UNITED STATES V. ESTRADA: THE SIXTH CIRCUIT MISSES THE MARK IN FINDING NO DUE PROCESS VIOLATION IN IMMIGRATION JUDGES' FAILURE TO PROVIDE NOTICE OF ELIGIBILITY FOR DISCRETIONARY RELIEF

I. INTRODUCTION

For many people facing deportation from the United States, most avenues of relief have been exhausted, and thus discretionary relief is their last chance in the judicial process to remain in this country.[1] Title VIII of the Code of Federal Regulations subsection 1240.11(a)(2) ("the Regulation") grants authority to Immigration Judges ("IJ") in Aliens in Removal Proceedings.[2] The Regulation states that IJs shall inform aliens of apparent eligibility of relief from removal.[3]

When given the opportunity to address whether an IJ's failure to notify an alien of discretionary relief is a due process violation, the United States Supreme Court did not give a definitive answer.[4] In recent decades, many United States circuit courts of appeals have refused to recognize a due process violation when an IJ fails to notify an alien of the availability of discretionary relief.[5] Only the Second and Ninth Circuits have recognized a due process violation when an IJ failed to advise an alien of the availability of discretionary relief.[6]

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1. *See* United States v. Copeland, 376 F.3d 61, 73 (2d Cir. 2004) (noting that for many aliens, discretionary relief was the only available avenue of relief).

2. 8 C.F.R. § 1240.11(a)(2) (2013).

3. *Id.*

4. United States v. Mendoza-Lopez, 481 U.S. 828, 839 (1987) (assuming, without deciding as a matter of law, that failure to notify respondent of availability of discretionary relief amounted to a violation of due process).

5. *See* United States v. Santiago-Ochoa, 447 F.3d 1015, 1020 (7th Cir. 2006) (joining the majority of circuits that have rejected the proposition that there is a constitutional right to be informed of eligibility for discretionary relief); United States v. Aguirre-Tello, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc) (noting the IJ's failure to advise Aguirre-Tello of his eligibility for section 212(c) relief was not a constitutional violation); United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002) (stating that "§ 212(c) relief, because it is available within the broad discretion of the Attorney General, is not a right protected by due process"); Smith v. Ashcroft, 295 F.3d 425, 429 (4th Cir. 2002) (stating that "to advance a due process claim [Respondent] must first establish he has a property or liberty interest at stake . . . because [Respondent] has no property or liberty interest in the 'right' to discretionary section 212(c) relief"); Oguejiofor v. Att'y Gen. of the U.S., 277 F.3d 1305, 1309 (11th Cir. 2002) (per curiam) (stating that "an alien has no constitutionally-protected right to discretionary relief or to be eligible for discretionary relief").

6. *See* United States v. Lopez-Velasquez, 629 F.3d 894, 897 (9th Cir. 2010) (stating that "[w]e have repeatedly held that an IJ's failure to . . . advise an alien violates

In *United States v. Estrada*,[7] the United States Court of Appeals for the Sixth Circuit determined that when suspension of deportation is discretionary, no valid property interest exists, and thus a due process violation cannot occur.[8] The defendant in *Estrada* sought to collaterally attack his underlying deportation hearing by asserting the immigration court denied him due process.[9] The Sixth Circuit upheld the United States District Court for the Eastern District of Tennessee's finding that the IJ's failure to inform Estrada of discretionary relief did not amount to a due process violation.[10]

This Note will discuss the Sixth Circuit's analysis in refusing to find a due process violation when an IJ fails to advise an alien of the availability of discretionary relief.[11] First, this Note will present the facts and holding of *Estrada*.[12] An examination of the procedures in removal proceedings and procedural due process will follow.[13] This Note will then discuss the United States Supreme Court's decisions regarding an alien's right to discretionary relief.[14] This Note will also discuss the recent circuit split regarding whether an IJ's failure to notify an alien of discretionary relief amounts to a due process violation.[15] Finally, this Note will argue that the Sixth Circuit's failure to recognize federal regulations resulted in the denial of due process because 8 C.F.R. section 1240.11(a)(2) establishes a property interest in the IJ's notice to an alien of the availability of discretionary relief.[16]

II. FACTS AND HOLDING

In *United States v. Estrada*,[17] the United States Court of Appeals for the Sixth Circuit affirmed the United States District Court for the Eastern District of Tennessee's refusal to find a due process violation when the IJ failed to inform the defendant of discretionary relief.[18] Emilio Estrada was a Mexican citizen and Green Card holder.[19] Un-

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due process"); *Copeland*, 376 F.3d at 71 (stating that "[w]e believe that a failure to advise a potential deportee of a right to seek 212(c) relief can, if prejudicial, be fundamentally unfair").

7. 876 F.3d 885 (6th Cir. 2017).

8. United States v. Estrada, 876 F.3d 885, 887 (6th Cir. 2017) [hereinafter *Estrada II*].

9. *Estrada II*, 876 F.3d at 887.

10. *Id*. at 889.

11. *See infra* notes 17-209 and accompanying text.

12. *See infra* notes 17-53 and accompanying text.

13. *See infra* notes 54-73 and accompanying text.

14. *See infra* notes 74-88 and accompanying text.

15. *See infra* notes 89-167 and accompanying text.

16. *See infra* notes 176-209 and accompanying text.

17. 876 F.3d 885 (6th Cir. 2017).

18. *Estrada II*, 876 F.3d 885, 888-89 (6th Cir. 2017).

19. *Estrada II*, 876 F.3d at 886.

dercover officers arrested Estrada in November of 2007 after attempting a controlled purchase of methamphetamine from Estrada.[20] Estrada pleaded guilty to possession of a firearm by an unlawful user of a controlled substance.[21] Following his guilty plea, the immigration court ordered Estrada to appear for removal proceedings.[22] At his removal hearing, Estrada stated that he understood his rights, and he advised the IJ that he had retained counsel; however, his counsel was not present.[23] At his next hearing before the IJ in March 2009, the court ordered Estrada to be removed from the United States.[24]

A few years later, Estrada illegally reentered the United States, and law enforcement officers arrested him once more.[25] In May of 2013, a federal grand jury indicted Estrada for being in the United States after being removed following the commission of an aggravated felony.[26] In March of 2015, a federal grand jury indicted Estrada again for another count of the same offense.[27] Estrada then moved to have the indictment dismissed by collaterally attacking his 2009 deportation order.[28] Estrada argued that his due process rights were violated when the IJ failed to act pursuant to § 212(h) of the Immigration and Nationality Act[29] ("INA") and advise him of his eligibility for discretionary relief from removal.[30]

The district court determined that the IJ's failure to inform Estrada of discretionary relief was not a due process violation.[31] The district court began its analysis by stating that to succeed on a collateral attack a defendant must demonstrate the following: the administrative remedies were exhausted; the opportunity for judicial review was denied; and the order was fundamentally unfair.[32] The district

20. *Id*. Officers found methamphetamine in Estrada's pocket, as well as a rifle and ammunition in his vehicle. *Id*.

21. *Id*.

22. *Id*.

23. *Id*.

24. *Id*. At the hearing, Estrada, with new counsel, "admitted to the facts alleged in the Notice to Appear and conceded to [his] removability." *Id*.

25. *Id.*

26. *Id*.

27. United States v. Estrada, No. 4:13-cr-13, slip op. at 1 (E.D. Tenn. Jan. 12, 2016) [hereinafter *Estrada I*].

28. *Estrada II*, 876 F.3d at 886.

29. Immigration and Nationality Act of 1952 § 212(h), 8 U.S.C. § 1182 (2008).

30. *Id*.

31. *Estrada I*, slip op. at 4.

32. *See id*. at 2. The court cited 8 U.S.C. § 1326(d) (2012), which states:

> An alien may not challenge the validity of the deportation order . . . unless the alien demonstrates (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair.

court opted to forgo the first two prongs and focused its analysis on the third element of fundamental unfairness.[33] The district court stated that for Estrada to show the fundamental unfairness of his underlying deportation order, he must prove: (1) a due process rights violation resulting from defects in the deportation proceeding and (2) his suffering of prejudice because of the defects.[34] The district court reasoned that since section 212(h) relief is not mandatory, there can be no constitutionally-protected liberty interest in discretionary relief from deportation.[35]

Finally, the district court stated that since Estrada was not able to establish a due process violation, he could not establish the fundamental unfairness of his deportation proceedings; therefore, Estrada failed to satisfy the third element of his collateral attack.[36] The district court denied Estrada's motion to dismiss his original indictment and his superseding indictment.[37] Estrada appealed the district court's denial of his motion to dismiss the indictment to the Sixth Circuit.[38]

On appeal, Estrada amended his initial motion to dismiss, and collaterally attacked the deportation order on due process grounds by claiming that his attorney failed to present Estrada's eligibility for discretionary relief under section 212(h) of the Immigration and Nationality Act.[39] The Sixth Circuit stated that many circuit courts have failed to recognize that an alien has a constitutional right to be informed of discretionary relief.[40] The court, however, decided not to

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8 U.S.C. § 1326(d).

33. *See id*. (stating "in the interest of expediency, the Court first turns to the third prong").

34. *See id*. (stating that "[d]efendant must show that '(1) [his] due process rights were violated by defects in the underlying deportation proceeding; and (2) he suffered prejudice as a result of the defects" (citing United States v. Pallares-Galan, 359 F.3d 1088, 1095 (9th Cir. 2004))).

35. *See id*. at 3 (noting that there is no constitutionally-protected liberty interest in obtaining discretionary relief from deportation (citing Ashki v. I.N.S., 233 F.3d 913, 921 (6th Cir. 2000))).

36. *Id.* at 4.

37. *Id*.

38. *Estrada II*, 876 F.3d at 886.

39. *Id*.

40. *Id*. at 888 (stating that "[w]e acknowledge the circuit split on this question, with the majority of our sister circuits likewise holding that an alien has no constitutional right to be informed of eligibility for, or to be considered for, discretionary relief"); *see also* United States v. Santiago-Ochoa, 447 F.3d 1015, 1020 (7th Cir. 2006) (joining the majority of circuits that have rejected the proposition that there is a constitutional right to be informed of eligibility for discretionary relief); United States v. Aguirre-Tello, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc) (noting the IJ's failure to advise Aguirre-Tello of his eligibility for section 212(c) relief was not a constitutional violation); United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002) (stating that "§ 212(c) relief, because it is available within the broad discretion of the Attorney General, is not a right protected by due process"); Smith v. Ashcroft, 295 F.3d 425, 429 (4th Cir. 2002) (stating

adopt the opinions of the United States Courts of Appeal for the Second and Ninth Circuits, which have held that an IJ's failure to inform an alien of potential eligibility for discretionary relief is a violation of due process.[41]

The Sixth Circuit began its analysis by stating the three prong test a defendant must satisfy to challenge the validity of a deportation order.[42] Like the district court, the Sixth Circuit did not address the first two prongs, and instead focused solely on the third prong.[43] The court acknowledged that aliens in removal proceedings are entitled to a full and fair hearing under the Due Process Clause of the Fifth Amendment.[44] The court reasoned that for Estrada to prove his removal proceedings were fundamentally unfair, he must establish that his due process rights were violated as a result of defects in the deportation proceeding and that prejudice resulted from those defects.[45] In addition, the court also required Estrada to demonstrate he was deprived of life, liberty, or property interest.[46]

The court referenced *Ashki v. Immigration and Naturalization Services*[47] in deciding whether Estrada had a liberty interest in his removal proceedings.[48] This Sixth Circuit case held that an individual does not have a constitutionally protected liberty interest in discretionary relief from deportation.[49] The Sixth Circuit determined

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that "to advance a due process claim [Respondent] must first establish he has a property or liberty interest at stake . . . because [Respondent] has no property or liberty interest in the 'right' to discretionary section 212(c) relief"); Oguejiofor v. Att'y Gen. of the U.S., 277 F.3d 1305, 1309 (11th Cir. 2002) (per curiam) (stating that "an alien has no constitutionally-protected right to discretionary relief or to be eligible for discretionary relief"). *But see* United States v. Lopez-Velasquez, 629 F.3d 894, 897 (9th Cir. 2010) (stating that "[w]e have repeatedly held that an IJ's failure to . . . advise an alien violates due process"); *Copeland*, 376 F.3d at 71 (stating that "[w]e believe that a failure to advise a potential deportee of a right to seek 212(c) relief can, if prejudicial, be fundamentally unfair").

41. *Estrada II*, 876 F.3d at 888 (explaining that "Estrada asks us to eschew *Ashki* and follow the Second and Ninth Circuits' approaches . . . [w]e decline the invitation").

42. *Id*. at 887.

43. *Id*. (stating, "Estrada focuses on the third one; like the district court, we begin—and end—our analysis there").

44. *Id*. (citing Huicochea-Gomez v. I.N.S., 237 F.3d 696, 699 (6th Cir. 2001)).

45. *Id*. (stating that "to prove the fundamental unfairness of an underlying deportation order, a defendant must show both a due process violation emanating from defects in the underlying deportation proceeding and resulting prejudice" (citing *Huicochea-Gomez*, 237 F.3d at 699)).

46. *Id*.

47. 233 F.3d 913 (6th Cir. 2000).

48. *Estrada II*, 876 F.3d at 887-88 (citing Ashki v. I.N.S., 233 F.3d 913, 921(6th Cir. 2000).

49. *Estrada II*, 876 F.3d at 888 (citing *Ashki*, 233 F.3d at 921). In *Ashki*, the Sixth Circuit held that in the case of a petitioner seeking to reopen her removal proceedings to apply for a discretionary grant of suspension of removal, the petitioner lacked a constitutionally protected interest because the grant was discretionary. *Ashki*, 233 F.3d at 916-17, 921.

that although *Ashki* did not address INA section 212(h), its holding applied to the case at hand.[50] The Sixth Circuit determined that when deportation relief is discretionary, no protected constitutional liberty or property interest exists.[51] Finally, the court held that because Estrada failed to establish a due process violation, he could not establish his removal proceedings were fundamentally unfair.[52] The Sixth Circuit affirmed the district court's denial of Estrada's motion to dismiss his indictments.[53]

III. BACKGROUND

A. Removal Proceedings

The Legislature has absolute authority in determining immigration law.[54] In delegating that authority, Congress granted the Executive authority in the administration of immigration laws.[55] Pursuant to that grant of power, agencies of the executive branch may create regulations which they deem necessary in the administration of immigration laws.[56] This grant of power permits those agencies to structure regulations setting forth the procedural requirements in removal proceedings.[57]

In removal proceedings, the government bears the burden in demonstrating that an alien is deportable by providing clear, convincing, and unequivocal evidence.[58] The full spectrum of constitutional rights afforded to citizens is not fully applicable to aliens in removal proceedings.[59] An alien may appeal the IJ's decision to the Board of Immigration Appeals ("BIA").[60] The BIA is the highest administrative body in

50. *Estrada II*, 876 F.3d at 888.
51. *Id*. (quoting Appiah v. I.N.S., 202 F.3d 704, 709 (4th Cir. 2000)).
52. *Id*. at 889.
53. *Id*.
54. Anthony Distinti, *Gone but not Forgotten: How Section 212(C) Relief Continues to Divide Courts Presiding over Indictments for Illegal Reentry*, 74 Fordham L. Rev. 2809, 2812 (2006).
55. *Id.; see also* 8 U.S.C. § 1552 (2012) (stating "[t]he office of the Commissioner of Immigration and Naturalization is created and established, and the President, . . . with the advice and consent of the Senate, is authorized . . . to appoint such officer.").
56. 8 U.S.C. § 1103(a)(1)-(3) (2012).
57. *See* 8 U.S.C. § 1103(a)(3) ("[the Secretary of Homeland Security] shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter").
58. Woodby v. I.N.S., 385 U.S. 276, 277 (1966).
59. *See* Hon. Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. Rev. 801, 849-50, n.218 (2013) ("Because exclusion and removal are considered civil rather than criminal matters, the Constitution's criminal procedure protections are largely inapplicable.").
60. *See* Distinti, *supra* note 54, at 2815 ("[w]ithin thirty days of the an IJ's decision, either party may appeal to the BIA.").

immigration law and is the primary authority in the interpretation and application of immigration law.[61] On appeal, the BIA gives deference to the IJ's factual findings by reviewing for clear error, and examines the IJ's conclusions of law under de novo review.[62] The Attorney General is responsible for naming BIA board members, defining the board's jurisdiction, and reviewing the board's decisions.[63] An alien may appeal a BIA decision to the United States court of appeals for the circuit where the IJ is located.[64]

B. Procedural Due Process

The Due Process Clause of the Fifth Amendment states that no person shall be deprived of life, liberty or property, without due process of law.[65] In *Mullane v. Central Hanover Bank & Trust*,[66] the United States Supreme Court stated that the essential element of a procedural due process claim is the deprivation of life, liberty, or property by adjudication without notice and opportunity for a hearing.[67] In *Board of Regents of State Colleges v. Roth*,[68] the Court reasoned that property interests are determined by existing rules that establish benefits and support petitioners' claims of entitlement to those benefits.[69]

The Supreme Court has also stated that to claim a property interest in a benefit, an individual must have more than a mere desire for it.[70] The individual must be entitled to the benefit.[71] The Court has identified that this claim of entitlement stems from an individual's reliance on the benefit in his or her daily life.[72] The constitutional right to a hearing provides a critical safeguard against arbitrary deprivation of benefits to which an individual claims entitlement.[73]

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61. *Board of Immigration Appeals*, United States Department of Justice, http://www.usdoj.gov/eoir/biainfo.htm (last visited Mar. 29, 2019).

62. Distinti*, supra* note 54, at 2816.

63. *Id.*

64. 8 U.S.C. § 1252(b)(2) (2012).

65. U.S. Const. amend. V.

66. 339 U.S. 306 (1950).

67. Mullane v. Central Hanover Bank & Tr., 339 U.S. 306, 313 (1950).

68. 408 U.S. 564 (1972).

69. Board of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

70. *Roth*, 408 U.S. at 577.

71. *Id*.

72. *Id*.

73. *See id*. (recognizing "[i]t is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate [entitlement] claims").

C. *United States v. Jose Mendoza-Lopez*: The Supreme Court Evaluates Fundamentally Unfair Deportation Proceedings

In *United States v. Jose Mendoza-Lopez*,[74] the United States Supreme Court addressed whether an alien who is prosecuted for illegal entry following deportation may collaterally attack an underlying deportation order.[75] *Mendoza-Lopez* reached the Supreme Court after the United States Court of Appeals for the Eighth Circuit concluded that a defendant may collaterally attack his or her underlying deportation order, and the failure of an IJ to inform a defendant of alternative relief resulted in a due process violation.[76]

Mendoza-Lopez involved two plaintiffs, Jose Mendoza-Lopez and Angel Landeros-Quinones.[77] On October 23, 1984 Immigration and Naturalization Service ("INS") agents arrested Mendoza-Lopez and Landeros-Quinones in separate incidents in Lincoln, Nebraska.[78] The immigration court ordered Mendoza-Lopez and Landeros-Quinones deported, and they both received a Form I-294 advising them that unlawful reentry into the United States constituted a felony.[79] A few months later, Mendoza-Lopez and Landeros-Quinones reentered the United States and were arrested in Lincoln, Nebraska.[80]

Mendoza-Lopez and Landeros-Quinones moved the United States District Court for the District of Nebraska to dismiss their indictments, stating that their underlying deportation hearings were fundamentally unfair.[81] The district court ruled that Mendoza-Lopez and Landeros-Quinones were permitted to collaterally attack their deportation orders and also found that since the defendants did not understand their deportation proceedings a due process violation occurred.[82] The Eighth Circuit affirmed the district court's finding of a due process violation and noted the fundamental unfairness of the underlying deportation hearing.[83]

On appeal, the Supreme Court agreed with the Eighth's Circuit's finding that an alien prosecuted for illegal entry following deportation

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74. 481 U.S. 828 (1987).

75. United States v. Mendoza-Lopez, 481 U.S. 828, 830 (1987) [hereinafter *Mendoza-Lopez I*].

76. United States v. Jose Mendoza-Lopez, 781 F.2d 111, 112-13 (8th Cir. 1985) [hereinafter *Mendoza-Lopez II*].

77. *Mendoza-Lopez I*, 481 U.S. at 830.

78. *Id*.

79. *Id*.

80. *Id*. (stating that "on December 12, 1984, both respondents were once again separately arrested in Lincoln, Nebraska).

81. *Id*. at 831.

82. *Id*.

83. *Id*.

may collaterally attack an underlying deportation order.[84] The Court reached its conclusion through statutory interpretation, determining it was not Congress's intent to not allow challenges to deportation proceedings.[85] The Court, however, did not address the issue of whether an IJ's failure to provide notice of potential relief was fundamentally unfair and resulted in a deportation order that violated due process.[86] In deciding whether a collateral attack on the deportation hearing may be permitted, the Court was asked by the government to assume that Mendoza-Lopez and Landeros-Quinones's deportation proceedings were fundamentally unfair.[87] Thus, the Court in *Mendoza-Lopez* never definitively stated whether an IJ's failure to adequately explain the Respondent's right to suspension of deportation constituted a due process violation.[88]

D. The Current Split in the United States Courts of Appeals Regarding Discretionary Relief Due Process Violations

1. Smith v. Ashcroft*: The Fourth Circuit Finds No Property or Liberty Interest in the Right to Discretionary Relief*

Many United States circuit courts of appeals have determined that an IJ's failure to inform a Respondent of the possibility of discretionary relief from removal does not amount to a due process violation.[89] Specifically, the United States Court of Appeals for the Fourth

84. *See id*. at 839 (reasoning that "depriving an alien of the right to have the disposition in a deportation hearing reviewed in a judicial forum requires . . . that review be made available in any subsequent proceeding in which the result of the deportation proceeding is used to establish an element of the criminal offense").

85. *See generally id*. at 834-37 (stating the issue was "whether the statute itself provides for a challenge to the validity of the deportation order in a proceeding under 8 U.S.C. §1326[,]" and determining that "[t]he text and background of § 1326 thus indicate no congressional intent to sanction challenges to deportation orders in proceedings under § 1326").

86. *Id*. at 839. "The United States did not seek this Court's review of the determination of the courts below that respondents' rights to due process were violated by the failure of the Immigration Judge to explain adequately their right to suspension of deportation or their right to appeal." *Id*.

87. *Id.* at 839–40.

88. *Id*.

89. *See* United States v. Santiago-Ochoa, 447 F.3d 1015, 1020 (7th Cir. 2006) (stating that "[the court] now join[s] the majority of circuits that have rejected the proposition that there is a constitutional right to be informed of eligibility for discretionary relief"); United States v. Aguirre-Tello, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc) (noting the IJ's failure to advise Aguirre-Tello that he could be eligible for section 212(c) relief was not a constitutional violation); United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002) (reasoning section 212(c) relief, because it is available within the broad discretion of the Attorney General, is not a right protected by due process); Smith v. Ashcroft, 295 F.3d 425, 429 (4th Cir. 2002) (noting that "no property or liberty interest in the 'right' to discretionary section 212(c) relief" exists); Oguejiofor v. Att'y Gen. of the U.S., 277 F.3d 1305, 1309 (11th Cir. 2002) (per curiam) (stating that "an alien has

Circuit determined respondents do not have a liberty or property interest in discretionary relief.[90]

In *Smith v. Ashcroft*,[91] the Fourth Circuit affirmed the United States District Court for the District of Maryland's dismissal of Wayne Ancil Smith's petition for habeas corpus relief challenging the constitutionality of his underlying deportation proceeding.[92] Smith, a citizen of Trinidad, arrived in the United States in 1967 and gained lawful status as a permanent resident in 1974.[93] In March 1992, he pled guilty to felony drug charges.[94] Due to Smith's guilty plea, in March 1996, the INS sent Smith an order to show cause as to why his deportation should be stayed.[95]

During Smith's deportation proceedings, he sought a waiver of deportation under section 212(c) of the INA.[96] The IJ denied Smith's request and ordered Smith's removal in April 1997.[97] Smith appealed the IJ's decision to the BIA, which denied Smith's appeal on August 24, 1998.[98]

Upon Smith's filing of a writ of habeas corpus in 1998, the District of Maryland stated it lacked jurisdiction to hear Smith's BIA appeal and granted the government's motion to dismiss, resulting in Smith's deportation in December 1998.[99] A few years later, law enforcement discovered Smith in the United States.[100] The immigration court reinstated Smith's deportation order and ordered Smith removed on March 16, 2001.[101] Smith challenged his deportation removal by filing a second habeas petition with the District of Maryland.[102] The district court dismissed Smith's petition, and the Fourth Circuit granted his appeal.[103]

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no constitutionally-protected right to discretionary relief or to be eligible for discretionary relief").

90. *Smith*, 295 F.3d at 429 (noting that Smith did not have a "property or liberty interest in the 'right' to discretionary section 212(c) relief").

91. 295 F.3d 425 (4th Cir. 2002).

92. *Smith*, 295 F.3d at 427.

93. *Id*.

94. *Id*.

95. *Id*.

96. *Id*.; Immigration and Nationality Act of 1952 § 212(c), 8 U.S.C. § 1182(c), *repealed by* Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, Div. C, Title III, § 304(b), 110 Stat. 3009-597 (1996). Congress replaced section 212(c) with section 212(h) by the same act. Omnibus Consolidated Appropriations Act of 1997, Div. C, Title III, § 304(b).

97. *Smith*, 295 F.3d at 427.

98. *Id*.

99. *Id*.

100. *See id*. (noting, "Smith illegally reentered the United States through Detroit in January 1999, and returned to his home in Maryland").

101. *Id*.

102. *Id*. at 427-28.

103. *Id*. at 428.

On appeal to the Fourth Circuit, Smith argued that his 1998 deportation proceeding violated his Fifth Amendment right to due process because the BIA refused to review the IJ's denial of discretionary relief.[104] The Fourth Circuit reasoned that in order for Smith to bring a due process claim, he needed to establish a valid property or liberty interest.[105] The Fourth Circuit stated that Smith failed to demonstrate a due process violation because he lacked entitlement to discretionary relief and no property or liberty interest existed in such relief.[106] The Fourth Circuit reasoned that for a statute to create a liberty or property interest there must be an entitlement to a benefit, and the discretionary nature of section 212(c) relief from deportation indicated it could not be an entitlement to a liberty or property interest protected by due process.[107]

2. United States v. Lopez-Ortiz*: The Fifth Circuit Finds that Notice of Potential Eligibility for Discretionary Relief is not a Right Protected by Due Process*

In *United States v. Lopez-Ortiz*,[108] the United States Court of Appeals for the Fifth Circuit reversed and remanded the United States District Court for the Southern District of Texas's order granting Joel Lopez-Ortiz's motion to suppress his removal order and dismiss his indictment.[109] Lopez-Ortiz, a Mexican citizen, entered the United States and became a lawful permanent resident in 1990.[110] Following his arrest in 1995, Lopez-Ortiz pled guilty to possession of cocaine.[111] In 1998, after Lopez-Ortiz's arrest for driving while intoxicated, the Immigration and Naturalization Service ("INS") served Lopez-Ortiz a Notice to Appear in immigration court before he could adjudicate the charge.[112] The INS determined that, due to Lopez-Ortiz's prior cocaine conviction, Lopez-Ortiz was an aggravated felon and therefore removable.[113] Lopez-Ortiz appeared before the IJ who advised him of

104. *See id* at 428-29 (acknowledging that "Smith argues that the Due Process Clause of the Fifth Amendment was violated by the lack of meaningful review of the IJ's refusal to grant him section 212(c) relief and suspend deportation").
105. *Id*. at 429.
106. *Id*. (quoting Board of Pardons v. Allen, 482 U.S. 369, 382 (1987) (O'Connor, J. dissenting).
107. *Id*. at 429-30. "The discretionary right to suspension of deportation does not give rise to a liberty or property interest protected by the Due Process Clause." *Id*. at 430.
108. 313 F.3d 225 (5th Cir. 2002).
109. United States v. Lopez-Ortiz, 313 F.3d 225, 227-28 (5th Cir. 2002).
110. *Lopez-Ortiz*, 313 F.3d at 227.
111. *See id*. (noting that Lopez-Ortiz, who had previously been convicted twice of misdemeanor driving while intoxicated, pleaded guilty to felony possession of cocaine).
112. *Id*.
113. *Id*.

his right to obtain counsel and his right to appeal, but neither the IJ nor the INS notified Lopez-Ortiz that he was eligible to apply for discretionary relief from removal.[114]

At the conclusion of his hearing, the immigration court ordered Lopez-Ortiz deported.[115] A few years later, the INS discovered Lopez-Ortiz in the United States after his fourth felony DWI conviction in 2000.[116] The INS brought charges against Lopez-Ortiz for illegal entry into the United States under 8 U.S.C. sections 1326(a) and (b)(2).[117] Lopez-Ortiz moved to suppress his prior deportation order, arguing that because the IJ failed to inform him of the possibility to discretionary relief his underlying removal ran afoul of due process.[118] Following the grant of Lopez-Ortiz's motion by the district court, the government appealed.[119]

On appeal, the Fifth Circuit determined that eligibility for section 212(c) discretionary relief is not a property or liberty interest that warrants due process protection.[120] Identifying that removal proceedings are civil proceedings, the Fifth Circuit noted that procedural protections available to aliens are not as great as those afforded to criminal defendants.[121] The court stated that, despite the lesser procedural protections in removal proceedings, due process nonetheless still afforded protections to aliens in removal proceedings.[122] The Fifth Circuit reasoned that Lopez-Ortiz was provided notice, a hearing, and an opportunity to be heard, thereby satisfying the requirements of due process.[123] Further, the court identified that because section 212(c) relief was the product of legislative grace, it conferred no protected status, and the denial of discretionary relief did not run afoul of the Due Process Clause.[124]

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114. *See id*. (stating that "[n]either the Immigration Judge nor anyone at the INS told Lopez-Ortiz that he was eligible to apply for § 212(c) relief").

115. *Id*.

116. *Id*.

117. *Id*.

118. *Id*. at 227-28.

119. *Id*. at 228.

120. *Id*. at 231.

121. *Id*. at 230.

122. *Id*. The Fifth Circuit noted that "[t]he Supreme Court has stated that due process requires an alien who faces deportation be provided (1) notice of the charges against him, (2) a hearing before an executive or administrative tribunal, and (3) a fair opportunity to be heard." *Id*. (citing Kwong Hai Chew v. Colding, 344 U.S. 590, 597-98 (1953)).

123. *Id*.

124. *Id*. at 231. "'As a piece of legislative grace, [section 212(c)] conveyed no rights, . . . conferred no status,' and its denial does not implicate the Due Process clause." *Id*. (quoting Cadby v. Savoretti, 256 F.2d 439, 443 (5th Cir. 1956)) (citing Alfarache v. Cravener, 203 F.3d 381 (5th Cir. 2000)).

3. United States v. Lopez-Velasquez*: The Ninth Circuit Finds that Due Process Imposes a Limited Duty to Inform an Alien of Eligibility for Discretionary Relief*

In *United States v. Lopez-Velasquez*,[125] the United States Court of Appeals for the Ninth Circuit, sitting en banc, reversed and remanded the United States District Court for the District of Oregon's grant of Edmundo Lopez-Velasquez's motion to dismiss the indictment charging him with illegal reentry.[126] Lopez-Velasquez, a citizen of Mexico, illegally entered the United States in the early 1980s.[127] Lopez-Velasquez attained the status of a lawful permanent resident in 1990.[128] A few years later, the INS initiated deportation proceedings due to his conviction for delivery of a controlled substance.[129] In 1994, Lopez-Velasquez appeared before an IJ without counsel and conceded his removability.[130] The IJ did not notify Lopez-Velasquez of any discretionary relief and ordered Lopez-Velasquez deported to Mexico.[131]

Lopez-Velasquez illegally entered the United States a few years later on an unknown date and was again ordered deported following his guilty plea to two counts of illegal reentry.[132] Lopez-Velasquez illegally reentered the United States once more, and at his immigration proceedings the government determined him removable.[133] Lopez-Velasquez moved to reopen his initial deportation proceedings, arguing that the IJ's failure to inform him of the possibility of discretionary relief was a denial of due process.[134] The government moved to reinstate Lopez-Velasquez 1994 deportation order, which was granted by the IJ.[135] Subsequently, on Lopez-Velasquez's appeal to the District of Oregon, the court dismissed the indictment, noting that the IJ's failure to inform Lopez-Velasquez of the possibility of discretionary relief invalidated the 1994 deportation order.[136]

The Ninth Circuit sitting en banc stated that an IJ maintained a duty to inform an alien during removal proceedings of a reasonable

125. 629 F.3d 894 (9th Cir. 2010).
126. United States v. Lopez-Velasquez, 629 F.3d 894, 895, 901 (9th Cir. 2010) (en banc).
127. *Lopez-Velasquez*, 629 F.3d at 895.
128. *Id*.
129. *Id*.
130. *Id*.
131. *See id*. (stating that when "[t]he IJ asked the INS attorney whether he was aware of any relief available to Lopez-Velasquez . . . the attorney responded that there did not appear to be any").
132. *Id*. at 896.
133. *Id*.
134. *Id*.
135. *Id*. (noting that the Board of Immigration Appeals affirmed the IJ's grant).
136. *Id*.

possibility of eligibility for discretionary relief.[137] The Ninth Circuit began its analysis by stating that 8 C.F.R. section 1240.11(a)(2) required an IJ to provide notice of apparent eligibility for relief to aliens during removal proceedings.[138]

Moreover, the Ninth Circuit interpreted apparent eligibility to mean when the record indicated to someone familiar with immigration laws of the existence of a reasonable possibility that the alien might be eligible for relief.[139] The Ninth Circuit reasoned that since an IJ is intimately familiar with the immigration laws, the IJ has a duty to inform the alien of a possibility that the alien may be eligible for relief.[140] Despite determining that such a duty generally existed, the Ninth Circuit reversed and remanded the district court's ruling.[141]

4. United States v. Copeland*: The Second Circuit Determines an Immigration Judge's Failure to Advise a Potential Deportee of a Right to Seek Discretionary Relief Can be Fundamentally Unfair*

In *United States v. Copeland*,[142] the United States Court of Appeals for the Second Circuit affirmed the United States District Court for the Eastern District of New York's finding that Copeland's underlying deportation hearing violated due process.[143] Copeland, a native and citizen of Jamaica, arrived in the United States in 1982 and thereafter became a lawful permanent resident.[144]

Prior to his deportation, Copeland committed numerous crimes in New York.[145] Copeland's criminal history began in 1988 with a conviction for disorderly conduct and culminated in a 1995 conviction for attempted murder.[146] After Copeland's guilty plea to the attempted

137. *Id*. at 901.

138. *Id*. at 896; 8 C.F.R. § 1240.11 (2013).

139. *Lopez-Velasquez*, 629 F.3d at 896 (citing Moran-Enriquez v. INS, 884 F.2d 420, 423 (9th Cir. 1989)).

140. *See id*. (recognizing "'[w]e have interpreted 'apparent eligibility' to mean 'where the record, fairly reviewed by an individual who is intimately familiar with the immigration laws—as IJs no doubt are—raises a reasonable possibility that the petitioner may be eligible for relief'" (quoting *Moran-Enriquez*, 884 F.2d at 423)).

141. *Id*. at 900. The Ninth Circuit determined that at the time of his 1994 deportation hearing, Lopez-Velasquez did not meet the physical presence requirement of seven years, and, in absence of relevant facts in the record supporting Lopez-Velasquez's claim, the IJ therefore did not have a duty to inform Lopez-Velasquez of relief which he was not eligible for. *Id*.

142. 376 F.3d 61 (2d Cir. 2004).

143. United States v. Copeland, 376 F.3d 61, 62 (2d Cir. 2004).

144. *Copeland*, 376 F.3d at 62.

145. *Id*.

146. *Id*. at 62-63.

murder charge, in addition to others, New York sentenced him to eighteen to fifty-four months in prison.[147]

While Copeland served his sentence, INS initiated deportation proceedings.[148] At his deportation hearing, the IJ informed Copeland of his right to counsel and an appeal.[149] Furthermore, the IJ told Copeland that if the government proved his previous conviction for sale of a controlled substance he would be deportable.[150] The IJ informed Copeland that under current law, an alien convicted for sale of a controlled substance was ineligible for any form of relief.[151] Copeland admitted to the charges and the IJ found him deportable.[152]

On September 22, 1998, Copeland filed a motion to reopen his deportation proceedings, arguing that the IJ breached his duty by failing to inform him of his eligibility for section 212(c) relief.[153] The IJ denied Copeland's motion, stating that since Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"),[154] and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"),[155] Copeland was no longer eligible for section 212(c) relief.[156] Copeland then appealed the decision to the BIA.[157] Before the BIA could consider his appeal, the government deported Copeland.[158]

Copeland reentered the United States in 1999 and, following his arrest in 2001, was indicted in the Eastern District of New York for illegal reentry into the United States.[159] Copeland moved to dismiss his indictment, asserting he was not accurately advised of his right to appeal.[160] The district court dismissed Copeland's indictment, determining the underlying deportation order violated Copeland's due process rights.[161] Therefore, the district court reasoned that because the

147. *Id*. at 63.
148. *Id*.
149. *Id*.
150. *See id*. (noting the IJ told Copeland that "because he was an alien, he would be deportable if the INS proved that he had been convicted of attempted sale of a controlled substance").
151. *See id*. (recognizing that "[t]he IJ stated [that]. . . 'the law changed April 1996 a couple months ago . . . and the new law says if you have a conviction for narcotics you're not eligible for any form of relief'").
152. *Id*. at 64.
153. *Id*. at 65.
154. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).
155. Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).
156. *Copeland*, 376 F.3d at 65.
157. *Id*.
158. *Id*.
159. *Id*.
160. *Id*. The court noted that "the IJ incorrectly told [Copeland] that no relief was available because of the 1996 amendments." *Id*.
161. *Id*.

IJ failed to advise Copeland of the existence of discretionary relief, his underlying deportation proceedings were fundamentally unfair.[162]

On appeal, the Second Circuit determined an IJ's failure to inform potential deportees of their eligibility for discretionary relief could result in fundamental unfairness if prejudice resulted.[163] The Second Circuit first acknowledged that other courts use a property rights analysis when addressing fundamental procedural error.[164] The Second Circuit noted that in the cases where the circuit courts applied a property rights analysis, the courts identified whether the benefit was discretionary or mandatory to determine the existence of a due process right.[165] In contrast to its sister circuits, the Second Circuit framed the question as whether the denial of notice of a possibility of relief amounted to a violation of due process.[166] Finally, the court stated that under applicable regulations, an IJ maintained a duty to inform an eligible alien of his or her right to a discretionary hearing, regardless of whether the ultimate granting of relief was a matter of discretion.[167]

IV. ANALYSIS

In *United States v. Estrada*,[168] the United States Court of Appeals for the Sixth Circuit followed circuit precedent in determining that section 212(h) of the INA did not create a protected property or liberty interest in discretionary relief from deportation.[169] The appeal

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162. *Id*. at 66.

163. *Id*. at 71.

164. *See id.* (stating that "[t]he cases holding that prejudicial misinformation about Section 212(c) relief is never a fundamental procedural error rely upon a property rights analysis that is utilized most frequently in Section 1983 cases").

165. *See id*. at 72 (stating that "[i]n such cases, that analysis looks to whether government benefits or employment are discretionary in order to determine whether there is a due process right to pre- or post-deprivation hearings before the benefits or employment can be terminated").

166. *See id*. (determining "[t]he issue . . . is not whether Section 212(c) relief is constitutionally mandated, but whether a denial of an established right to be informed of the possibility of such relief can, if prejudicial, be a fundamental procedural error"). The Second Circuit further remarked that the decisions of other courts "holding that a failure to inform an alien about Section 212(c) relief cannot be a fundamental error collapse" the distinction between the grant of discretionary relief and the notice of the potential eligibility for the relief. *Id*.; *see also* 8 C.F.R. § 1240.11(a)(2) (providing "[t]he immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing").

167. *Copeland*, 376 F.3d at 72. The court asserted that "the right to a Section 212(c) hearing is well established and mandatory, whether or not the ultimate granting of relief is discretionary. In fact, under applicable regulations, an IJ must both inform an eligible alien of his or her right to a section 212(c) hearing." *Id*.

168. 876 F.3d 885 (6th Cir. 2017).

169. *Estrada II*, 876 F.3d 885, 888 (6th Cir. 2017).

in *Estrada* arose from the United States District Court for the Eastern District of Tennessee's determination that an IJ's failure to inform a defendant of the possibility of discretionary relief did not amount to a due process violation.[170] The Sixth Circuit followed the district court's framing of Estrada's constitutional question, determining that the discretionary nature of section 212(h) relief did not create a protected liberty or property interest in notice of eligibility for discretionary relief during an alien's removal proceedings.[171]

This Analysis will argue the Sixth Circuit erred by not following federal regulations.[172] The language of 8 C.F.R. section 1240.11(a)(2) imposes a requirement on IJ's to notify aliens of potential eligibility for discretionary relief during deportation proceedings.[173] This Analysis will further identify that numerous United States circuit courts of appeal have incorrectly framed the issue of discretionary relief, resulting in denials of due process rights.[174] Finally, this Analysis will assert that under the Sixth Circuit's analysis, IJ's will continue to disregard federal regulations, fail to inform aliens of their eligibility for discretionary relief, and as a result, deny aliens due process.[175]

A. Federal Regulations Expressly Require Informing an Alien of Discretionary Relief

The United States Court of Appeals for the Ninth Circuit held in *United States v. Lopez-Velasquez*[176] that an IJ has a duty to inform an alien of a reasonable possibility of eligibility for discretionary relief at the time of the deportation hearing.[177] In reaching its conclusion, the Ninth Circuit cited 8 C.F.R. section 1240.11(a)(2), which requires an IJ to inform an alien of apparent eligibility of relief.[178] The Ninth Circuit reasoned that apparent eligibility referred to circumstances where the IJ, in making the determination, has fairly reviewed the record and is intimately familiar with immigration laws.[179] The Ninth Circuit correctly adhered to and interpreted the federal regulations in determining an alien in removal proceedings is entitled to be informed of discretionary relief.[180]

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170. *Estrada I*, No. 4:13-cr-13, slip op. at 2 (E.D. Tenn. Jan 12, 2016).
171. *Estrada II*, 876 F.3d at 888.
172. *See infra* notes 176-209 and accompanying text.
173. *See infra* notes 176-187 and accompanying text.
174. *See infra* notes 188-196 and accompanying text.
175. *See infra* notes 199-209 and accompanying text.
176. 629 F.3d 894 (9th Cir. 2010) (en banc).
177. United States v. Lopez-Velasquez, 629 F.3d 894, 895 (9th Cir. 2010) (en banc).
178. *Lopez-Velasquez*, 629 F.3d at 896.
179. *Id.* at 897.
180. *Compare* 8 C.F.R. § 1240.11(a)(2) (2001) (stating that "[t]he immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits

In *United States v. Estrada*,[181] the United States Court of Appeals for the Sixth Circuit stated that, for Estrada to prove fundamental unfairness, he must first show a due process violation.[182] The Sixth Circuit opined Estrada needed to establish he was deprived of a life, liberty, or property interest to trigger due process protection.[183] The Sixth Circuit reasoned that the clear language of section 212(h) of the INA was discretionary and did not invoke due process protection or create a protectable property or liberty interest.[184]

The Sixth Circuit correctly stated that section 212(h) of the INA gives the IJ discretion in granting relief from removal.[185] In contrast, this discretion does not extend to the IJ's duty to inform defendants of potential eligibility for discretionary relief.[186] Therefore, the failure of the IJ to advise Estrada of the availability of discretionary relief disregarded the language in 8 C.F.R. section 1240.11(a)(2), which imposed a duty upon the IJ to provide notice; this disregard resulted in a denial of due process.[187]

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enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing"), *and Lopez-Velasquez*, 629 F.3d at 896-97 (reasoning apparent eligibility means "where the record, fairly reviewed by an individual who is intimately familiar with the immigration laws—as IJs no doubt are—raises a reasonable possibility that the petitioner may be eligible for relief"), *with* United States v. Copeland, 376 F.3d 61, 72 (2d Cir. 2004) (stating that "[w]hen a regulation is promulgated to protect a fundamental right derived from . . . a federal statute, and the INS fails to adhere to it, the challenged deportation proceedings are invalid").

181. 876 F.3d 885 (6th Cir. 2017).

182. *Estrada II*, 876 F.3d 885, 887 (6th Cir. 2017).

183. *Estrada II*, 876 F.3d at 887.

184. *See id*. at 888 (noting that because the relief itself is discretionary, no protected liberty or property interest could exist).

185. *Compare* 8 U.S.C. § 1182 (2008) (permitting the Attorney General to act with discretion in waiving inadmissibility for certain aliens with criminal convictions), *with Estrada II*, 876 F.3d at 888 (stating that "[t]he statute's plain language is clear; relief under § 212(h) is discretionary . . . [a]nd when 'suspension of deportation is discretionary, it does not create a protectable liberty or property interest'").

186. *Compare* 8 C.F.R. § 1240.11(a)(2) (stating that "[t]he Immigration Judge *shall* inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter") (emphasis added), *with Lopez-Velasquez*, 629 F.3d at 897 (noting that "an IJ's failure to so advise an alien [of the alien's eligibility for discretionary relief] violates due process"), *and Copeland*, 376 F.3d at 72 (stating that "[t]he right to a section 212(c) hearing is well established and mandatory, whether or not the ultimate granting of relief is discretionary").

187. *Compare Estrada II*, 876 F.3d at 887 (determining that to prove the fundamental unfairness of an underlying deportation order, a defendant must show both a due process violation emanating from defects in the underlying deportation proceeding and resulting prejudice), *with* 8 C.F.R. § 1240.11(a)(2) (requiring the IJ to inform an alien of potential eligibility for discretionary relief), *Lopez-Velasquez*, 629 F.3d at 897 (noting a deportation proceeding violates due process where the IJ failed to advise the alien of potential eligibility for discretionary relief), *and Copeland*, 376 F.3d at 71 (stating that "failure to advise a deportee of a right to seek [discretionary] relief can, if prejudicial, be fundamentally unfair" and violate due process).

B. The Distinction Between Eligibility for Discretionary Relief and the Exercise of Discretion

In *United States v. Copeland*,[188] the United States Court of Appeals for the Second Circuit determined that the failure of an IJ to advise a potential deportee of a right to seek discretionary relief was fundamentally unfair.[189] The Second Circuit recognized a fundamental difference between eligibility for discretionary relief and the favorable exercise of discretion.[190] When an alien in removal proceedings applies for discretionary relief, the Attorney General is afforded considerable deference in deciding the alien's removability.[191] However, federal regulations require an IJ to inform aliens of discretionary relief when it is apparent that they are eligible for such relief.[192]

This requirement of notice is distinct from the section 212(h) of the INA's grant of discretionary relief.[193] The United States Court of Appeals for the Sixth Circuit erred by construing the discretionary nature of section 212(h) to extend to an IJ's notification of an alien's eligibility for discretionary relief.[194] The Sixth Circuit's analysis

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188. 376 F.3d 61 (2d Cir. 2004).

189. United States v. Copeland, 376 F.3d 61, 71 (2d Cir. 2004).

190. *Copeland*, 376 F.3d at 72. The Second Circuit quoted I.N.S. v. St. Cyr, 533 U.S. 289, 307-08 (2001) and stated:

> "Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand. Eligibility that was 'governed by specific statutory standards' provided 'a right to a ruling on an applicant's eligibility,' even though the actual granting of relief 'was not a matter of right under any circumstances, but rather is in all cases a matter of grace.'"

Id.

191. *See* Smith v. Ashcroft, 295 F.3d 425, 430 (4th Cir. 2002) (stating that "[f]ormer section 212(c) did not in any way limit the discretion of the Attorney General to admit otherwise deportable aliens" as "it 'grant[ed] the Attorney General *broad* discretion to admit excludable aliens") (emphasis original); United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002) (stating that "[section] 212(c) relief 'was couched in conditional and permissive terms. As a piece of legislative grace, it conveyed no rights . . . [and] conferred no status'"); *see also* Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. Rev. 801, 853 (2013) (stating "despite recognizing that aliens are entitled to due process in removal proceedings, the Supreme Court has consistently regarded the Executive's power as virtually unlimited with respect to the substantive bases upon which removal may be effectuated").

192. 8 C.F.R. § 1240.11(a)(2) (2001). "The immigration judge *shall* inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing." *Id*. (emphasis added).

193. *Compare* 8 U.S.C. § 1182 (affording discretion in granting relief from deportation), *with* 8 C.F.R. § 1240.11(a)(2) (requiring an immigration judge provide an alien in deportation proceedings notice of the potential for discretionary relief).

194. *Compare* 8 C.F.R. § 1240.11(a)(2) (stating that "[t]he immigration judge *shall* inform the alien of his or her apparent eligibility" for discretionary relief) (emphasis added), *and Copeland*, 376 F.3d at 72 (noting that "[t]raditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand"), *with Estrada II*, 876 F.3d at 888

centered on the application of due process principles to the discretionary relief an IJ may grant under section 212(h).[195] Rather, the court's analysis ought to have focused on the language of 8 C.F.R. section 1240.11(a)(2) that did not afford discretion to the IJ in notifying an alien of the possibility for discretionary relief.[196]

C. Failure to Inform an Alien of the Availability of Discretionary Relief Constitutes A Due Process Violation

In *Smith v. Ashcroft*,[197] the United States Court of Appeals for the Fourth Circuit stated that to bring a due process claim an alien must first establish a valid property or liberty interest.[198] The Fourth Circuit reasoned that a statute provided for procedural due process protection when it conferred an entitlement, rather than a mere expectation, to the benefit.[199] The court held that since section 212(c) of the INA did not limit the Attorney General's discretion, it did not create an entitlement to a waiver of deportation.[200] Therefore, an alien seeking discretionary relief lacked a constitutionally protected property or liberty interest.[201] Many circuit courts of appeals have adopted approaches similar to the Fourth Circuit when addressing due process rights afforded to an alien seeking discretionary relief.[202]

(stating that "[t]he statute's language is clear: relief under § 212(h) is discretionary" and that "an alien has no constitutional right to be informed of eligibility for, or to be considered for, discretionary relief")

195. *See Estrada II*, 876 F.3d at 888 (determining that "the statute's language is clear: relief under § 212(h) is discretionary . . . [a]nd when 'suspension of deportation is discretionary, it does not create a protectable liberty or property interest'").

196. *Compare Copeland*, 376 F.3d at 72 (recognizing that "[t]he issue . . . is not whether Section 212(c) relief is constitutionally mandated, but whether denial of an established right to be informed of the possibility of such relief can, if prejudicial, be a fundamental procedural error"), *with Estrada II*, 876 F.3d at 887 (stating that "an individual 'has no constitutionally-protected liberty interest in obtaining discretionary relief from deportation'").

197. 295 F.3d 425 (4th Cir. 2002).

198. Smith v. Ashcroft, 295 F.3d 425, 429 (4th Cir. 2002).

199. *Smith*, 295 F.3d at 429.

200. *Smith*, 295 F.3d at 430; *see also* Immigration and Nationality Act of 1952 § 212(c), 8 U.S.C. § 1182 (repealed 1996).

201. *Smith*, 295 F.3d at 431.

202. *See* United States v. Santiago-Ochoa, 447 F.3d 1015, 1020 (7th Cir. 2006) (joining the "majority of circuits [that] have rejected the proposition that there is a constitutional right to be informed of eligibility for . . . discretionary relief"); United States v. Aguirre-Tello, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc) (noting that "the IJ's failure to specifically advise Aguirre-Tello that he could be eligible for § 212(c) relief . . . was not a constitutional violation"); United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002) (stating that "section 212(c) relief, because it is available within the broad discretion of the Attorney General, is not a right protected by due process"); Oguejiofor v. Att'y Gen. of U.S., 277 F.3d 1305, 1309 (11th Cir. 2002) (per curiam) (holding that "an alien has no constitutionally-protected right to discretionary or to be eligible for discretionary relief").

In *United States v. Estrada*,[203] the United States Court of Appeals for the Sixth Circuit applied reasoning similar to that of the Fourth Circuit.[204] The Sixth Circuit focused on the discretionary nature of the Attorney General's statutory authority under section 212(h) of the INA to conclude that such discretion precluded the existence of any entitlement to notice for discretionary relief.[205] However, 8 C.F.R. section 1240.11(a)(2) imposes a requirement upon the IJ to notify an alien of the possibility for discretionary relief.[206] This requirement, created to protect the fundamental right of due process, established an entitlement to the notice of eligibility for discretionary relief.[207] Therefore, the failure of an IJ to advise an alien of apparent eligibility for discretionary relief amounts to a violation of due process.[208] As a result, the Sixth Circuit erred when it determined that no due process right existed in the receipt of notice of potential eligibility for discretionary relief in deportation proceedings.[209]

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203. 876 F.3d 885 (6th Cir. 2017).

204. *Compare Smith*, 295 F.3d at 429-30 (asserting that for a statute to create a vested liberty or property interest giving rise to a procedural due process protection, it must confer more than a mere expectation), *with Estrada II*, 876 F.3d 885, 888 (6th Cir. 2017) (declining to extend due process protection to notice of eligibility for discretionary relief).

205. *Compare* 8 U.S.C. § 1182 (2008) (granting discretionary authority to the Attorney General to grant relief from deportation), *with Estrada II*, 876 F.3d at 888 (stating that "the statute's plain language is clear: relief under § 212(h) is discretionary. And when 'suspension of deportation is discretionary, it does not create a protectable a protectable liberty or property interest'" (quoting Ashki v. I.N.S., 233 F.3d 913, 921 (6th Cir. 2000))).

206. *See* 8 C.F.R. § 1240.11(a)(2) (stating that "[t]he immigration judge *shall* inform the alien of his or her apparent eligibility to apply for [discretionary relief]") (emphasis added).

207. *Compare id*. (mandating the IJ provide notice to an alien of potential discretionary relief), *with* United States v. Lopez-Velasquez, 629 F.3d 894, 897 (9th Cir. 2010) (en banc) (noting that "[this court] ha[s] repeatedly held that an IJ's failure to so advise an alien violates due process"), *and* United States v. Copeland, 376 F.3d 61, 72 (2d Cir. 2004) (stating that "[w]hen a regulation is promulgated to protect a fundamental right . . . the challenged deportation proceeding is invalid").

208. *Compare Smith*, 295 F.3d at 429–30 (determining that "in order for a statute to create a vested liberty or property interest giving rise to procedural due process protection, it must confer more than a mere expectation . . . [t]here must be entitlement to the benefit as directed by statute"), *with Lopez-Velasquez*, 629 F.3d at 896 (referencing the mandatory nature of 8 C.F.R. section 1240.11(a)(2) and determining that "an IJ's failure to so advise an alien [of potential eligibility for discretionary relief] violates due process").

209. *Compare* 8 C.F.R. § 1240.11(a)(2) (requiring an IJ to notify aliens of potential eligibility for discretionary relief), *Lopez-Velasquez*, 629 F.3d at 896 (noting the regulatory requirements for notice of potential eligibility for discretionary relief and determining that failure to provide such notice violated due process), *and Copeland*, 376 F.3d at 71-72 (determining that failure to adhere to federal regulation renders the underlying deportation proceeding fundamentally unfair and therefore invalid), *with Estrada II*, 876 F.3d at 888 (determining that since the sought-for relief was discretionary, the procedural requirements of the underlying deportation hearing were also discretionary).

V. CONCLUSION

In *United States v. Estrada*,[210] Estrada, an alien facing deportation, sought to challenge his underlying deportation hearing, arguing that the IJ's failure to notify him of discretionary relief amounted to a due process violation.[211] The United States Court of Appeals for the Sixth Circuit determined that the IJ's failure to notify Estrada of discretionary relief did not result in a due process violation.[212] The Sixth Circuit upheld the United States District Court for the Eastern District of Tennessee's finding that the IJ's failure to inform Estrada of discretionary relief could not amount to a violation of due process.[213]

The Sixth Circuit's analysis failed to recognize federal regulations that require an IJ to notify an alien of discretionary relief.[214] These regulations create a property interest in notification because the language of the regulations impose a duty upon IJ's to notify aliens of the potential for discretionary relief. United States circuit courts of appeals, other than the Second and Ninth Circuits, have improperly extended the discretionary nature of the grant of relief to the notification required by 8 C.F.R. section 1240.11(a)(2).[215] An IJ's failure to adhere to this regulation, which is intended to protect a fundamental right, is a violation of due process.[216]

Deportation proceedings have serious consequences for aliens and their families. Federal regulations require IJ's to notify aliens if they are eligible to apply for discretionary relief. Additionally, aliens who apply for discretionary relief more-often-than-not are granted relief from removal.[217] Since there are serious consequences for aliens who are facing deportation and numerous circuit courts of appeals have held that an IJ's failure to notify an alien of discretionary relief is not a due process violation, the United States Supreme Court should finally decide the issue and find that, in accordance with 8 C.F.R. section 1240.11(a)(2), an IJ's failure to inform an alien of eligibility to discretionary relief is a violation of due process.

Daniel J. Esquivel – '20

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210. 876 F.3d 885 (6th Cir. 2017).
211. *Estrada II*, 876 F.3d 885, 887 (6th Cir. 2017).
212. *Estrada II*, 876 F.3d at 889.
213. *Id.*; *Estrada I*, No. 4:13-cr-13, slip op.at 2 (E.D. Tenn. Jan. 12, 2016)
214. *See supra* notes 176-187 and accompanying text.
215. *See supra* notes 188-196 and accompanying text.
216. *See supra* notes 197-209 and accompanying text.
217. *See* I.N.S. v. St. Cyr, 533 U.S. 289, 295-96 (2001) (noting that "the class of aliens whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial number of their applications . . . have been granted").