonstrated his counsel performed deficiently and that he suffered prejudice as a result); *see also United States v. Lopez-Chavez*, 757 F.3d 1033, 1041 (9th Cir. 2014) ("No constitutional right to counsel in deportation proceedings, but must be accorded due process under the Fifth Amendment."); *Blanco v. Mukasey*, 518 F.3d 714, 722 (9th Cir. 2008) (explaining "[i]ndividuals in immigration proceedings do not have Sixth Amendment rights, so ineffective

assistance of counsel claims are analyzed under the Fifth Amendment's due process clause" and denying ineffective assistance of counsel claim because petitioner failed to show that counsel's performance denied him a right to a "full and fair hearing" where "counsel diligently examined and cross-examined witnesses, argued points of law before the IJ and informed [petitioner] of his right to appeal."); *Hernandez v. Mukasey*, 524 F.3d 1014, 1017 (9th Cir. 2008) ("[I]f an individual chooses to retain counsel, his or her due process right includes a right to *competent representation*." (internal quotation marks omitted) (emphasis in original)).

"An alien's right to a full and fair presentation of his claim includes the right to have an attorney who would present a viable legal argument on his behalf supported by relevant evidence, if he could find one willing and able to do so." *Lopez-Chavez*, 757 F.3d at 1041 (internal quotation marks and citation omitted). "[R]eliance upon the advice of a non-attorney cannot form the basis of a claim for ineffective assistance of counsel." *Hernandez*, 524 F.3d at 1020 (rejecting due process claim based on deficient advice from non-attorney immigration consultant).

"[I]n assessing an attorney's performance, the proper focus of [the court's] inquiry is whether the proceeding is so fundamentally unfair that the alien is prevented from reasonably presenting her case." *Torres-Chavez v. Holder*, 567 F.3d 1096, 1100 (9th Cir. 2009) (rejecting petitioner's contention that he received IAC where attorney conceded petitioner's alienage and did not inform him about the advantages of remaining silent). A noncitizen must also show prejudice by demonstrating the alleged violation affected the outcome of the proceedings. *See id.* *See also Lopez-Chavez*, 757 F.3d at 1041 (To establish ineffective assistance of counsel in immigration proceedings in violation of the right to due process, a petitioner must show (1) that "the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case," and (2) prejudice."). A showing of prejudice can be made if counsel's performance "was so inadequate that it may have affected the outcome of the proceedings." *Iturribarria v. INS*, 321 F.3d 889, 899–90 (9th Cir. 2003) (internal quotation marks omitted); *see also Flores v. Barr*, 930 F.3d 1082, 1087 (9th Cir. 2019) (stating "the petitioner need only demonstrate that counsel's deficient performance 'may have affected the outcome of the proceedings' by showing 'plausible' grounds for relief"). The court has explained that noncitizens "shoulder a heavier burden of proof in establishing ineffective assistance of counsel under the Fifth Amendment than under the Sixth Amendment." *Torres-Chavez*, 567 F.3d at 1100 (internal quotation marks omitted).

Due process claims based on ineffective assistance of counsel must generally comply with the requirements set forth in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1071–72 (9th Cir. 2003). The noncitizen must: "(1) provide an affidavit describing in detail the agreement with counsel; (2) inform counsel of the allegations and afford counsel an opportunity to respond; and (3) report whether a complaint of ethical or legal violations has been filed, and if not, why." *Id*. at 1072; *see also Tamang v. Holder*, 598 F.3d 1083, 1089 (9th Cir. 2010). "Compliance with *Lozada* ensures that the BIA has an objective basis "for assessing the substantial number of claims of ineffective assistance of counsel that come before [it]." *See Al Ramahi v. Holder*, 725 F.3d 1133, 1139 (9th Cir. 2013) (concluding it was reasonable for BIA to conclude it lacked a basis from which to analyze petitioner's claim that counsel's advice was deficient). "The *Lozada* factors are not rigidly applied, especially where their purpose is fully served by other means." *Morales Apolinar v. Mukasey*, 514 F.3d 893, 896 (9th Cir. 2008) (concluding that petitioner substantially complied with *Lozada* requirements, despite failure to confront attorney directly or report misconduct to a disciplinary authority); *see also Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920 n.2 (9th Cir. 2015) ("Strict compliance with *Lozada* is not always necessary for equitable tolling."); *Ray v. Gonzales*, 439 F.3d 582, 588 (9th Cir. 2006) (observing that the court has "not hesitated to address ineffective assistance of counsel claims even when an alien fails to comply strictly with *Lozada*"). For example, this court has held the BIA abused its discretion by requiring a noncitizen to provide correspondence from the Bar indicating receipt of complaint in order to comply with *Lozada* where the noncitizen provided a copy of the complaint, along with a declaration from the attorney admitting responsibility and absolving his client of any culpability. *See Correa-Rivera v. Holder*, 706 F.3d 1128, 1131–34 (9th Cir. 2013) (holding the noncitizen was prejudiced by his attorney's failure to file an application for cancellation of removal). Noncompliance with *Lozada* will be excused where the "facts are plain on the face of the administrative record." *Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000) (internal quotation marks omitted); *see also Guan v. Barr*, 925 F.3d 1022, 1033 (9th Cir. 2019) (per curiam) (explaining that because petitioner failed to comply with the procedural requirements of *Lozada*, he was entitled to relief only if "the ineffectiveness of counsel was plain on its face" and determining that the record did not show counsel performed deficiently).

"[D]ue process rights to assistance of counsel do not extend beyond the fairness of the hearing itself." *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050 (9th Cir. 2008). The "Fifth Amendment simply does not apply to preparation and filing

of a petition that does not relate to the fundamental fairness of an ongoing proceeding." *Id.* at 1051. Furthermore, the legal services must be rendered "*while proceedings were ongoing*." *Id.* at 1050 (concluding there was no ineffective assistance of counsel, where attorney failed to properly file visa application and the deficiency did not relate to the substance of an ongoing proceeding).

Impinging on a petitioner's "authority to decide whether, and on what terms, to concede his case" by failing to insure counsel's withdrawal will not prejudice the petitioner can "effectively deprive[] [the petitioner] of the ability to present his case ... ." *See Nehad v. Mukasey*, 535 F.3d 962, 972 (9th Cir. 2008) (concluding that counsel's performance was deficient where counsel pressured client to accept voluntary departure under threat of counsel's withdrawal two hours before hearing).

"[W]hen ineffective assistance leads to in absentia removal, [the court has] 'followed the BIA's usual practice of not requiring a showing of prejudice.'" *Sanchez Rosales v. Barr*, 980 F.3d 716, 720 (9th Cir. 2020) (quoting *Lo v. Ashcroft*, 341 F.3d 934, 939 n.6 (9th Cir. 2003)). In *Sanchez-Rosales*, the court concluded that petitioners were not required to demonstrate that the ineffective assistance provided by a non-attorney notario caused them prejudice. 980 F.3d at 719.

See also Guan v. Barr, 925 F.3d 1022, 1033 (9th Cir. 2019) (ineffective assistance of counsel claim failed where there was no reason to suspect that counsel's failure to object to the admission of the asylum officer's notes may have affected the outcome of the proceedings); *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041–42 (9th Cir. 2014) (counsel's concession that a noncitizen's prior drug conviction was an aggravated felony under the INA and the failure to appeal the question to the Court of Appeals constituted deficient performance); *Kwong v. Holder*, 671 F.3d 872, 880–81 (9th Cir. 2011) (counsel's performance was not constitutionally deficient where counsel interrogated petitioner and presented sufficient evidence in support of petitioner's claim for withholding of removal to permit the IJ to make a reasoned decision on the merits of that claim); *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 835–36 (9th Cir. 2011) (petitioner was prejudiced by counsel's ineffective assistance where counsel admitted to factual allegations without any factual basis for doing so).

Cross-reference: Motions to Reopen or Reconsider Immigration Proceedings, Ineffective Assistance of Counsel.

18. Waiver of Appeal

"A waiver of the right to appeal a removal order must be considered and intelligent or it constitutes a deprivation of the right to appeal and thus of the right to a meaningful opportunity for judicial review." *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) (internal quotation marks omitted); *see also Chavez-Garcia v. Sessions*, 871 F.3d 991, 996 (9th Cir. 2017) ("an alien may validly waive his right to appeal his removal order as long as his waiver is 'considered' and 'intelligent.'"); *United States v. Hernandez-Arias*, 757 F.3d 874, 879–80 (9th Cir. 2014) (no due process violation prevented defendant's waiver of appeal from being knowing and intelligent); *United States v. Vidal-Mendoza*, 705 F.3d 1012, 1021 (9th Cir. 2013) (waiver of appeal rights was considered and intelligent); *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1044 (9th Cir. 2012); *United States v. Ramos*, 623 F.3d 672, 680–81 (9th Cir. 2010) (petitioner's waiver of his right to appeal was not considered or intelligent and was thus invalid); *Rendon v. Mukasey*, 520 F.3d 967, 972 (9th Cir. 2008) (rejecting due process contention that petitioner's waiver "of his right to challenge the finding of removability based on" a conviction was not "considered and intelligent" where IJ gave detailed instructions on how to file an appeal, and petitioner failed to present arguments concerning his conviction before the BIA where he had ample opportunity to do so); *United States v. Jimenez-Borja*, 378 F.3d 853, 859 (9th Cir. 2004) (where noncitizen consented to deportation and waiver of appeal, the IJ's failure to advise him of available relief resulted in a due process violation; however, there was no prejudice because he was not ultimately eligible for the relief); *Matter of Rodriguez-Diaz*, 22 I. & N. Dec. 1320, 1323, 1324 n.2 (BIA 2000) (in cases involving unrepresented noncitizens, more detailed explanations of appeal rights are often needed).

> "Where 'the record contains an inference that the petitioner is eligible for relief from deportation,' but the IJ fails to 'advise the alien of this possibility and give him the opportunity to develop the issue,' we do not [regard] an alien's waiver of his right to appeal his deportation order [as] 'considered and intelligent.' " *United States v. Pallares-Galan*, 359 F.3d 1088, 1096 (9th Cir. 2004) (quoting *United States v. Muro-Inclan*, 249 F.3d 1180, 1182 (9th Cir. 2001)) (some internal quotation marks omitted).

Garcia v. Lynch, 786 F.3d 789, 792 (9th Cir. 2015) (per curiam). In *Garcia*, "the IJ 'believed, incorrectly, that [Garcia's] conviction ... constituted a[n] ... aggravated felony,' and so 'erred when [ ]he told [Garcia] that no relief was

available' for that reason." 786 F.3d at 796 (quoting *Pallares-Galan*, 359 F.3d at 1096). Because of the IJ's error, Garcia's "waiver of his right to appeal was not considered and intelligent." *Garcia*, 786 F.3d at 796.

The government must prove a valid waiver by "clear and convincing evidence." *United States v. Gomez*, 757 F.3d 885, 894 (9th Cir. 2014); *see also United States v. Valdivia-Flores*, 876 F.3d 1201, 1205 (9th Cir. 2017). The government "may not simply rely on the signed document purportedly agreeing to the waiver." *Valdivia-Flores*, 876 F.3d at 1205 (citing *Gomez*, 757 F.3d at 895). Additionally, the court should "indulge every reasonable presumption against waiver and should not presume acquiescence in the loss of fundamental rights." *Gomez*, 757 F.3d at 894. The foregoing is especially true where an uncounseled individual purportedly waived his right to appeal. *Id.* "Because [the court] cannot rely on [a] contested waiver document itself, [the court] evaluate[s] the surrounding circumstances to determine whether the government can overcome the presumption against waiver." *Valdivia-Flores*, 876 F.3d at 1205.

In *United States v. Gomez*, the court held that the stipulated removal proceeding violated noncitizen defendant's due process rights because the government's introduction of a signed waiver did not prove by clear and convincing evidence that he waived his right to appeal where he had difficulty reading Spanish, was uncounseled, and the immigration officer did not review the purported waiver with him during their individual meeting. 757 F.3d at 894–96.

In *Chavez-Garcia*, the court held that petitioner's departure from the United States, without more, [did] not provide clear and convincing evidence of a 'considered' and 'intelligent' waiver of the right to appeal. 871 F.3d at 997. The court explained that "[t]he IJ's failure to inform [petitioner] that his departure would constitute a waiver of his previously reserved right to appeal to the BIA render[ed petitioner's] purported waiver invalid." *Id.* at 997–98.

In *Valdivia-Flores*, the court held that Valdivia-Flores's waiver of his right to seek judicial review of his underlying removal order was not considered or intelligent. 876 F.3d at 1205–06. Although he was issued a notice of intent to issue a final administrative removal order that described the window in which he could respond to the charges or petition for judicial review, the notice did not explicitly inform him that he could "refute, through either an administrative or judicial procedure, the legal conclusion underlying his removability." *Id.* Furthermore, the Notice of Intent was issued without a hearing before an immigration judge, despite Valdivia-Flores's request for a hearing. *Id.* at 1206.

19. Right to File Brief

The BIA's refusal to allow an appellant to file a brief may violate due process. *See Singh v. Ashcroft*, 362 F.3d 1164, 1168–69 (9th Cir. 2004) (BIA violated due process by refusing to accept late brief where noncitizen followed all regulations and procedures but the BIA sent the briefing schedule and transcript to an incorrect address). *Cf. Zetino v. Holder*, 622 F.3d 1007, 1013–14 (9th Cir. 2010) (no due process violation when BIA refused to accept untimely brief where it was petitioner's own fault that the brief was untimely and notice of appeal contained coherent argument); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 822 (9th Cir. 2003) (no due process violation where failure to file a brief was caused by counsel's mistake, as opposed to a deficiency in BIA's procedures).

The court has held that due process was violated when the BIA dismissed a motion before the expiration of the filing deadline based on a noncitizen's failure to file a supporting brief. *See Yeghiazaryan v. Gonzales*, 439 F.3d 994, 998–99 (9th Cir. 2006) (BIA violated due process in dismissing motion prior to expiration of 90-day time limitation on motions to reopen, because supporting documentation need not be submitted concurrently with the motion).

The BIA may violate due process if it summarily dismisses an appeal for failing to file a brief, where the notice of appeal is sufficiently detailed to put the BIA on notice of the issues on appeal. *See Garcia-Cortez v. Ashcroft*, 366 F.3d 749, 753–54 (9th Cir. 2004); *see also Nolasco-Amaya v. Garland*, 14 F.4th 1007, 1012 (9th Cir. 2021) ("[W]hen an alien gives detailed reasons to support h[er] appeal, either in a separate brief or on the Notice of Appeal itself, summary dismissal under 8 C.F.R. § 1003.1(d)(2)(i)(E) [(failure to file a brief)] violates the alien's due process rights as guaranteed by the Fifth Amendment.") (citing *Garcia-Cortez*, 366 F.3d at 753)); *Zetino*, 622 F.3d at 1014 (noting that BIA may violate due process where it summarily dismisses an appeal where the notice of appeal is sufficient to put BIA on notice of issues on appeal). *Cf. Singh v. Ashcroft*, 361 F.3d 1152, 1157 (9th Cir. 2004) (summary dismissal appropriate where noncitizen failed to file a brief when he indicated he would on the appeal form and his notice of appeal failed to describe grounds for appeal with requisite specificity).

20. Consideration of Evidence by Agency

The BIA may violate a noncitizen's due process rights on appeal if it fails to consider relevant evidence. *See Larita-Martinez v. INS*, 220 F.3d 1092, 1095 (9th Cir. 2000) (due process claim that BIA failed to review all relevant evidence

submitted in suspension of deportation case); *see also Aguilar-Osorio v. Garland*, 991 F.3d 997, 999 (9th Cir. 2021) (per curiam) (rejecting due process claim and stating, "[t]here is nothing in the record to indicate that there was relevant evidence that the BIA failed to consider in making its hardship decision"). However, for a noncitizen to prevail on such a due process claim, the noncitizen must overcome the presumption that the BIA considered the evidence. *Larita-Martinez*, 220 at 1095–96; *see also Vilchez v. Holder*, 682 F.3d 1195, 1200–01 (9th Cir. 2012) (concluding the agency gave adequate consideration to all of the positive and negative equities in the record and noting that the IJ does not have to write an exegesis on every contention); *Fakhry v. Mukasey*, 524 F.3d 1057, 1066 n.12 (9th Cir. 2008) (concluding IJ did not violate due process despite IJ's initial statement that he had not fully reviewed the record, where IJ went off record to review the record and later stated he had reviewed the complete record).

21. Notice of Evidentiary Requirements

The BIA may violate due process by imposing new proof requirements without notice. *See Singh v. INS*, 213 F.3d 1050, 1053–54 (9th Cir. 2000) (due process violation where BIA newly required noncitizen moving to reopen proceedings held in absentia to produce an affidavit from his employer or doctor, and to have contacted the immigration court). *Cf. Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891–92 (9th Cir. 2002) (petitioner had notice of BIA's evidentiary requirements and did not explain lack of evidence or failure to notify immigration court).

22. Intervening Law

Application of intervening law without notice does not violate due process. *See Theagene v. Gonzales*, 411 F.3d 1107, 1112–13 (9th Cir. 2005). *See also Khan v. Holder*, 584 F.3d 773, 778–79 (9th Cir. 2009) (concluding no due process violation in denying petitioner opportunity to present evidence to meet higher standard post-REAL ID Act); *Williams v. Mukasey*, 531 F.3d 1040, 1043 (9th Cir. 2008) (concluding that publication in the Federal Register of regulations implemented while noncitizen was incarcerated provided noncitizen with notice required by due process).

23. Sua Sponte Credibility Determinations

The BIA may not make an adverse credibility determination in the first instance unless the applicant is afforded certain due process protections. *See*

Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 661 (9th Cir. 2003) (pre-REAL ID Act) (superseded by statute) (holding that due process was violated where the IJ made a credibility observation but failed to make an express credibility determination and noting that under 8 C.F.R. § 1003.1(d)(3)(i) "the BIA would have no choice but to remand to the IJ for an initial credibility determination, as the BIA is now limited to reviewing the IJ's factual findings, including credibility determinations, for clear error"). *Cf. Lin v. Gonzales*, 472 F.3d 1131, 1136 n.1 (9th Cir. 2007) (BIA did not violate due process by denying asylum application on a ground not previously discussed by IJ, where IJ discussed the asylum requirements and gave petitioner notice that he failed to meet his burden of proof).

Where the IJ makes an adverse credibility determination and the BIA affirms that determination for different reasons, there is no due process violation because the applicant was on notice that credibility was at issue. *Pal v. INS*, 204 F.3d 935, 939 (9th Cir. 2000).

Where an applicant had no notice that an adverse credibility determination could be based on his failure to call a witness to corroborate his testimony, due process required a remand for a new hearing. *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000) (as amended).

Cross-reference: Credibility Determinations.

24. Detention

The Attorney General's statutory authority to detain noncitizens whose administrative review is complete but whose removal is stayed pending the court of appeals' resolution of a petition for review is grounded in 8 U.S.C. § 1226(a). *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1067–68 (9th Cir. 2008). 8 U.S.C. § 1226(a) does not authorize indefinite detention. Where a noncitizen's detention is prolonged by pursuit of judicial review of his administratively final removal order, the detention continues to be authorized by § 1226(a). *See Prieto-Romero*, 534 F.3d at 1068. "[D]ue process requires adequate procedural protections to ensure that the government's asserted justification for physical confinement outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* at 1065 (internal quotation marks omitted). In *Rodriguez v. Marin*, the Ninth Circuit court remanded to the district court for it to consider "the minimum requirements of due process to be accorded to [noncitizens who were subject to prolonged detention pursuant to statute] that will ensure a meaningful time and manner of opportunity to be heard … ." 909 F.3d 252, 257 (9th Cir.

2018) (order) (on remand from the Supreme Court). While leaving the constitutional question to the district court to address in the first instance, the court noted:

> We have grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so. Arbitrary civil detention is not a feature of our American government. "[L]iberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, [481 U.S. 739, 755] (1987). Civil detention violates due process outside of "certain special and narrow nonpunitive circumstances." *Zadvydas v. Davis*, [533 U.S. 678, 690] (2001) (internal quotation marks and citation omitted).

Rodriguez, 909 F.3d at 256–57.

25. Duty to Probe All Relevant Facts

"'[A]liens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'" *Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009) (order) (quoting *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002)) (internal quotation marks omitted). "An IJ cannot correct his failure to probe more deeply by simply asking the alien whether he has anything to add in support of his claim." *Id.* (explaining that obligation to probe into relevant facts is founded in statutory duty to "administer oaths, receive evidence, and interrogate, examine and cross-examine the alien and any witnesses" under 8 U.S.C. § 1229a(b)(1)) (internal quotation marks omitted). *See also Zamorano v. Garland*, 2 F.4th 1213, 1226 (9th Cir. 2021) ("[I]f the alien is proceeding pro se, the IJ has an obligation to fully develop the record, meaning the IJ must 'scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'" (internal citation and quotation marks omitted)); *Dent v. Holder*, 627 F.3d 365, 373–74 (9th Cir. 2010) ("When the alien appears pro se, it is the IJ's duty to fully develop the record. Because noncitizens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is

critical that the IJ scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." (internal citation and quotation marks omitted)).

Where the IJ inexplicably delegates his duties to develop the record in an unrepresented noncitizen's case to the government attorney, the IJ creates an unfair conflict of interest on the government and deprives the noncitizen of development of the record, thereby violating due process. *See Pangilinan*, 568 F.3d at 709–10.

See also Zetino v. Holder, 622 F.3d 1007, 1014–15 (9th Cir. 2010) (rejecting petitioner's contention that IJ violated due process by failing to develop a factually complete record or advise him of right to counsel, where court concluded IJ did both).

26. Reasoned Explanation

"Due process and this court's precedent require a minimum degree of clarity in dispositive reasoning and in the treatment of a properly raised argument." *She v. Holder*, 629 F.3d 958, 963 (9th Cir. 2010) (superseded by statute); *see also Hernandez-Galand v. Garland*, 996 F.3d 1030, 1034 (9th Cir. 2021) (stating BIA abuses its discretion when it fails to provide a reasoned explanation for its actions); *Tadevosyan v. Holder*, 743 F.3d 1250, 1258 (9th Cir. 2014) (stating the BIA decision lacked reasoned decisionmaking); *Vilchez v. Holder*, 682 F.3d 1195, 1200–01 (9th Cir. 2012) (rejecting challenge to denial of cancellation of removal, concluding the agency gave adequate consideration to all of the positive and negative equities in the record and noting that the IJ does not have to write an exegesis on every contention); *Antonyan v. Holder*, 642 F.3d 1250, 1256–57 (9th Cir. 2011) (recognizing that BIA must provide reasons for denying relief, but concluding that contrary to petitioner's assertion, BIA adequately addressed CAT claim). In *She*, although the BIA surmised that the IJ made a finding of firm resettlement, the court concluded the IJ did not. 629 F.3d at 963. As such, the court could not "confidently infer the reasoning behind the IJ's conclusion" of firm resettlement and remanded the case to the BIA for clarification. *Id*. at 963–64.

27. Bond Hearing

Due process requires a contemporaneous record of bond hearings. *Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011). "[In] lieu of providing a transcript, the immigration court may record [bond] hearings and make the audio recordings available for appeal upon request." *Id*. Although such audio recordings satisfy due process, the court has not decided whether they are the only constitutional adequate

alternative to a transcript. *Id*. *See also Rodriguez v. Robbins*, 715 F.3d 1127, 1136 (9th Cir. 2013) (reiterating that due process requires a contemporaneous record of bond hearings, such as a transcript or an audio recording available on request).

In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), petitioner sought a writ of habeas corpus, on behalf of himself and a certified class of noncitizens, challenging prolonged detention pursuant immigration detention statutes, namely 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c), without individualized bond hearings and determinations to justify continued detention. Avoiding the constitutional question, the Supreme Court "concluded that as a matter of statutory construction, the only exceptions to indefinite detention were those expressly set forth in the statutes or related regulations. *See* 8 U.S.C. § 1182(d)(5)(A) (humanitarian parole); 8 U.S.C. § 1226(a)(2)(A) (bond); 8 U.S.C. § 1226(c)(2) (witness protection); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1) (bond hearing)." *Rodriguez v. Marin*, 909 F.3d 252, 255 (9th Cir. 2018) (order) (on remand from the Supreme Court). Ultimately, the constitutional question was remanded to the district court for it to consider and determine "the minimum requirements of due process to be accorded to all claimants that will ensure a meaningful time and manner of opportunity to be heard … ." 909 F.3d 252, 257 (9th Cir. 2018) (order).

28. Notice of Deadline

Notice of the deadline to file a special motion to reopen to apply for § 212(c) relief was presumptively in compliance with due process where law was enacted by Congress and regulation that established procedures for filing motions to reopen. *See Luna v. Holder*, 659 F.3d 753, 759–60 (9th Cir. 2011).

29. Video Conference

"The INA expressly authorizes hearings by video conference, even without an alien's consent." *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012) (citing 8 U.S.C. § 1229a(b)(2)(A)(iii) and 8 C.F.R. § 1003.25(c)). Although hearings by video conference are authorized, the court has recognized "that in a particular case video conferencing may violate due process or the right to a fair hearing guaranteed by 8 U.S.C. § 1229a(b)(4)(B)." *Vilchez*, 682 F.3d at 1199. However, whether a particular video-conference hearing violates a petitioner's due process rights must be determined on a case-by-case basis. *Id*. In *Vilchez*, the court held there was no due process violation, where petitioner was represented by counsel, testified at length, had three witnesses speak on his behalf, and failed to establish

the outcome of the proceeding may have been affected by video conference. *Id*. at 1200.

30. Confessions

"'Expulsion cannot turn upon utterances cudgeled from the alien by governmental authorities; statements made by the alien and used to achieve his deportation must be voluntarily given.'" *Gonzaga-Ortega v. Holder*, 736 F.3d 795, 804 (9th Cir. 2013) (as amended) (quoting *Bong Youn Choy v. Barber*, 279 F.2d 642, 646 (9th Cir. 1960)). To prevail on a due process claim that a confession was coerced, the petitioner must demonstrate error and substantial prejudice. *Gonzaga-Ortega*, 736 F.3d at 804 (the court rejected the petitioner's contention that his admission was coerced where he stated his statements were voluntary, he was treated fine, and held for only a brief period).

31. Consideration of Guilty Plea

"As a general rule, a voluntary guilty plea to criminal charges is probative evidence that the petitioner did, in fact, engage in the charged activity, even if the conviction is later overturned for a reason unrelated to voluntariness." *Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014). "[T]here may be instances in which an overturned conviction may require the BIA to give little or no weight to a guilty plea." *Id*. In *Chavez-Reyes*, the petitioner alleged the BIA violated his due process rights by considering his guilty plea because the conviction was overturned on appeal. However, because petitioner's conviction was overturned on a reason unrelated to the voluntariness of his guilty plea, the court concluded that his due process rights were not violated. *Id*.

32. Competence During Proceedings

> The Immigration and Nationality Act ("INA") requires that, "[i]f it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien," 8 U.S.C. § 1229a(b)(3) (INA § 240(b)(3)).

Calderon-Rodriguez v. Sessions, 878 F.3d 1179, 1182 (9th Cir. 2018). In *Matter of M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011), the BIA drew on the general due process principles for assuring competence in criminal proceedings. *See Calderon-Rodriguez*, 878 F.3d at 1182. The BIA explained in *Matter of M-A-M-*:

> [T]he test for determining whether an alien is competent to participate in immigration proceedings is whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses.

Matter of M-A-M-, 25 I. & N. Dec. at 479. "Under *Matter of M-A-M-*, if there are indicia of incompetence—which may 'include a wide variety of observations and evidence,' ranging from 'medical reports or assessments from past medical treatment' to 'school records' and 'testimony from friends,' *id.* at 479–80—'the Immigration Judge must make further inquiry to determine whether the alien is competent for purposes of immigration proceedings,' *id.* at 484." *Calderon-Rodriguez*, 878 F.3d at 1182. *See also Mejia v. Sessions*, 868 F.3d 1118, 1121–22 (9th Cir. 2017) (holding that the indicia of incompetence required the IJ "to explain whether Petitioner was competent and whether procedural safeguards were needed").

"The standard for mental incompetency as set by the BIA in *Matter of M-A-M-*, and endorsed by our court in *Calderon–Rodriguez* and *Mejia*, is a stringent one." *Salgado v. Sessions*, 889 F.3d 982, 989 (9th Cir. 2018). "[A]lleged poor memory without some credible evidence of an inability to comprehend or meaningfully participate in the proceedings does not constitute indicia of incompetency." *Salgado*, 889 F.3d at 989 (concluding petitioner failed to show indicia of incompetency where there was no evidence that he did not comprehend the nature and object of the proceedings, nor evidence that he was unable to meaningfully assist his counsel's defense efforts).

In *Calderon-Rodriguez*, 878 F.3d 1179 (9th Cir. 2018), the court held that substantial evidence did not support the BIA's determination that petitioner was competent to participate in removal proceedings.

In *Mejia*, 868 F.3d at 1121–22, the court held the BIA abused its discretion by failing to explain why it allowed the IJ to disregard rigorous procedural requirements set forth by the BIA in *M-A-M-*, which explains that if an applicant shows an indicia of incompetency, the IJ has an independent duty to determine whether the applicant is competent.

When an IJ makes a mental incompetency finding, the IJ must provide adequate "'safeguards to protect [the noncitizen's] rights and privileges' during the

proceedings, such that he could 'have a reasonable opportunity to examine the evidence and to present evidence on [his] own behalf.'" *Benedicto v. Garland*, 12 F.4th 1049, 1058 (9th Cir. 2021) (quoting 8 U.S.C. § 1229a(b)(3)). "'[T]he ultimate determination of which safeguards to implement and whether they are adequate to ensure the fairness of proceedings is discretionary.'" *Benedicto*, 12 F.4th at 1058 (quoting *Matter of M-J-K-*, 26 I. & N. Dec. 773, 776 (BIA 2016)). In *Benedicto*, the court held that on the record in the case, "the IJ's safeguards sufficed to provide Benedicto with due process … ." 12 F.4th at 1058.

33. Deliberate Indifference

A petitioner can succeed on a due process claim by showing that the INS was 'deliberately indifferent to whether his application was processed,' ... , and that he or she suffered prejudice, 'which means that the outcome of the proceeding *may have been affected* by the alleged violation[.]'" *Dent v. Sessions*, 900 F.3d 1075, 1083 (9th Cir. 2018) (internal citations omitted).

> Under *Brown v. Lynch*, 831 F.3d 1146 (9th Cir. 2016) ("*Brown II*"), to establish deliberate indifference in the immigration context, a petitioner must present:
>
> > (1) a showing of an objectively substantial risk of harm; and (2) a showing that the officials were subjectively aware of facts from which an inference could be drawn that a substantial risk of serious harm existed and (a) the official actually drew that inference or (b) that a reasonable official would have been compelled to draw that inference.
>
> *Id.* at 1150 (internal quotation marks omitted). Even gross negligence does not amount to deliberate indifference. *Brown [v. Holder*, 763 F.3d 1141, 1150 n.5 (9th Cir. 2014)]. Nor does an agency's failure to comply with its own regulations amount to deliberate indifference. *Id.* at 1148.

Dent, 900 F.3d at 1083 (concluding INS was not deliberately indifferent to processing citizenship applications). Note that the court in *Dent*, recognized that although *Brown II* provides a subjective standard for evaluating deliberate indifference claims in the immigration context, an objective standard was used to evaluate a deliberate indifference claim in the prison context in *Castro v. County of*

Los Angeles, 833 F.3d 1060 (9th Cir. 2016) (en banc). The court in *Dent*, did not decide whether the *Brown II* standard should be revised after *Castro* because the claims failed under either standard.

34. Retroactivity

"[L]egislation does not apply retroactively absent a clear indication that Congress intended to make the statute retroactive." *Reyes Afanador v. Garland*, 11 F.4th 985, 990 (9th Cir. 2021). "The presumption against retroactive legislation, … , 'embodies a legal doctrine centuries older than our Republic.' … Several provisions of the Constitution, … , embrace the doctrine, among them, the *Ex Post Facto* Clause, the Contract Clause, and the Fifth Amendment's Due Process Clause." *Vartelas v. Holder*, 566 U.S. 257, 266 (2012) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265–66 (1994)). "[D]ue process 'protects the interests in fair notice and repose that may be compromised by retroactive legislation.'" *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1052 (9th Cir. 2004) (Pregerson, J., concurring) (quoting *Landgraf*, 511 U.S. at 266).

> Despite the dangers inherent in retroactive legislation, it is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect. … A statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.

I.N.S. v. St. Cyr, 533 U.S. 289, 316 (2001) (internal citations and quotation marks omitted) (holding that IIRIRA § 304(b) was impermissibly retroactive as applied to noncitizens who pleaded guilty to deportable offenses before its effective date).

The Supreme Court has set forth a two-step process to determine whether a civil statute may apply retroactively.

> First, when a statute is enacted after the events at issue in a suit, the court must determine whether Congress expressly provided that the statute should apply retroactively. *Landgraf*, 511 U.S. at 280, 114 S. Ct. 1483. If the answer is yes, then the inquiry is complete and the statute applies retroactively. *Id.* If the answer is no, then the court must proceed to the second step and determine whether the statute

> would have a retroactive effect. *Id.* If the statute would operate retroactively, then the court must apply the traditional presumption against retroactivity and prohibit retroactive application of the statute. *Id.*

Cardenas-Delgado v. Holder, 720 F.3d 1111, 1115 (9th Cir. 2013). "[S]omeone seeking to show that a civil statute is impermissibly retroactive is not required to prove any type of reliance … ." *Id.* at 1119 (explaining that after *Vartelas*, it is clear that reliance on prior law is not a necessary predicate for proving retroactivity). "[T]he essential inquiry is whether the new statute attaches new legal consequences to events completed before the enactment of the statute." *Id.*

See, e.g., *Reyes Afanador v. Garland*, 11 F.4th 985, 990 (9th Cir. 2021); *Lopez v. Sessions*, 901 F.3d 1071, 1076 (9th Cir. 2018) (holding that statute at issue did not attach new legal consequences to events completed before its enactment, and thus contention that statute was impermissibly retroactive failed); *Cardenas-Delgado*, 720 F.3d at 1119 (holding that repeal of § 212(c) relief impermissibly attached new legal consequences to the trial convictions of noncitizens like Cardenas-Delgado, and thus could not be applied retroactively); *Ixcot v. Holder*, 646 F.3d 1202, 1213 (9th Cir. 2011) (concluding the post-IIRIRA reinstatement provision is impermissibly retroactive); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 939 (9th Cir. 2005) (holding that application of the continuous presence requirement of 8 U.S.C. § 1229b(d)(2) did not violate due process through an impermissible retroactive effect).

"Retroactivity challenges to immigration laws implicate legitimate due process considerations that need not be exhausted in administrative proceedings because the BIA cannot give relief on such claims." *Garcia-Ramirez*, 423 F.3d at 938.

a. Retroactivity of Board Decisions

"When an agency decides to create a new rule through adjudicatory action, that new rule may apply retroactively to regulated entities." *Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1276 (9th Cir. 2018). "[T]he agency may act through adjudication to clarify an uncertain area of the law, so long as the retroactive impact of the clarification is not excessive or unwarranted. … [A]lthough the agency [is] free to change or modify its position, the agency's interest in doing so must be 'balanc[ed] [against] a regulated party's interest in being able to rely on the terms of a rule as it is written.'" *Garfias-Rodriguez v. Holder*, 702 F.3d 504,

518 (9th Cir. 2012) (en banc) (citation omitted). To balance these interests, the court applies the five-factor test set forth in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982). The factors are:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Garfias-Rodriguez, 702 F.3d at 518 (holding that where the court overturns its own precedent following a contrary statutory interpretation by an agency, the test applies to determine whether the agency's statutory interpretation applies retroactively). *See also Reyes Afanador*, 11 F.4th at 992; *Olivas-Motta*, 910 F.3d at 1276 (stating the test has been applied in the immigration context to determine whether Board decisions may apply retroactively); *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1295 (9th Cir. 2018) (balancing factors and holding that BIA's new CIMT rule should not apply retroactively).

Before *Montgomery Ward* is implicated, there must have been a change in law. *See Olivas-Motta*, 910 F.3d at 1277–78 (concluding *Montgomery Ward* did not apply because there was no change of law, where prior to petitioner's plea, the BIA had never previously determined in a precedential opinion whether felony endangerment in Arizona was a crime of moral turpitude, and thus, the subsequent precedential opinion could not have attached a new disability to his guilty plea; rather, 8 U.S.C. § 1227(a)(2)(A)(ii) had already created the legal consequences of his plea, and it was merely unclear whether it would apply).

See also Reyes Afanador v. Garland, 11 F.4th 985, 996 (9th Cir. 2021) (discussing underlying principles of retroactivity and holding that the BIA impermissibly gave retroactive effect to its adjudicatory rule that indecent exposure was a crime involving moral turpitude).

35. Procedural Delays

"[P]rocedural delays, such as routine processing delays, do not deprive aliens of a substantive liberty or property interest unless the aliens have a 'legitimate claim of entitlement' to have their applications adjudicated within a

specified time." *Mendez-Garcia v. Lynch*, 840 F.3d 655, 666 (9th Cir. 2016) (noncitizens lacked any legitimate claim of entitlement to having their applications adjudicated before their sons turned 21, and thus denial of their applications due to lack of a qualifying relative at the time of the final decision did not deprive them of a substantive right). Additionally, the agency's delay in adjudicating the applications did not violate petitioners' procedural due process rights. *Id.* at 667.

36. Notice and Opportunity to be Heard

"Notice and an opportunity to be heard are fundamental elements of due process that have been long established in our law." *Flores-Rodriguez v. Garland*, 8 F.4th 1108, 1113 (9th Cir. 2021). In *Flores-Rodriguez*, the court held that the immigration judge denied the noncitizen due process by failing to give him notice that his alleged false claim of citizenship would be at issue in the final hearing. *Id.* The court explained:

> The IJ's failure to put Flores-Rodriguez on notice of this central issue in his case denied him "a full and fair hearing" by preventing him from submitting significant testimony and other evidence. … . Because the IJ's conduct potentially affected the outcome of the proceedings, Flores-Rodriguez has also suffered prejudice. … For these reasons, a due process violation warranting reversal has occurred.

Id. at 1114 (quoting *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000)).

F. Due Process Challenges to Certain Procedures and Statutory Provisions

1. Summary Affirmance

The BIA's summary affirmance procedure does not violate due process. *See Falcon Carriche v. Ashcroft*, 350 F.3d 845, 848 (9th Cir. 2003) (cancellation of removal); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078–79 (9th Cir. 2004) (same in asylum context); *see also Tijani v. Holder*, 628 F.3d 1071, 1074 n.1 (9th Cir. 2010) ("This court has held that streamlining does not violate an alien's due process rights."); *Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1323 (9th Cir. 2006) (rejecting challenge to BIA's streamlining procedure because streamlining does not violate due process under *Falcon Carriche*, and petitioner failed to show that court could not adequately determine BIA's reasons for denying relief, or that

BIA abused its own regulations in streamlining); *Jiang v. Gonzales*, 425 F.3d 649, 654 (9th Cir. 2005) (rejecting petitioner's argument that summary affirmance procedures violated his right to an administrative appeal and concluding that the contention was foreclosed by *Falcon Carriche*); *Kumar v. Gonzales*, 439 F.3d 520, 523–24 (9th Cir. 2006) (although BIA violated regulation governing summary affirmance procedures by including a footnote, the addition of the footnote did not prejudice petitioners or affect the outcome of proceedings).

Note that the BIA errs by summarily affirming the IJ's decision where the petitioner challenges procedural irregularities of the proceedings before the IJ. *See Montes-Lopez v. Gonzales*, 486 F.3d 1163, 1165 (9th Cir. 2007). Furthermore, the BIA abuses its discretion when it reduces the voluntary departure period in a streamlined opinion. *See Padilla-Padilla v. Gonzales*, 463 F.3d 972, 980–81 (9th Cir. 2006). Additionally, where the IJ denies relief on alternative reviewable and unreviewable grounds and the BIA issues a streamlined opinion, the court may remand to the BIA. *See Lanza v. Ashcroft*, 389 F.3d 917, 932 (9th Cir. 2004) (remanding where IJ denied relief on alternative grounds and the court was unable to determine whether BIA's streamlined opinion was based on a reviewable or unreviewable ground).

Cross-reference: Streamlined Cases.

2. Summary Dismissal

Whether the BIA's summary dismissal of an appeal violated a petitioner's due process rights is a question of law that is reviewed de novo. *Nolasco-Amaya v. Garland*, 14 F.4th 1007, 1012 (9th Cir. 2021). In *Nolasco-Amaya*, the court held that the BIA violated pro se petitioner's right to due process by summarily dismissing her appeal where petitioner's Notice of Appeal was sufficiently specific to inform the BIA of the issues she was challenging. *Id.* at 1014–15.

3. Reinstated Removal Proceedings

In *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495–96 (9th Cir. 2007) (en banc), the court held that the reinstatement procedures in 8 C.F.R. § 241.8 constitute a valid interpretation of the INA and do not offend due process. *See also Martinez-Merino v. Mukasey*, 525 F.3d 801, 803–05 (9th Cir. 2008).

"Reinstatement of a prior removal order – regardless of the process afforded in the underlying order – does not offend due process because reinstatement of a

prior order does not change the alien's rights or remedies." *Morales-Izquierdo*, 486 F.3d at 497; *see also Tomczyk v. Garland*, 25 F.4th 638, 648 (9th Cir. 2022) (concluding reinstatement of prior removal order did not violate due process even though reinstatement would deny noncitizen the ability to stay in the United States with his United States citizen wife and stating the "lawful denial of immigration relief does not violate any of a noncitizen's or a noncitizen's family's substantive rights protected by the Due Process Clause."); *Vega-Anguiano v. Barr*, 982 F.3d 542, 550 (9th Cir. 2020) (as amended) (discussing *Morales-Izquierdo*). In *Vega-Anguiano*, the court explained that although *Morales-Izquierdo* addressed "due process" and overruled prior case law which held a removal order that did not comport with due process could not be reinstated, *Morales-Izquierdo* said nothing about collaterally attacking a final order of removal based on a "gross miscarriage of justice." *Vega-Anguiano*, 982 F.3d at 550. As such, the court held that Vega-Anguiano had shown a gross miscarriage of justice where the removal order lacked a valid legal basis at the time of his removal, and thus could not be reinstated. *Id.* at 550–51 (distinguishing between a collateral attack of a final order of removal based on a gross miscarriage of justice, and a collateral attack based on an alleged due process violation). The court did not address petitioner's due process contentions. *Id.* at 551.

"[T]he post IIRIRA reinstatement provision is impermissibly retroactive […] when applied to [a noncitizen] who applied for immigration relief prior to IIRIRA's effective date." *See Ixcot v. Holder*, 646 F.3d 1202, 1213 (9th Cir. 2011) (concluding the post-IIRIRA reinstatement provision is impermissibly retroactive).

In *Villa-Anguiano v. Holder*, 727 F.3d 873 (9th Cir. 2013) the court held that ICE improperly reinstated a removal order after the district court found the underlying removal proceedings violated noncitizen's due process rights. The court concluded that when:

> a district court finds constitutional infirmities in the prior removal proceedings that invalidate the prior removal for purposes of criminal prosecution, the agency cannot simply rely on a pre-prosecution determination to reinstate the prior removal order. Instead the agency must—as it may well ordinarily do—(1) provide the alien with an opportunity *after* the criminal prosecution is dismissed to make a written or oral statement addressing the expedited reinstatement determination in light of the facts found and the legal conclusions reached in the course of the criminal case; and (2) independently reassess whether to rely on the order

> issued in the prior proceedings as the basis for deportation or instead to instigate full removal proceedings.

Id. at 880.

"Aliens subject to reinstated orders of removal are placed in reasonable fear screening proceedings, if they express fear of persecution or torture in their country of removal." *Bartolome v. Sessions*, 904 F.3d 803, 807 (9th Cir. 2018).

> These reasonable fear proceedings, as outlined in 8 C.F.R. §§ 208.31, 1208.31, are intended to provide a fair determination of whether an alien has a reasonable fear of persecution or torture, which fear would require the alien to be referred to an IJ to review eligibility for withholding of removal or relief under the Convention Against Torture ("CAT"). However, these reasonable fear proceedings are to be streamlined, not intended to have full evidentiary hearings, because the alien continues to be subject to the expedited removal process used for previously removed aliens with reinstated orders of removal. Thus, an IJ's failure specifically to address all of the evidence and claims before him or her (during the reasonable fear review proceedings) does not violate the alien's due process rights.

Bartolome, 904 F.3d at 807. "Although previously removed aliens in the United States are entitled to due process protections, they are not entitled to all of the same protections granted to aliens not previously removed." *Id.* at 812 (concluding that Bartolome's due process allegations lacked merit).

"Due process does not mandate the right to present new evidence to an appellate tribunal when a litigant has been afforded a reasonable opportunity to present evidence to the first-instance decision-maker." *Alvarado-Herrera v. Garland*, 993 F.3d 1187, 1195 (9th Cir. 2021) (concluding that reasonable fear proceedings did not violate due process, notwithstanding that the proceedings did not afford noncitizen the right to present new evidence during review hearing before immigration judge). *See also Orozco-Lopez v. Garland*, 11 F.4th 764, 779 (9th Cir. 2021) (rejecting petitioner's due process claim "because purpose of the hearing is to conduct a de novo review of the record prepared by the asylum officer, and the IJ may (but need not) accept additional evidence.).

3. IIRIRA

The application of IIRIRA to place noncitizens in removal rather than deportation proceedings does not by itself amount to a due process violation. *See Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1008–09 (9th Cir. 2003); *see also Lopez-Urenda v. Ashcroft*, 345 F.3d 788, 796 (9th Cir. 2003) (rejecting claim that "placement in removal proceedings is so fundamentally unfair as to amount to a denial of due process"); *Ramirez-Zavala v. Ashcroft*, 336 F.3d 872, 874–75 (9th Cir. 2003) (noncitizen who tried to file for suspension of deportation was not eligible for such relief because her removal proceedings commenced with the filing of a Notice to Appear); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 600 (9th Cir. 2002) (same). *Cf. Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 935–44 (9th Cir. 2007) (concluding that IIRIRA's repeal of suspension of deportation under former 8 U.S.C. § 1254(a)(2) was impermissibly retroactive as applied to the noncitizen, who had the right to seek suspension of deportation when she applied for naturalization 18 months prior to IIRIRA's effective date), *implied overruling recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111 (9th Cir. 2013) (explaining that after *Vartelas v. Holder*, 566 U.S. 257 (2012), "it is clear that someone seeking to show that a civil statute is impermissibly retroactive is not required to prove any type of reliance and the essential inquiry is whether the new statute attaches new legal consequences to events completed before the enactment of the statute.").

In *Vartelas v. Holder*, 566 U.S. 257 (2012), the Supreme Court held that it was impermissible to retroactively apply an IIRIRA provision to a lawful permanent resident whose conviction was obtained prior to enactment of IIRIRA. The Court made clear that 'neither actual reliance nor reasonable reliance was required to show that a statute was impermissibly retroactive." *Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1118 (9th Cir. 2013) (explaining *Vartelas* and how Ninth circuit cases had previously held otherwise). *Cf. Peng v. Holder*, 673 F.3d 1248, 1256 (9th Cir. 2012) (decided before *Vartelas* and holding that applying IIRIRA § 304(b) retroactively may result in impermissible retroactive effect, where the noncitizen demonstrates reasonable reliance on pre-IIRIRA law).

The retroactive application of the stop-time rule in § 309(c)(5)(A) of IIRIRA does not violate due process. *See Ram v. INS*, 243 F.3d 510, 516–19 (9th Cir. 2001).

Additionally, the ten-year continuous physical presence requirement for cancellation of removal eligibility in 8 U.S.C. § 1229b(b)(1)(A) and the stop-time

rule of § 1229b(d)(1) do not violate substantive due process. *See Padilla-Padilla v. Gonzales*, 463 F.3d 972, 978–79 (9th Cir. 2006).

IIRIRA's limitations on habeas review were found to be constitutional as applied in *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020). In that case, Thuraissigiam contended that "IIRIRA violate[ed] his right to due process by precluding judicial review of his allegedly flawed credible-fear proceeding." The Supreme Court rejected that argument holding that where Thuraissigiam entered the country illegally, he did not have a federal constitutional procedural right to judicial review of an allegedly flawed credible fear determination in expedited removal proceedings. *Id.* at 1981–84. The Court explained that because he had entered the country illegally, he was to be treated as an "applicant for admission" and had only those rights regarding admission that Congress provided by statute. "In [Thuraissigiam's] case, Congress provided the right to a 'determin[ation]' whether he had 'a significant possibility' of 'establish[ing] eligibility for asylum,' and he was given that right. … Because the Due Process Clause provides nothing more, it does not require review of that determination or how it was made." *Id.* at 1983 (quoting §§ 1225(b)(1)(B)(ii), (v)). The Court held, in short, that "neither the Suspension Clause nor the Due Process Clause of the Fifth Amendment require[d] any further review of [Thuraissigiam's] claims, and IIRIRA's limitations on habeas review [were] constitutional as applied." *Thuraissigiam*, 140 S. Ct. at 1964.

4. Adjustment of Status

The lawful denial of adjustment of status does not violate a noncitizen's or the noncitizen's "family's substantive rights protected by the Due Process Clause." *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1091 (9th Cir. 2010), *overruled in part on other grounds by Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012) (en banc). *See also Tomczyk v. Garland*, 25 F.4th 638, 648 (9th Cir. 2022) (stating "lawful denial of immigration relief does not violate any of a noncitizen's or a noncitizen's family's 'substantive rights protected by the Due Process Clause.'").

5. 8 C.F.R. § 245.2(a)(2)(i)(B)

In *Ruiz-Diaz v. United States*, 703 F.3d 483 (9th Cir. 2012), a class of noncitizen religious workers, as beneficiaries of five-year special immigrant religious worker visas, challenged the regulation governing the process for religious workers to apply for adjustment of status. The court explained that

plaintiffs could not claim "that their due process rights [were] violated unless they ha[d] some 'legitimate claim of entitlement' to have the petitions approved before their visas expire." *Id*. at 487. The court rejected the due process claim, explaining that even if the regulation "ma[de] it more difficult for plaintiffs to obtain adjustment of status, it d[id] not violate due process as there is no legitimate statutory or constitutional claim of entitlement to concurrent filings." *Id.* at 487–88.

6. 8 U.S.C. § 1231(b)(3)(B)(ii)

"The void-for-vagueness doctrine stems from the Fifth Amendment's guarantee of due process." *Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1281 (9th Cir. 2018) (rejecting argument that 8 U.S.C. § 1227(a)(2)(A)(ii) is unconstitutionally vague), *cert. denied*, 140 S. Ct. 1105 (2020). "The Fifth Amendment provides that '[n]o person shall ... be deprived of life, liberty, or property, without due process of law.' [Supreme Court] cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). "Because 'deportation is "'a particularly severe penalty,'" which may be of greater concern to a convicted alien than "'any potential jail sentence,'" ' a provision of immigration law making an alien deportable is subject to the void-for-vagueness doctrine." *Olivas-Motta*, 910 F.3d at 1281 (quoting *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018)).

In *Guerrero v. Whitaker*, 908 F.3d 541, 542 (9th Cir. 2018), the court addressed the legal argument that the statutory phrase "particularly serious crime" within 8 U.S.C. § 1231(b)(3)(B)(ii), is unconstitutionally vague on its face following the Supreme Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Applying the reasoning of *Johnson* and *Dimaya*, the court held that the "particularly serious crime" provision is not unconstitutionally vague on its face. *Guerrero*, 908 F.3d at 543–45 (explaining that the incorrect legal standard had been applied previously to the same question in *Alphonsus v. Holder*, 705 F.3d 1031 (9th Cir. 2013), and therefore addressing the question with "fresh" eyes).

7. 18 U.S.C. § 16(b)

"The Fifth Amendment's Due Process Clause 'requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Dimaya v. Lynch*, 803 F.3d 1110, 1112–13 (9th Cir. 2015) (citations omitted), *affirmed by*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018). In *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015), the Supreme Court noted the need for "efficiency, fairness, and predictability in the administration of immigration law." In *Dimaya*, this court explained that "[v]ague immigration statutes significantly undermine these interests by impairing non-citizens' ability to anticipate the immigration consequences of guilty pleas in criminal court." *Dimaya*, 803 F.3d at 1114 (internal quotation marks and citation omitted).

In *Dimaya*, the Ninth Circuit "concluded that 8 U.S.C. § 1101(a)(43)(F)'s definition of 'crime of violence' was void for vagueness as it related to 18 U.S.C. § 16(b)." *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1131 (9th Cir. 2016); *see also Dimaya*, 803 F.3d at 1120. Affirming the Ninth Circuit decision that § 16(b) as incorporated into the INA is unconstitutional, the Supreme Court held "§ 16(b) 'produces more unpredictability and arbitrariness than the Due Process Clause tolerates.'" *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015)).

Because "§ 16(b) is unconstitutionally vague [it] cannot be the basis for an aggravated felony" that would make someone removable. *Dent v. Sessions*, 900 F.3d 1075, 1085 (9th Cir. 2018) (granting petition for review where's petitioner's Arizona conviction for third-degree escape was not a crime of violence, and thus not an aggravated felony that would make him removable).

Note, the Ninth Circuit's decision in *Dimaya*, did not cast doubt on the constitutionality of 18 U.S.C. § 16(a)'s definition of crime of violence. *See Arellano Hernandez*, 831 F.3d at 1131–32.

8. 8 U.S.C. § 1101(f)(1)

"A statute is unconstitutionally vague if it is so standardless that it authorizes or encourages seriously discriminatory enforcement or if it fails to provide a person of ordinary intelligence fair notice of what is prohibited." *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1047 (9th Cir. 2017) (en banc) (internal quotation

marks and citation omitted). In *Ledezma-Cosino*, the court determined that the "habitual drunkard" provision in 8 U.S.C. § 1101(f)(1) is not unconstitutionally vague. *Id*. *See also Calderon-Rodriguez v. Sessions*, 878 F.3d 1179, 1184 (9th Cir. 2018) (holding that equal protection argument which rested on a case prior to the en banc *Ledezma-Cosino* decision failed).

9. Crime Involving Moral Turpitude

The phrase "crime involving moral turpitude" is not unconstitutionally vague. *Jordan v. De George*, 341 U.S. 223, 231–32 (1951); *see also Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1250 (9th Cir. 2019) (rejecting challenge to 8 U.S.C. § 1227(a)(2)(A)(i)), *cert. denied sub nom. Islas-Veloz v. Barr*, 140 S. Ct. 2704 (2020). As explained in *Islas-Veloz*, the Supreme Court's decisions in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) and *Johnson v. United States*, 576 U.S. 591 (2015), "did not reopen the inquiry into the constitutionality of the phrase." *Islas-Veloz*, 914 F.3d at 1250. Rather, the court has "repeatedly echoed the holding that the Supreme Court laid down in *De George*" and no subsequent cases have changed the constitutionality of that phrase. *Islas-Veloz*, 914 F.3d at 1250; *see also Diaz-Flores v. Garland*, 993 F.3d 766, 774 (9th Cir. 2021) (stating that even if the panel agreed with petitioner that the phrase "crime involving moral turpitude" is unconstitutionally vague, precedent binds the court from holding so); *Martinez-De Ryan v. Whitaker*, 909 F.3d 247, 251–52 (9th Cir. 2018) (rejecting challenge to 8 U.S.C. § 1182(a)(2)(A)(i)(I), and holding that the phrase is not unconstitutionally vague); *Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1281 (9th Cir. 2018) (rejecting argument that 8 U.S.C. § 1227(a)(2)(A)(ii) is unconstitutionally vague), *cert. denied*, 140 S. Ct. 1105 (2020); *Tseung Chu v. Cornell*, 247 F.2d 929, 938–39 (9th Cir. 1957) (citing *De George* in ruling that the phrase "crime involving moral turpitude" was constitutional in the immigration context).

10. Statutory Cap on Grants of Cancellation of Removal, 8 U.S.C. § 1229b(e)

The court held in *Mendez-Garcia v. Lynch*, that petitioner's due process right to a "fundamentally fair proceeding" was not violated by the application of the statutory cap on grants of applications for cancellation of removal pursuant to 8 U.S.C. § 1229b(e). 840 F.3d 655, 669 (9th Cir. 2016) (holding although the statutory cap may have deprived Mendez-Garcia of the ability to receive cancellation of removal relief, the right to receive that relief unrestricted by the cap was "a right he never had", and thus, the due process challenge failed).

II. MISCELLANEOUS CONSTITUTIONAL ISSUES

A. Equal Protection Generally

Noncitizens are entitled to the benefits of the Equal Protection Clause. *Halaim v. INS*, 358 F.3d 1128, 1135 (9th Cir. 2004) (Lautenberg Amendment, which lowered the burden of proof for some categories of refugees, did not violate equal protection). "[B]ecause federal authority in the areas of immigration and naturalization is plenary, federal classifications distinguishing among groups of aliens ... are valid unless wholly irrational." *Halaim*, 358 F.3d at 1135 (internal quotation marks omitted); *see also Lawrence v. Holder*, 717 F.3d 1036, 1041 n.9 (9th Cir. 2013) (addressing a "half-hearted" equal protection argument, the court note that Congress can "draw lines that specify effective dates when it enacts or amends relief statutes."); *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1163–64 (9th Cir. 2002) (filing deadline for NACARA relief did not violate equal protection); *Perez-Oropeza v. INS*, 56 F.3d 43, 45–46 (9th Cir. 1995) (limited eligibility for family unity waiver did not violate equal protection).

"The Constitution's guarantee of equal protection forbids governmental decisionmakers from treating differently persons who are in all *relevant* respects alike." *Roy v. Barr*, 960 F.3d 1175, 1183 (9th Cir. 2020) (internal quotation marks and citation omitted), *cert. denied sub nom. Roy v. Wilkinson*, 141 S. Ct. 1517 (2021). An "equal protection claim turns upon [the petitioner's] ability to demonstrate that the treatment … differed from that of similarly situated persons." *Cruz Rendon v. Holder*, 603 F.3d 1104, 1110 n.2 (9th Cir. 2010); *see also Lopez v. Sessions*, 901 F.3d 1071, 1078 (9th Cir. 2018) (rejecting equal protection claim where petitioner was convicted after the effective date of AEDPA and was therefore not similarly situated to lawful permanent residents who could have relied on the availability of 212(c) relief because their pleas were entered prior to the effective date). To establish an equal protection violation, the petitioner bears "the burden to negate every conceivable basis which might support [a legislative classification] ... whether or not the basis has a foundation in the record." *de Martinez v. Ashcroft*, 374 F.3d 759, 764 (9th Cir. 2004) (as amended) (internal quotation marks omitted); *see also Gonzalez-Medina v. Holder*, 641 F.3d 333, 336 (9th Cir. 2011) ("[petitioner] has the burden to negate every conceivable basis which might support a legislative classification ... whether or not the basis has a foundation in the record." (internal quotation marks and citation omitted). "The government has no obligation to produce evidence to sustain the rationality of a statutory classification." *Gonzalez-Medina*, 641 F.3d at 336 (internal quotation marks and citation omitted).

1. NACARA

Limitations by country of origin on the availability of NACARA special rule cancellation of removal do not violate equal protection. *See Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602–03 (9th Cir. 2002); *Ram v. INS*, 243 F.3d 510, 517 (9th Cir. 2001); *see also Masnauskas v. Gonzales*, 432 F.3d 1067, 1071 n.5 (9th Cir. 2005) (NACARA §§ 202 and 203's nationality-based classifications do not violate equal protection); *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1163–65 (9th Cir. 2002) (NACARA limitation based on whether an applicant filed an asylum application by April 1, 1990 deadline does not violate equal protection or due process).

2. Voluntary Departure

The court has held that treating noncitizens permitted voluntary departure differently, with respect to the window for filing a motion to reopen, from those not granted voluntary departure, does not violate equal protection. *See de Martinez v. Ashcroft*, 374 F.3d 759, 764 (9th Cir. 2004) (as amended).

Furthermore, 8 U.S.C. § 1229c(b)(1)(A), which draws a distinction for purposes of voluntary departure eligibility between noncitizens present in the United States for at least a year, and those present for less than a year, does not violate equal protection. *See Tovar-Landin v. Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004). Although "some people under somewhat similar circumstances might manage to remain long enough to accrue some benefit or other ... the [petitioner's] constitutional rights have [not] been violated." *Id.* (internal quotation marks omitted).

3. 8 C.F.R. § 1003.44

8 C.F.R. § 1003.44(k)(2), which permits noncitizens who were in proceedings before a certain date to file a motion to reopen to seek discretionary relief, but excludes noncitizens who were issued a final order of deportation or removal and then illegally returned to the United States, does not violate equal protection. *See Avila-Sanchez v. Mukasey*, 509 F.3d 1037, 1041 (9th Cir. 2007); *see also Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1174 (9th Cir. 2001) (explaining that "[t]he government has a legitimate interest in discouraging aliens who have already been deported from illegally reentering, and this distinction is rationally related to that purpose").

4. 8 U.S.C. § 1182 Waiver

8 U.S.C. § 1182(h) "provides the Attorney General with discretion to waive certain deportation orders." *Taniguchi v. Schultz*, 303 F.3d 950, 956 (9th Cir. 2002). Although § 1182(h) provides "a waiver of deportation to non-[lawful permanent resident] aggravated felons while denying such a waiver to [lawful permanent resident] aggravated felons," the distinction does not violate equal protection. *Id.* at 957–58; *see also Habibi v. Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011) ("Congress does not violate equal protection by denying LPRs the opportunity to apply for a § 212(h) waiver."); *Hing Sum v. Holder*, 602 F.3d 1092, 1095 (9th Cir. 2010). Additionally, the court has held that there exists a rational basis for applying the seven-year residency requirement to lawful permanent residents ("LPR"), and not to non-LPRs, convicted of crimes involving moral turpitude, and thus does not violate equal protection. *See Peng v. Holder*, 673 F.3d 1248, 1258–59 (9th Cir. 2012).

Additionally, the court has rejected an equal protection challenge to the "absence of a waiver provision in 8 U.S.C. § 1182(a)(2)(A)(i)(II) for a state pardon, although a waiver is available in similar circumstances to deportable aliens, pursuant to 8 U.S.C. § 1227(a)(2)(A)(vi)." *Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1252 (9th Cir. 2008).

5. Availability of Discretionary Relief

Previously, the court held that "when the basis upon which the [government] seeks deportation *is identical to a statutory ground for exclusion* for which discretionary relief [under former INA § 212(c)] would be available, the equal protection component of the fifth amendment ... requires that discretionary relief be accorded in the deportation context as well." *Komarenko v. INS*, 35 F.3d 432, 434 (9th Cir. 1994), *abrogated by Abebe v. Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc) (per curiam); *see also Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1198–99 (9th Cir. 2002); *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981), *overruled by Abebe*, 554 F.3d at 1207.

In *Abebe v. Mukasey*, 554 F.3d 1203, 1206–07 (9th Cir. 2009) (en banc) (per curiam), the court overruled *Tapia-Acuna*'s holding "that there's no rational basis for providing section 212(c) relief from inadmissibility, but not deportation[,]" and held that the BIA did not "violate petitioner's right to equal protection by finding him ineligible for section 212(c) relief from deportation" where petitioner was not eligible for 212(c) relief in the first place. The court explained that "Congress has

particularly broad and sweeping powers when it comes to immigration, and is therefore entitled to an additional measure of deference when it legislates as to admission, exclusion, removal, naturalization or other matters pertaining to aliens. … [The court's task] is to determine, not whether the statutory scheme makes sense …, but whether [the court] can conceive of a rational reason Congress may have had in adopting it." *Id*. at 1206.

6. Federal First Offender Act ("FFOA")

"[T]he constitutional guarantee of equal protection does not require treating, for immigration purposes, an expunged state conviction of a drug crime the same as a federal drug conviction that has been expunged under the FFOA." *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (en banc), *overruling* the holdings to the contrary in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), *Rice v. Holder*, 597 F.3d 952, 956 (9th Cir. 2010); *Ramirez-Altamirano v. Holder*, 563 F.3d 800, 806–07 (9th Cir. 2009); *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001); and *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000). Note the rule in *Nunez-Reyes* applies prospectively only. 646 F.3d at 690–94.

7. 8 U.S.C. § 1101(a)(48)(A)

"[W]here a juvenile offender is charged and convicted as an adult under state law, the offender has a 'conviction' for purposes of [8 U.S.C. § 1101(a)(48)(A)]." *Rangel-Zuazo v. Holder*, 678 F.3d 967 (9th Cir. 2012) (per curiam). It does not violate equal protection "to treat differently offenders who have reached eighteen years of age before conviction or adjudication from those who have not reached eighteen years of age before conviction or adjudication." *Id*.

8. 8 U.S.C. § 1101(f)(1)

"The statutory 'habitual drunkard' provision does not violate equal protection principles." *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1048 (9th Cir. 2017) (en banc). "Congress reasonably could have concluded that, because persons who regularly drink alcoholic beverages to excess pose increased risks to themselves and to others, cancellation of removal was unwarranted." *Id.* *See also Calderon-Rodriguez v. Sessions*, 878 F.3d 1179, 1184 (9th Cir. 2018) (holding that equal protection argument which rested on a case prior to the en banc *Ledezma-Cosino* decision failed).

9. 8 U.S.C. § 1101(f)(7)

Congress has "established eight categories of individuals who are conclusively presumed to *lack* good moral character." *Romero-Ochoa v. Holder*, 712 F.3d 1328, 1330 (9th Cir. 2013) (citing 8 U.S.C. § 1101(f)). In *Romero-Ochoa*, the petitioner challenged on equal protection grounds § 1101(f)(7), which classifies individuals who have been "confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more" as lacking good moral character. 712 F.3d at 1130. The court denied the petition for review, concluding that there is a rational basis for § 1101(f)(7). *See id*. at 1331–32.

10. One-Year Filing Deadline

"The BIA has held that the one-year deadline for filing an asylum application restarts if an alien leaves the United States and then reenters – an application may be filed within one year of reentry, even if the applicant previously lived in the United States for more than a year and was gone for only a brief period." *Gonzalez-Medina v. Holder*, 641 F.3d 333, 336–37 (9th Cir. 2011). "Leaving the country resets the deadline only if the applicant's departure is for a 'legitimate' reason and not 'solely or principally ... to overcome the 1-year time bar." *Id*. at 337 (citation omitted). Applying the one-year deadline for filing an asylum application to an "alien who has been in the United States for more than a year but has not left" does not violate equal protection. *Id*. (concluding the government's treatment of Gonzalez-Medina was "rationally related to a legitimate government purpose," and that she failed to establish an Equal Protection claim).

11. 8 U.S.C. § 1229b

There exists a rational basis for "Congress to require a ten-year span with exceptions for intermittent absences as opposed to a total-number-of-days requirement" for purposes of calculating continuous physical presence for cancellation of removal. *See Hernandez-Mancilla v. Holder*, 633 F.3d 1182, 1185–86 (9th Cir. 2011).

12. Application of Law Where There is a Circuit Split

"[T]he mere existence of a circuit split on an issue of statutory interpretation" violates neither due process, nor equal protection. *Habibi v. Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011) (as amended) (rejecting contention

that the differing application of the law in different circuits violates equal protection).

13. 8 C.F.R. § 245.2(a)(2)(i)(B)

"Under the regulation, 8 C.F.R. § 245.2(a)(2)(i)(B), [religious workers] are among the categories of applicants for lawful permanent resident … status who cannot file their visa applications concurrently with the petitions of their sponsoring employers. The employees must wait for the Citizenship and Immigration Service … to approve their employers' petitions before they can file applications." *Ruiz-Diaz v. United States*, 703 F.3d 483, 485 (9th Cir. 2012). The court has held that 8 C.F.R. § 245.2(a)(2)(i)(B) does not violate equal protection. In *Ruiz-Diaz*, the court concluded that the regulation had a "rational basis" where the government demonstrated "that there have been concerns about fraud in the religious worker visa program, and as a result, the government has encountered difficulties in determining which applicants are bona fide religious workers." 703 F.3d at 486–87.

14. Child Status Protection Act

"[T]he failure of Congress to apply the [Child Status Protection Act] to NACARA [does not] violate equal protection." *Tista v. Holder*, 722 F.3d 1122, 1128 (9th Cir. 2013). The Child Status Protection Act "was designed to protect individuals who seek relief as derivative beneficiaries when their parents obtain [asylum] relief. A common difficulty arose in cases where the child was under the age of twenty-one years when the child's parents applied for relief, but was over that age when the parents were granted that relief. That is, it was designed to prevent a determination that the child had 'aged out' of eligibility." *Id*. at 1125 (internal quotation marks omitted). The court explained that "children of those who have obtained NACARA relief are in a category that is significantly distinct from children of those who have obtained asylum relief." *Id*. at 1127.

15. 8 U.S.C. §§ 1401 & 1409

"The gender-based distinction infecting §§ 1401(a)(7) and 1409(a) and (c), … , violates the equal protection principle." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1700–01 (2017). The statutes in question created different continuous physical presence requirements based on gender, before an unwed parent could pass citizenship status to their children. *Id*. The Supreme Court determined the

appropriate remedy was to apply the longer requirement prospectively, rather than to extend the benefit of the shorter requirement. *Id.*

16. 8 U.S.C. § 1433

In *Dent v. Sessions*, 900 F.3d 1075, 1080 (9th Cir. 2018), petitioner brought "a facial challenge to 8 U.S.C. § 1433 (1982), a citizenship statute in effect when he began the naturalization process." Applying rational basis review, the court concluded that a legitimate governmental interest was rationally related to § 1433's requirement that citizen parents petition to naturalize their adopted, foreign-born children," and thus did not violate the Fifth Amendment's Equal Protection Clause. *Dent*, 900 F.3d at 1082.

17. Derivative Citizenship 8 U.S.C. § 1432(a)(3) (1984)

In *Roy v. Barr*, 960 F.3d 1175 (9th Cir. 2020), *cert. denied sub nom. Roy v. Wilkinson*, 141 S. Ct. 1517 (2021), the court concluded that petitioner failed to establish an equal protection violation with respect to former 8 U.S.C. § 1432(a)(3) (1984), the applicable derivative-citizenship statute. "Section 1432(a)(3)'s second clause grants citizenship to a child upon 'the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation.'" *Roy*, 960 F.3d at 1179. Petitioner alleged that the clause discriminated by gender and legitimacy. The court held that although the second clause discriminates on the basis of gender, petitioner's gender-discrimination claim failed because she was not similarly situated to persons who derived citizenship under § 1432(a)(3)'s second clause. *See Roy*, 960 F.3d at 1181–82. The panel also rejected the petitioner's legitimacy-discrimination claim, concluding that, because both fathers and mothers can legitimate a child after the child's birth, legitimation is not inherently discriminatory on the basis of gender. *See id.* at 1183–84. *See also United States v. Mayea-Pulido*, 946 F.3d 1055 (9th Cir. 2020) (upholding as constitutional the first clause of 8 U.S.C. § 1432(a)(3), which grants citizenship to a child upon the naturalization of the parent having legal custody of the child when there has been a legal separation of the parents).

B. Suspension Clause

"The Suspension Clause provides that '[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.'" *Singh v. Mukasey*, 533 F.3d 1103, 1106 (9th Cir. 2008) (quoting U.S. Const. art. 1, § 9, cl. 2.); *see also Perez v. Barr*, 957 F.3d 958,

963 (9th Cir. 2020). "Congress may eliminate the writ without running afoul of the Suspension Clause so long as it provides a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention." *Singh*, 533 F.3d at 1106 (internal quotation marks omitted); *see also Negrete v. Holder*, 567 F.3d 419, 422 (9th Cir. 2009) (per curiam).

The Suspension Clause requires some judicial intervention in deportation cases. *See Lolong v. Gonzales*, 484 F.3d 1173, 1177 (9th Cir. 2007) (en banc). *See also Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1981 (2020) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 300 (2001)).

The court has "held the REAL ID Act does not violate the Suspension Clause because a petition for review under §1252(a)(5) is 'an adequate substitute for habeas proceedings.'" *Perez*, 957 F.3d at 964 (9th Cir. 2020) (quoting *Puri v. Gonzales*, 464 F.3d 1038, 1041 (9th Cir. 2006)). "[I]f a substitute remedy provides the same scope of review as a habeas remedy, it is adequate and effective." *Puri*, 464 F.3d at 1042; *see also Perez*, 957 F.3d at 964.

In *Perez v. Barr*, the court held that the Suspension Clause does not require government compensation of court-appointed counsel, at least as long as the court can obtain the assistance of pro bono counsel. 957 F.3d at 964. The court explained, "[t]he unavailability of compensation for counsel does not reduce the scope of the 'review' or 'relief' available to REAL ID Act petitioners who obtain competent pro bono representation." *Id.*

The court has also determined that a potential motion to reopen with the agency to assert a nationality claim can suffice to alleviate Suspension Clause concerns. *See Iasu v. Smith*, 511 F.3d 881, 892–93 (9th Cir. 2007).

Additionally, the court held in *Rauda v. Jennings*, 8 F.4th 1050, 1054 (9th Cir. 2021), that 8 U.S.C. § 1252(g), which bars judicial review of Attorney General's action to execute removal, does not violate the Suspension Clause. *Rauda*, 8 F.4th at 1055–59.

The Supreme Court held in *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1983 (2020) that, as applied in that case, 8 U.S.C. § 1252(e)(2), which limits the review that an alien in expedited removal proceedings may obtain via a petition for a writ of habeas corpus, does not violate the Suspension Clause or the Due Process Clause.

See also Negrete, 567 F.3d at 422 ("The fact that neither [the court of appeals] nor the district court has jurisdiction to hear ... discretionary claims does not present a Suspension Clause problem because review of discretionary determinations was not traditionally available in habeas proceedings."); *Garcia de Rincon v. Dep't of Homeland Security*, 539 F.3d 1133, 1141 (9th Cir. 2008) (jurisdictional limitations on review of noncitizen's expedited removal order did not violate the suspension clause).

C. Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act

Fernandez v. Mukasey, 520 F.3d 965, 966 (9th Cir. 2008) (per curiam) held that the qualifying relative requirement for cancellation of removal did not substantially burden the petitioners' religious exercise. Petitioners had argued that the qualifying relative requirement violated free exercise of their religion where they were unable to have a child, and religious beliefs prevented them from using in vitro fertilization. *Id*.

In *Ruiz-Diaz v. United States*, 703 F.3d 483 (9th Cir. 2012), the court held that a regulation governing the process by which religious workers can apply for adjustment of status pursuant to 8 U.S.C. § 1255 did not impose a substantial burden on plaintiff's religious exercise; therefore, the regulation did not violate the RFRA. *Id*. at 486.

D. Fourth Amendment Exclusionary Rule

The exclusionary rule provides that in criminal proceedings "evidence obtained in violation of a defendant's Fourth Amendment rights may not be introduced to prove the defendant's guilt." *Martinez-Medina v. Holder*, 673 F.3d 1029, 1033 (9th Cir. 2011). "The exclusionary rule is an exceptional remedy typically reserved for violations of constitutional rights." *Hong v. Mukasey*, 518 F.3d 1030, 1034 (9th Cir. 2008) (internal quotation marks omitted).

> As a general matter, the Fourth Amendment's exclusionary rule does not apply to immigration proceedings. *See [INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984)]. There are, however, two longstanding exceptions: (1) "when the agency violates a regulation promulgated for the benefit of petitioners and that violation prejudices the petitioner's protected interests" and (2) "when the agency egregiously violates a petitioner's Fourth Amendment rights."

Sanchez v. Sessions, 904 F.3d 643, 649 (9th Cir. 2018); *see also Adamson v. Comm'r*, 745 F.2d 541, 546 (9th Cir. 1984) (egregious Fourth Amendment violations); *United States v. Calderon-Medina*, 591 F.2d 529, 531–32 (9th Cir. 1979) (regulatory violations).

Perez Cruz v. Barr, 926 F.3d 1128, 1137 (9th Cir. 2019). *See also B.R. v. Garland*, 26 F.4th 827, 832 (9th Cir. 2022) ("The exclusionary rule is generally not available in immigration proceedings, but we hold that once an alien makes a prima facie showing of an egregious regulatory or Fourth Amendment violation warranting suppression and submits specific evidence that the government's evidence is tainted, the government has the burden and opportunity to rebut that claim of taint.").

Not all violations of agency regulations result in the exclusion of evidence in proceedings. *See Hong*, 518 F.3d at 1035–36 (holding that where it appears the regulation was not violated, and any alleged violation would still not have deprived Petitioner of any protected right, the evidence was properly admitted). The court has explained:

> For nearly four decades, it has been the law in our circuit that evidence may be excluded for a regulatory violation as long as three conditions are satisfied: (1) the agency violated one of its regulations; (2) the subject regulation serves a "purpose of benefit to the alien"; and (3) the violation "prejudiced interests of the alien which were protected by the regulation."

Sanchez v. Sessions, 904 F.3d 643, 650 (9th Cir. 2018) (citation omitted) (concluding that regulation at issue was "for the benefit" of petitioners like Sanchez and that prejudice was presumed where Coast Guard's failed to abide by the regulation, and remanding for the agency to determine whether termination of the removal proceedings without prejudice was appropriate). *See also Gonzalez-Villalobos*, 724 F.3d at 1129 n.5 (Although the exclusionary rule generally does not apply in civil deportation proceedings, ..., it does apply where the immigration agency violates its own rules if (1) "the regulation serves a purpose of benefit to the alien," and (2) "the violation prejudiced interests of the alien which were protected by the regulation." (citations omitted)); *Hong*, 518 F.3d at 1035 (explaining that to evaluate the potential exclusion of evidence obtained through a violation of agency regulations, the regulation must serve a purpose of benefit to the noncitizen, and the violation prejudiced the interests of the noncitizen which were protected by the regulation).

Where "compliance with the regulation is mandated by the Constitution, prejudice may be presumed." *Sanchez*, 904 F.3d at 652 (internal quotation marks and citation omitted) (presuming prejudice where the regulation violated by Coast Guard officers reflected the Fourth Amendment's requirement that brief detentions be supported by reasonable suspicion); *see also Perez Cruz*, 926 F.3d at 1145–46 (citing *Sanchez* and presuming prejudice where compliance with the regulation was mandated by the Constitution). "The regulation need not explicitly invoke the Constitution for the Constitution to mandate compliance with the regulation." *Sanchez*, 904 F.3d at 652 n.10 (concluding that the regulation at issue was intended to reflect constitutional restrictions on the ability of immigration officials to interrogate and detain persons in this country – doctrine rooted in the Fourth Amendment – and thus it was promulgated for the benefit of petitioners like Sanchez).

This court has held that "petitioners may be entitled to termination of their removal proceedings without prejudice for egregious regulatory violations." *Sanchez*, 904 F.3d at 653 ("Because Sanchez has made a prima facie showing that he was detained solely on the basis of his race and that his detention was contrary to the requirements of § 287.8(b)(2), we grant his petition for review and remand for the agency to determine in the first instance whether termination without prejudice is appropriate here."); *see also Perez Cruz*, 926 F.3d at 1146 (recognizing that where evidence of alienage is suppressed and the government offers no other evidence to show alienage, termination of proceedings is warranted).

"A Fourth Amendment violation is egregious if evidence is obtained by deliberate violations of the Fourth Amendment or by conduct a *reasonable officer should have known* is in violation of the Constitution." *See Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018, 1016–19 (9th Cir. 2012) (internal quotation, alteration, and citation omitted) (concluding IJ erred by denying motion to suppress where statements were obtained immediately following the unconstitutional entry of noncitizen's home); *see also Martinez-Medina*, 673 F.3d at 1034 (concluding that even if Fourth Amendment rights were violated, the violation was not egregious). Where egregious violations of the Fourth Amendment occur, the exclusionary rule may apply. *See Lopez-Rodriguez*, 536 F.3d at 1016–19. *See also Perez-Cruz*, 926 F.3d at 1136 (discussing *Lopez-Rodriguez*, and distinguishing between evidence pertaining to "alienage" resulting from an egregious Fourth Amendment violation, which may be suppressed, and evidence pertaining to "identity" which is not subject to suppression).

See also *B.R. v. Garland*, 26 F.4th 827, 832 (9th Cir. 2022) (remanding to agency for it to determine in the first instance whether DHS did in fact commit an egregious regulatory violation, including whether the claimed violation prejudiced B.R.); *Lopez-Mendoza*, 468 U.S. at 1051–52 (announcing blanket rule that exclusionary rule generally does not apply in immigration proceedings, but noting that in the present case there was no challenge to the INS's own internal regulations, and also that the Court was not dealing with egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained); *Martinez-Medina*, 673 F.3d at 1033–34 (noting an exception to the exclusionary rule exists in immigration proceedings where the Fourth Amendment violation is egregious, and holding that there was no egregious violation of petitioners' Fourth Amendment rights); *Hong*, 518 F.3d at 1035 (noting the rule in *Lopez-Mendoza* did not cover transgressions that implicate fundamental fairness and undermine probative value of evidence, nor challenges to the INS's own internal regulations); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448–49 (9th Cir. 1994) (noting *Lopez-Mendoza* limited its holding to situations that do not involve egregious violations of the Fourth Amendment).

E. Fifth Amendment Right Against Self-Incrimination

"In a deportation hearing there is no prohibition against drawing an adverse inference when a petitioner invokes his Fifth Amendment right against self-incrimination." *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011). However, the court has held that where "the sole witness refuses to answer questions, [the Department of Homeland Security] cannot satisfy its burden [of establishing grounds for termination of asylum by a preponderance of the evidence], 'in the absence of any substantive evidence ..., based solely upon the adverse inference drawn from ... silence.'" *Urooj v. Holder*, 734 F.3d 1075, 1078 (9th Cir. 2013).