NO LAWYER? NO DUE PROCESS: THE ILL-CONCEIVED ROLE OF THE SUBSTANTIAL PREJUDICE REQUIREMENT FOR NONCITIZEN FELONS

Abstract: In 2022, in *Priva v. U.S. Attorney General*, the U.S. Court of Appeals for the Eleventh Circuit held that to prevail on a due process claim regarding the denial of counsel during a deportation-related reasonable fear hearing, a noncitizen aggravated felon must show that they were substantially prejudiced by the denial. Some courts have applied the substantial prejudice requirement to due process challenges to immigration proceedings. These courts have essentially treated denial of counsel claims as equivalent to other due process disputes. A majority of circuits recognize, on the other hand, that demonstrating substantial prejudice is not required when there is a corresponding statutory right to counsel. This Comment argues that the *Priva* court was wrong to impose the substantial prejudice requirement because there is a federal statutory right to counsel in deportation proceedings and the denial of counsel is distinct from other due process challenges due to its inherently prejudicial consequences.

INTRODUCTION

Since the time of its founding, the United States has truly been a "nation of immigrants."[1] Despite the critical importance of immigrants to the United States' societal fabric, the extent to which they enjoy the liberties and privileges ingrained in American culture depends heavily on their citizenship status.[2] Although the U.S. Supreme Court has extended some due process safeguards to noncitizens, those same noncitizens are not always afforded *fundamental* due process protections.[3]

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[1] *See* James Devitt, *A Nation of Immigrants—But Hardly a Pro-Immigration Nation*, N.Y. UNIV. (Nov. 28, 2023), https://www.nyu.edu/about/news-publications/news/2022/november/a-nation-of-immigrants-but-hardly-a-pro-immigration-nation.html [https://perma.cc/9V52-SQWF] (noting that, since the nation's founding, immigrants have been a fundamental part of the United States).

[2] *See* David D. Cole, *Against Citizenship as a Predicate for Basic Rights*, 75 FORDHAM L. REV. 2541, 2542, 2544 (2007) (discussing how citizenship status impacts whether one may be penalized for their political beliefs and how, in the past, the government argued that immigrants do not deserve equal rights to citizens).

[3] *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that noncitizens are protected by the Fifth and Fourteenth Amendments); *see also* Reno v. Flores, 507 U.S. 292, 306 (1993) (holding that the Fifth Amendment entitles noncitizens to due process in deportation proceedings). *But see* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1993 (2020) (Sotomayor, J., dissenting) (highlighting how the U.S. Supreme Court's decision deprives noncitizens of due process protections in asylum proceedings); Bridget Kessler, *In Jail, No Notice, No Hearing . . . No Problem? A*

Every day, U.S. Immigration and Customs Enforcement (ICE) confines thousands of noncitizens in detention facilities for alleged violations of federal immigration laws.[4] Although detention is in many ways identical to incarceration, noncitizen detainees are not afforded fundamental legal protections germane to criminal proceedings.[5] This includes the right to a speedy trial and government-appointed counsel, and the protections against self-incrimination.[6]

As such, due process voids acutely manifest in removal proceedings.[7] For example, the absence of a statutory right to a *government-funded* lawyer leaves many noncitizens, including children, unrepresented in removal proceedings.[8] This is particularly concerning given that the immigration court system is notoriously difficult to navigate without a lawyer.[9]

Closer Look at Immigration Detention and the Due Process Standards of the International Covenant on Civil and Political Rights, 24 AM. U. INT'L L. REV. 571, 584 (2009) (noting that immigration officials have authority to arrest noncitizens without a warrant).

[4] *See* Emily Ryo & Ian Peacock, *The Landscape of Immigration Detention in the United States*, 2018 AM. IMMIGR. COUNS. 1, 1, https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf [https://perma.cc/G6LD-2NH7] (stating that "U.S. Immigration and Customs Enforcement (ICE) detains tens of thousands" of immigrants per day and "relies on a complex network of jails and jail-like facilities to confine" them). In June 2023, 9,657 individuals were detained in immigration centers per day in Texas, 4,416 in Louisiana, and 1,793 in California. *Detention by the Numbers*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/detention-statistics [https://perma.cc/JL3M-R72S]. In December 2023, over twenty-thousand noncitizens were put into detention centers. *Immigration Detention Quick Facts*, TRAC IMMIGR. (2024), https://trac.syr.edu/immigration/quickfacts/detention.html [https://perma.cc/99B5-ZSEB]. Notably, 67.5% of immigrant detainees do not have a criminal record. *Id.*

[5] *See* Ryo & Peacock, *supra* note 4, at 5 (highlighting the similarities between detention and incarceration and stating that immigrant detainees do not enjoy various legal protections that are granted to criminal defendants). Detainees are often confined in "jails and jail-like facilities," where they are perpetually surveilled. *Id.* Despite the prevalence of detention within the United States' immigrant regime, "the Supreme Court has yet to determine the specific due process boundaries limiting such detention." Christopher Dunn, *The Constitutional Hole in Government Detention*, N.Y.L.J. (Dec. 1, 2021), https://www.law.com/newyorklawjournal/2021/12/01/the-constitutional-hole-in-government-detention/ [https://perma.cc/8GV9-JQBV]. Beyond the sufficient Due Process protections afforded to detainees, detention centers are a site for "civil and human rights violations." Ryo & Peacock, *supra* note 4, at 5. Such violations include "exploitative labor practices," insufficient medical care, and physical and sexual abuse. Ryo & Peacock, *supra* note 4, at 5.

[6] Ryo & Peacock, *supra* note 4, at 5. Also included in the legal void that exists within the immigration detention scheme is the ban of cruel and unusual punishment. *Id.*

[7] *See* Diana G. Li, *Due Process in Removal Proceedings After* Thuraissigiam, 74 STAN. L. REV. 793, 799 (2022) (suggesting that under the expedited removal regime, most noncitizens do not even appear in court before an immigration judge (IJ) and, instead, Border Patrol agents control their fates); Krystin Roehl, Logan Schmidt & Hayne Yoon, *The Shocking Lack of Due Process for Immigrants*, VERA INST. JUST. (Jan. 2, 2020), https://www.vera.org/news/target-2020/the-shocking-lack-of-due-process-for-immigrants [https://perma.cc/9LMG-WL8W] (discussing how criminal defendants have the right to government-sponsored counsel, but immigrants in deportation proceedings do not).

[8] *See* 8 U.S.C. § 1362 (establishing that in deportation proceedings in front of an IJ, noncitizens are entitled to representation by counsel at no cost to the government); Roehl et al., *supra* note 7 (noting that most children facing deportation are unrepresented in court).

[9] *See* Roehl et al., *supra* note 7 (noting that the complexity of the immigration system can make it feel impossible to traverse without a lawyer). Not only is the system itself complex, but many nonciti-

Further, although noncitizens are entitled to representation at no cost to the government, the denial of counsel does not necessarily amount to a due process violation.[10] The practical consequences of due process voids are grave: noncitizens may be removed to a country where they face significant harm or even death.[11]

In 2022, in *Priva v. U.S. Attorney General*, the U.S. Court of Appeals for the Eleventh Circuit held that to prevail on a due process challenge to a denial of counsel in reasonable fear proceedings, a component of removal proceedings, a noncitizen aggravated felon must show that they were substantially prejudiced.[12] Part I of this Comment discusses the legal landscape surrounding reasonable fear proceedings, as well as the factual and procedural background of *Priva*.[13] Part II evaluates the circuit split on the application of the substantial prejudice requirement to the right to counsel.[14] Part III argues that the statutory right to counsel in

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zens face the added burden of language barriers. *Id.* Significantly, detainees are 10.5% more likely to succeed if they are represented by counsel. *Id.*

[10] *See* 8 U.S.C. § 1362 (promulgating that noncitizens are entitled to representation by counsel at no cost to the government in removal proceedings); Hernandez Lara v. Barr, 962 F.3d 45, 58 (1st Cir. 2020) (Lipez, J., concurring) (discussing how not all circuits acknowledge that the right to counsel in immigration proceedings is so important that its denial innately amounts to a due process violation).

[11] *See* Elizabeth G. Kennedy & Alison Parker, *Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse*, HUM. RTS. WATCH 1 (Feb. 2020), https://www.hrw.org/sites/default/files/report_pdf/elsalvador0220_web_0.pdf [https://perma.cc/K2AW-Y9F9] (discussing the harms faced by Salvadorian deportees due to the prevalence of violent gangs, including death and abuse); Rosa Flores & Sara Weisfeldt, *The US Keeps Deporting People to a Country That It Says Is Too Dangerous for Travel*, CNN (Sept. 6, 2023), https://www.cnn.com/2023/09/06/americas/us-haiti-deportations-intl-latam/index.html [https://perma.cc/T4ZG-Y52Q] (reporting that deporting immigrants to Haiti "could amount to death sentences" given the control of "gangs infamous for kidnapping and murder"). For example, an investigation by the Human Rights Watch identified 138 Salvadorians killed after being deported from the United States and 70 cases where deportees were subject to abuse—such as torture and sexual violence—usually inflicted by gangs. Kennedy & Parker, *supra*. Rendering these statistics even more troubling is the fact that these cases are difficult to identify as they are often not reported on and there is no official count, and thus, these numbers are likely greater. *Id.*

[12] *Compare* Priva v. U.S. Att'y Gen., 34 F.4th 946, 954 (11th Cir.), *cert. denied sub nom*. Priva v. Garland, 143 S. Ct. 526 (2022) (requiring noncitizens to show substantial prejudice to prevail on any due process challenge to a deportation hearing, including challenges to the denial of counsel), *with* Zuniga v. Barr, 946 F.3d 464, 469, 471 (9th Cir. 2019) (per curiam) (holding that a noncitizen aggravated felon has a right to counsel during their reasonable fear interview before an IJ and does not need to show prejudice to prevail on a due process challenge to the violation of this right). Whereas five circuits acknowledge that the right to counsel in immigration proceedings is such a significant statutory right that noncitizens need not demonstrate prejudice when it is denied, four circuits require noncitizens to demonstrate prejudice due to "the denial of counsel and do not distinguish between Fifth Amendment procedural due process claims and statutory right to counsel claims." *Priva*, 34 F.4th at 961 (Wilson, J., dissenting); *see also* Hernandez Lara v. Barr, 962 F.3d 45, 58 (1st Cir. 2020) (Lipez, J., concurring) (recognizing the circuit split).

[13] *See infra* notes 16–55 and accompanying text.

[14] *See infra* notes 56–75 and accompanying text.

expedited removals and the severe consequences of deportations compel the conclusion that a noncitizen should not be required to show prejudice.[15]

I. The Legal, Factual, and Procedural Background of *Priva v. U.S. Attorney General*

In 2022, in *Priva v. U.S. Attorney General*, the U.S. Court of Appeals for the Eleventh Circuit considered whether noncitizen aggravated felons subject to expedited removals must show that they were substantially prejudiced by the denial of counsel to succeed on their due process challenge.[16] Section A of this Part discusses the expedited removal process for noncitizen aggravated felons and the function of reasonable fear proceedings.[17] Section B introduces the substantial prejudice standard.[18] Section C recounts the factual and procedural background of *Priva*.[19]

A. The Expedited Removal Process and Reasonable Fear Proceedings

Under the Immigration and Nationality Act (INA), distinct categories of noncitizens are subject to expedited removal proceedings, including noncitizens convicted of aggravated felonies.[20] Expedited removal proceedings facilitate the swift removal of noncitizen aggravated felons by presuming that they are deportable.[21]

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[15] *See infra* notes 76–98 and accompanying text.

[16] *See* Priva v. U.S. Att'y Gen., 34 F.4th 946, 954 (11th Cir.), *cert. denied sub nom*. Priva v. Garland, 143 S. Ct. 526 (2022) (holding that noncitizens undergoing reasonable fear proceedings must meet the substantial prejudice requirement to succeed "on a due process challenge to a deportation proceeding").

[17] *See infra* notes 20–33 and accompanying text.

[18] *See infra* notes 35–38 and accompanying text.

[19] *See infra* notes 40–55 and accompanying text.

[20] *Compare* 8 U.S.C. § 1229(a) (describing standard removal proceedings), *with id.* § 1228 (promulgating that noncitizens convicted of aggravated felonies are subject to expedited removal proceedings), *and id.* § 1225 (describing expedited removals for arriving noncitizens). *See gen.* HILLEL R. SMITH, CONG. RSCH. SERV., IF11357, EXPEDITED REMOVAL OF ALIENS: AN INTRODUCTION (2022) (explaining the expedited removal process for noncitizens without proper entry documents or that attempted to enter the United States by means of misrepresentation or fraud). "Aggravated felonies" are statutorily defined by twenty-one categories of offenses. 8 U.S.C. § 1101(a)(43).

[21] *See* 8 U.S.C. § 1228(c) (stating that noncitizen aggravated felons "shall be conclusively presumed to be deportable"); Daniel Kanstroom, *Expedited Removal and Due Process: "A Testing Crucible of Basic Principle" in the Time of Trump*, 75 WASH. & LEE L. REV. 1323, 1330 (2018) (discussing how expedited removals allow for the quick removal of certain noncitizens). There is ongoing debate in immigration law on the appropriate label to use, either "alien" or "noncitizen." *See generally* Ufonobong Umanah, *Conservative Judge Offers Defense of Alien in Immigration Case,* BLOOMBERG L. (May 31, 2023), https://news.bloomberglaw.com/immigration/conservative-judge-offers-defense-of-alien-in-immigration-case [https://perma.cc/8K6T-YMEX] (discussing the debate surrounding the term "alien"). Justice Jackson exclusively used the terminology "noncitizen" in her recent dissent in *United States v. Hansen*. *See* 143 S. Ct. 1932, 1952–64 (2023) (Jackson, J., dissenting); *see also* Bar-

As such, noncitizen aggravated felons have little opportunity for relief from deportation because they are only eligible for withholding of removal if they succeed in establishing a reasonable fear of torture or persecution in their country of removal.[22] Although this accelerated procedure infringes on due process, noncitizen aggravated felons are still entitled to certain protections, such as the right to counsel.[23]

Expedited removal proceedings begin when a noncitizen is served with a Notice of Intent to issue a Final Administrative Removal Order (FARO), which sets forth the charges against them.[24] Upon receipt of the notice, noncitizens may seek withholding of removal if they fear torture or persecution in their removal country.[25] Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) requires the United States to protect noncitizens from being deported to states where they would face torture.[26]

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ton v. Barr, 140 S. Ct. 1442, 1446 n.2 (2020) (stating that the term "noncitizen" is utilized as an alternative to "alien").

[22] *See* 8 U.S.C. § 1158(b)(2)(A)–(B) (indicating that noncitizen aggravated felons are ineligible for asylum); 8 U.S.C. § 1254a(c)(2)(B)(ii) (repealed 1996) (providing that noncitizens aggravated felons are ineligible for temporary protected status); 8 C.F.R. § 208.31(g)(1)–(2) (2024) (stating that, depending on a reasonable fear determination, a noncitizen may apply for withholding of removal or asylum, or otherwise may be removed by the Department of Homeland Security (DHS)); Am. Immigr. Couns. & Nat'l Immgr. Just. Ctr., *The Difference Between Asylum and Withholding of Removal*, AM. IMMIGR. COUNS. 1–2 (Oct. 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf [https://perma.cc/6W9M-8TVP] (defining withholding of removal as an alternate form of protection for those that are ineligible for asylum that offers less assurances than asylum); *see also* Anthony D. Kennedy, *Expedited Injustice: The Problems Regarding the Current Law of Expedited Removal of Aggravated Felons*, 60 VAND. L. REV. 1847, 1852 (2007) (explaining that the aggravated felony statute is embedded with presumptions that practically guarantee the deportation of a noncitizen aggravated felon).

[23] *See* 8 U.S.C. § 1228(b)(4)(B) (stating that noncitizens may be represented by counsel); Kanstroom, *supra* note 21, at 1329–31 (explaining that "fast-track" immigration proceedings such as expedited removals infringe on due process protections). According to the American Civil Liberties Union, expedited removals symbolize "a dramatic assault" on "due process rights" by allowing for the removal of noncitizens "without review and without a fair hearing." Laura W. Murphy & Timothy Edgar, *ACLU Comments on INS Notice to Expand Expedited Removal*, ACLU (Dec. 13, 2002), https://www.aclu.org/other/aclu-comments-ins-notice-expand-expedited-removal?redirect=aclu-comments-ins-notice-expand-expedited-removal [https://perma.cc/MG3Q-RM3U].

[24] *See* 8 U.S.C. § 1228 (describing expedited removals for noncitizen aggravated felons); 8 C.F.R. § 238.1(b)(2)(i) (2024) (discussing proceedings under 8 U.S.C. § 1228 and explaining that the Notice of Intent must "include allegations of fact and conclusions of law"). Noncitizens are defined as individuals who at the time the proceedings commenced were either "(A) not lawfully admitted for permanent residence," or "(B) had permanent resident status on a conditional basis." 8 U.S.C. § 1228(b)(2)(A)–(B).

[25] *See* 8 C.F.R. § 238.1(b)(2)(i) (promulgating that the Notice of Intent must inform noncitizens of their right to "request withholding of removal," to be represented by counsel "at no expense to the government," and to review the evidence underlying the Notice of Intent and rebut the charges).

[26] *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8478 (Feb. 19, 1999) (discussing the implementation of the United States' agreement under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)). In 1998, President Clinton signed a law requiring agencies to prescribe regulations to enforce the United

If a noncitizen claims a fear of torture or persecution, immigration officials conduct a reasonable fear proceeding to evaluate the claim's validity.[27] The noncitizen expressing this fear is then referred to an asylum officer who interviews the noncitizen in a non-adversarial manner and renders a reasonable fear determination.[28]

During the interview, noncitizens are permitted legal representation and to present evidence germane to the possibility of torture or persecution.[29] Noncitizens receive a positive determination if they establish a "reasonable possibility" that they face torture or persecution in their country of removal based on their "race, religion, nationality, membership in a particular social group or political opinion."[30]

If the asylum officer concludes that the noncitizen does not have a reasonable fear of torture or persecution, the noncitizen can request review by an immigration judge (IJ).[31] If the IJ affirms the negative determination, the Department of Homeland (DHS) Security is charged with removing the nonciti-

States' obligations under the CAT. *Id.* As a result, the Department of Justice created the Regulations Concerning the Convention Against Torture to "implement the United States' [CAT] Article 3 obligations" regarding noncitizens subject to removal. *Id.* at 8479.

[27] *See* 8 C.F.R. § 208.31 (promulgating the reasonable fear determination process for noncitizens convicted of aggravated felonies and noncitizens "whose removal is reinstated"); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8479 (stating that the process aims to fairly and efficiently effectuate Article 3 within statutory framework of removal orders); Zuniga v. Barr, 946 F.3d 464, 467 (9th Cir. 2019) (per curiam) (explaining that reasonable fear interviews evaluate torture claims by noncitizen aggravated felons who "may be entitled to withholding or deferral of removal" under the CAT or under 8 U.S.C. § 1231(b)(3)); *see also* 8 U.S.C. § 1231(b)(3)(A) (stating that if the noncitizen's "life or freedom would be threatened" because of multiple protected grounds, the Attorney General shall not remove them to that country). Although § 1228 itself does not require reasonable fear proceedings as part of expedited removals, it is the source of authority for the regulations promulgating their requirement. *See* Priva v. U.S. Att'y Gen., 34 F.4th 946, 952 (11th Cir.), *cert. denied sub nom.* Priva v. Garland, 143 S. Ct. 526 (2022) (stating that "the Attorney General promulgated the regulations establishing reasonable fear proceedings" pursuant to their authority under § 1228).

[28] 8 C.F.R § 208.31(b)–(c) (explaining the referral procedure and stating that asylum officers have a statutory requirement to (1) ensure that the noncitizen understands the reasonable fear determination process, (2) summarize the facts and allow the noncitizen to correct any errors, (3) prepare a written record of their determination, and (4) arrange for an interpreter if necessary).

[29] *Id.* § 208.31(c). Although § 208.31(c) states that noncitizens may be represented by counsel at their screening interview with the asylum officer, the rule does not specify that they have this right during their hearing with the immigration judge (IJ). *See id.* § 208.31(g) (failing to stipulate whether noncitizens may be represented before the IJ).

[30] *Id.* § 208.31(c). If the asylum officer finds that the noncitizen has established a reasonable fear at the initial screening stage, they issue a Notice of Referral to the IJ, for "full consideration" of the withholding of removal. *Id.* § 208.31(e). Torture is delineated as an act by a "public official acting in an official capacity or other person acting in an official capacity" who intentionally inflicts "severe pain or suffering . . . on a person." *Id.* § 208.18(a)(1).

[31] *Id.* § 208.31(f) (stating that the asylum officer must inform the noncitizen in writing of their decision and ask whether the noncitizen desires review of their negative decision by an IJ).

zen and no further agency appeals are available.[32] Noncitizens can, however, petition for review by a U.S. Court of Appeals.[33]

B. The Substantial Prejudice Requirement

Although the Sixth Amendment does not apply to immigration hearings, noncitizens have a right to counsel via their due process rights under the Fifth Amendment.[34] In some circuit courts, noncitizens must demonstrate prejudice to establish a due process violation in removal proceedings.[35] If a noncitizen facing removal is denied counsel, they must subsequently demonstrate to those circuit courts that this denial amounted to "substantial prejudice."[36]

Circuit courts are split on the substantial prejudice requirement, and within this split, courts that require it are not uniform in their definitions of "substantial prejudice."[37] Whereas some circuits define substantial prejudice as having the *potential* to affect the outcome of the removal case, others define it as having *actually* affected it.[38] This was the state of affairs the Eleventh Circuit faced in *Priva v. U.S. Attorney General*.[39]

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[32] *Id.* § 208.31(g)(1) (stating that "no appeal shall lie from the [IJ's] decision").

[33] *See* Zuniga v. Barr, 946 F.3d 464, 467–68 (9th Cir. 2019) (per curiam) (explaining that the IJ's holding is the final agency decision on the existence of reasonable fear and therefore their "final removal order is ripe for judicial review by a federal court of appeals"); Priva v. U.S. Att'y Gen., 34 F.4th 946, 952 (11th Cir.), *cert. denied sub nom*. Priva v. Garland, 143 S. Ct. 526 (2022) (illustrating that although the IJ's decision was final, and thus, administrative appeal was unavailable, noncitizens may petition for review with a U.S. Court of Appeals).

[34] *See Zuniga*, 946 F.3d at 470 (explaining that Congress has acknowledged "[a right to counsel] among the rights stemming from the Fifth Amendment" in immigration hearings) (quoting Tawadrus v. Ashcroft, 364 F.3d 1099, 1103 (9th Cir. 2004)). The right to counsel in immigration proceedings is codified in § 1362 of the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1362. Not all courts agree, however, that this engenders a statutory right to counsel before an IJ in reasonable fear proceedings. *Compare Zuniga*, 946 F.3d at 468–70 (finding that noncitizens have a statutory right to counsel during their interview with the IJ), *with Priva*, 34 F.4th at 954 (declining to establish a right to counsel before an IJ given the regulations' silence on the matter).

[35] *See* Hernandez Lara v. Barr, 962 F.3d 45, 58 (1st Cir. 2020) (Lipez, J., concurring) (stating that Fifth Amendment due process challenges normally necessitate a showing of prejudice).

[36] *See, e.g.*, *Priva*, 34 F.4th at 954 (requiring that noncitizens demonstrate substantial prejudice when alleging a due process violation to the denial of counsel); Ogbemudia v. Immigr. & Naturalization Serv., 988 F.2d 595, 598 (5th Cir. 1993) (same); Michelson v. Immigr. & Naturalization Serv., 897 F.2d 465, 468 (10th Cir. 1990) (same).

[37] *See Hernandez Lara*, 962 F.3d at 58 (Lipez, J., concurring) (recognizing the circuit split); *Priva*, 34 F.4th at 954 (stating that although the Fifth Amendment entitles noncitizens to due process in deportation hearings, the U.S. Court of Appeals for the Eleventh Circuit requires they demonstrate "substantial prejudice" to successfully allege a due process challenge); Kristina C. Castillo, *Whether Petitioner Denied Right to Counsel in Immigration Proceeding Must Demonstrate Prejudice or Substantial Prejudice*, 79 A.L.R. Fed. 3d Art. 1 (2023) (discussing varying definitions of "substantial prejudice" and "prejudice").

[38] *Compare* Serrano-Alberto v. U.S. Att'y Gen., 859 F.3d 208, 213 (3d Cir. 2017) (defining substantial prejudice as having "the *potential* for affecting the outcome" of deportation proceedings) (quoting Cham v. U.S. Att'y Gen., 445 F.3d 683, 694 (3d Cir. 2006)), *with* Indrawati v. U.S. Att'y Gen., 779 F.3d 1284, 1299 (11th Cir. 2015) (stating that to establish substantial prejudice, noncitizens

C. Factual History of Priva v. U.S. Attorney General

Emmanuel Priva, a Haitian native and citizen, arrived in the United States on an R-1 non-immigrant visa in 2014 and was granted conditional permanent resident status in 2017.[40] One year later, Priva was arrested for conspiracy to commit visa fraud and multiple counts of visa fraud.[41] He was subsequently convicted and sentenced to twenty-seven months in prison.[42]

In 2020, DHS issued Priva a Notice of Intent to Issue a FARO.[43] The notice informed Priva that he was deportable because he was convicted of an aggravated felony, and that he may obtain legal representation at no cost to the government during his removal proceedings.[44] In response, Priva requested withholding or deferral of removal, claiming he would face torture or persecu-

must show that the alleged violations engendered a different outcome). Some courts simply refer to the standard as "prejudice," and, similarly, some require a showing that the denial of counsel would potentially affect the case, whereas others require a showing that the outcome would have been different. *Compare* Martadinata v. U.S. Att'y Gen., No. 07-1012, 2009 WL 82705, at *3 (3rd Cir. Jan. 14, 2009) (denying that the noncitizen was prejudiced because the absence of counsel "did not have the potential for affecting the outcome"), *with* Urbaniak v. Immigr. & Naturalization Serv., No. 91-70650, 1993 WL 91270, *2 (9th Cir. Mar. 30, 1993) (denying that the noncitizen was prejudiced because he "failed to show how the outcome of the case would have differed with the assistance of counsel").

[39] *See generally Priva*, 34 F.4th at 954–55 (introducing the substantial prejudice requirement and explaining that it necessitates noncitizens demonstrate that the alleged due process violations changed the outcome of their case).

[40] *Id.* at 948; *see R-1 Nonimmigrant Religious Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-in-the-united-states/temporary-workers/r-1-nonimmigrant-religious-workers [https://perma.cc/AS9G-ELN9] (Mar. 2, 2023) (stating that R-1 non-immigrant visas are issued to "[m]inisters and non-ministers in religious vocations and occupations . . . for the purpose of performing religious work"); Conditional Permanent Residence, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card/after-we-grant-your-green-card/conditional-permanent-residence [https://perma.cc/7LNB-9563] (Jan. 23, 2023) (promulgating that conditional permanent residents are issued a Green Card effective for two years and can petition to remove the conditions on their permanent resident status within ninety days before their Green Card expires, but "if [the] conditions are not removed," they "become removable from the United States").

[41] *Priva*, 34 F.4th at 948.

[42] *Id.*; *see* 18 U.S.C. § 371 (criminalizing the conspiracy "to commit any offense against the United States, or to defraud the United States"); *id.* § 1546(a) (stipulating that, among other things, one who falsely produces or alters immigration documents (e.g., immigrant or nonimmigrant visas), or knowingly makes false statements with respect to immigration applications and documents, shall be fined or imprisoned).

[43] *Priva*, 34 F.4th at 948; *see* 8 U.S.C. § 1228(b) (describing the expedited removal process for "aliens who are not permanent residents" convicted of aggravated felonies). Although Priva acquired conditional permanent residence status in 2017, this status had a two-year expiration period in the absence of a petition for removal of conditions. *See* Conditional Permanent Residence, *supra* note 40 (indicating that conditional permeant resident status expires after two years). Further, § 1228(b)(2)(b) stipulates that the rule applies to noncitizens who had conditional permanent resident status "at the time that proceedings . . . commenced." 8 U.S.C. § 1228(b)(2)(b).

[44] *Priva*, 34 F.4th at 948; *see* 8 U.S.C. § 1227(a)(2)(A)(iii) (providing that noncitizen aggravated felons are deportable); *id.* § 1101(a)(43)(P) (indicating that forgery in violation of 18 U.S.C. § 1546 is an aggravated felony); *id.* § 1228(a)(2) (ensuring a noncitizen's right to counsel).

tion if returned to Haiti.[45] As a result, his case was referred to an asylum officer for a reasonable fear interview.[46]

Represented by counsel during his interview, Priva explained that he agreed to help Haitians secure U.S. visas in exchange for money, offering reimbursement if he was unsuccessful.[47] Because of this scheme, Priva owed money to, at minimum, one hundred people, had received threats from over twenty, and feared he would be: persecuted, tortured, and killed in Haiti.[48] The

[45] *Priva*, 34 F.4th at 948–49. A noncitizen is eligible for withholding or deferral of removal under CAT if they demonstrate that "it is more likely than not" that they would face torture in their removal country. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999). Relevant evidence to eligibility for withholding of removal includes past persecution based on the protected grounds of "race, religion, nationality, membership in a particular social group, or political opinion." 8 C.F.R. § 208.16(b)(1) (2024). Noncitizens can demonstrate a future threat if they can establish "that it is more likely than not" that they would face persecution based on a protected ground. *Id.* § 208.16(b)(2). Deferral of removal is available for individuals who are ineligible for withholding of removal but would likely face torture in their country of removal. *See id.* § 208.17(a) (promulgating that deferral of removal is available for noncitizens who would be entitled to withholding of removal but are subject to mandatory denial provisions); *see also id.* § 208.16(d)(2) (promulgating mandatory denials, including conviction of a particularly serious crime). Deferral of removal is a less protective form of relief available to noncitizens with criminal convictions that prevent them from being eligible for withholding of removal. *See* Carmel I. Dooling, *The Finality of Final Orders of Removal*, 83 U. CHI. L. REV. 1459, 1460 (2016) (describing the differences between withholding and deferral of removal and explaining that noncitizens granted deferral of removal may be confined in a detention center during the deferral of removal). Both withholding and deferral of removal are temporary forms of relief that can be revoked if the circumstances of the noncitizens home country improve. *Id.*

[46] *Priva*, 34 F.4th at 949.

[47] *Id.*; *see Haitian National Sentenced for Running Visa Fraud Scheme Involving More Than 100 Fraudulent Visa Applications*, U.S. ATT'YS OFF. E.D. OF LA. (Dec. 13, 2019), https://www.justice.gov/usao-edla/pr/haitian-national-sentenced-running-visa-fraud-scheme-involving-more-100-fraudulent-visa [https://perma.cc/TCF7-3H2S] (alleging that Priva submitted online fraudulent visa applications and false documents that supported them, and taught noncitizens "how to deceive consular officers at interviews for the visas").

[48] *Priva*, 34 F.4th at 949. Priva argued that he cannot reimburse them because the government took everything he had and would not "make it out" if he returns without paying them. *Id.* Regarding his eligibility for relief under the CAT, Priva clarified that prior to his current situation, he never experienced any harm, threats, or mistreatment from anyone in the Haitian government, military, or police, but feared that he could be harmed by public officials in the future. *Id.* at 950. Because of corruption in the Haitian government, Priva claimed he would suffer repercussions if he reported the threats made by police officers and a government official. Priva referenced "threats from police officers" and a government official and claimed that reporting these threats could make things worse due to corruption in Haiti. *Id.* Priva's counsel did not submit evidence relevant to country conditions. *Id.*; *see* 8 C.F.R. § 208.16(c)(2) (placing the burden of proof on the applicant to introduce evidence relating to country conditions). Priva indicated that police or officials did not threaten or harm him during the time he lived in Haiti, nor that he feared they would, based on a protected ground. *Priva*, 34 F.4th at 950–51; *see* § 208.16(b)–(c) (promulgating eligibility for withholding of removal under 8 C.F.R. § 241(b)(3)—currently codified as 8 U.S.C. § 1231(b)(3)—and relief under CAT).

asylum officer determined that Priva was credible, but that he did not establish a reasonable fear of torture or persecution based on a protected ground.[49]

Following the asylum officer's negative determination, Priva requested that an IJ review his case, and subsequently appeared before one without an attorney.[50] Priva's petition was unsuccessful, however, as the IJ affirmed the asylum officer's negative reasonable fear determination.[51]

Subsequently, Priva exercised his right to petition for review from the Eleventh Circuit, alleging that the IJ violated his right to counsel by failing to acquire a waiver of his right to counsel, thereby substantially prejudicing him.[52] The court abstained from recognizing a right to counsel during reasonable fear hearings before an IJ, stating that irrespective of Priva's statutory right, noncitizens must demonstrate substantial prejudice to prevail in due process challenges.[53] The court rejected Priva's arguments regarding how the outcome would have been different if counsel was present and held that he was not substantially prejudiced.[54] Priva filed a petition for certiorari but was denied.[55]

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[49] *Priva*, 34 F.4th at 951. The asylum officer determined that Priva's fear was based solely on his financial debt, which is not a protected ground. *Id.* Although public officials and police officers threatened Priva, the asylum officer determined that they were not acting under "the color of law" and Priva did not demonstrate that a public official would assent to his future harm. *Id.* at 950–51; *see* § 208.18(a)(1) (defining torture as pain or suffering inflicted "with the consent or acquiescence of a public official" and indicating that public officials must be "acting under color of law" to warrant protection).

[50] *Priva*, 34 F.4th at 950–51; *see* § 208.31(f)–(g) (stating that noncitizens can request review of a "negative decision" by an IJ). Priva received a notice of referral stating that he may be represented by an attorney and clarifying that if he chose to be represented, his counsel should accompany him at the proceeding. *Priva*, 34 F.4th at 951. Although the IJ recognized that Priva was representing himself, he did not ask about Priva's lack of representation. *Id.*

[51] *Priva*, 34 F.4th at 951. The IJ stated that his judgment was a final order and rendered an order of removal that held that Priva failed to establish that he would be tortured or persecuted based on a protected ground in Haiti. *Id.*; *see* § 208.16(b)–(c) (discussing the burden of proof for relief based on a fear of persecution or torture).

[52] *Priva*, 34 F.4th at 952. Priva argued he did not need to demonstrate that the IJ's violation of his right to counsel resulted in substantial prejudice but, if required, he has already demonstrated substantial prejudice. *Id.* He also alleged that the IJ did not sufficiently explain the proceedings and this he was deprived of a fair hearing. *Id.*

[53] *Id.* at 954; *see* Ibrahim v. Immigr. & Naturalization Serv., 821 F.2d 1547, 1550 (11th Cir. 1987) (holding that noncitizens must establish substantial prejudice to prevail on due process objections); Flores-Panameno v. U.S. Att'y Gen., 913 F.3d 1036, 1040 (11th Cir. 2019) (finding that noncitizens must demonstrate prejudice when alleging ineffective assistance of counsel); Frech v. U.S. Att'y Gen., 491 F.3d 1277, 1282 (11th Cir. 2007) (stating that the petitioner's due process challenge failed because he had not shown substantial prejudice).

[54] *Priva*, 34 F.4th at 955–56. Regarding substantial prejudice, Priva argued that: (1) he was stripped of his right to apply for CAT relief; (2) the IJ mistakenly did not differentiate between the modes of relief for withholding of removal under CAT, in which torture does not need to be based on a protected ground, and under the INA, in which persecution or torture must be "based on a protected ground"; and (3) counsel would have shed light on the different relief eligibility standards. *Id.* at 955. The court dismissed these arguments by finding that the IJ "did not make his finding on torture based on a protected ground" and that Priva was able to, and did, apply for CAT relief. *Id.* Priva also alleged

II. The Circuit Split on the Substantial Prejudice Requirement

Federal circuits are divided as to whether noncitizens subject to removal proceedings must show that they were prejudiced by the denial of counsel to prevail on a due process challenge.[56] A minority of federal circuit courts apply the substantial prejudice requirement to all due process challenges, thus combining the denial of counsel with other procedural challenges.[57] A majority of circuits, on the other hand, recognize that the statutory right to representation in removal proceedings nullifies the need to show prejudice.[58] Section A of this Part discusses the minority approach, focusing on the U.S. Court of Appeals for the Eleventh Circuit's holding in *Priva v. U.S. Attorney General*.[59] Section

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that the IJ failed to inquire into country conditions, which counsel would have pointed out, and would have resulted in a different outcome. *Id.* at 955–56. The court rejected this argument because Priva did have counsel before the asylum officer, and he did not offer any evidence of conditions in Haiti. *Id.* at 956.

[55] *See* Priva v. Garland, 143 S. Ct. 526 (2022) (denying certiorari).

[56] *See* Priva v. U.S. Att'y Gen., 34 F.4th 946, 961 (11th Cir.) (Wilson, J., dissenting), *cert. denied sub nom*. Priva v. Garland, 143 S. Ct. 526 (2022) (noting that five circuits do not require a showing of substantial prejudice to prevail on a due process challenge to the denial of counsel whereas four circuits mandate it). It should be noted that the circuit split is not limited to the context of the right to counsel before an IJ in reasonable fear hearings—rather, it reflects a broader debate around the right to counsel and the substantial prejudice requirement in removal proceedings generally. *See, e.g.*, Njoroge v. Holder, 753 F.3d 809, 812 (8th Cir. 2014) (stating that even if the IJ's denial of a motion for continuance violated the noncitizen asylum seeker's statutory right to counsel, the noncitizen failed to show prejudice); Michelson v. Immigr. & Naturalization Serv., 897 F.2d 465, 467–68 (10th Cir. 1990) (stating that a noncitizen tourist who stayed in the United States longer than permitted was required to show prejudice by his lack of representation during his deportation proceedings).

[57] *See* Hernandez Lara v. Barr, 962 F.3d 45, 58 (1st Cir. 2020) (Lipez, J., concurring) (noting that the four circuits comprising the minority do not distinguish the denial of counsel from other Fifth Amendment due process violations that ordinarily require a showing of prejudice); *Priva*, 34 F.4th at 961 (Wilson, J., dissenting) (same). The U.S. Court of Appeals for the Eleventh Circuit's holding in *Priva* exemplifies the minority approach in the context of reasonable fear hearings. *See Priva*, 34 F.4th at 954 (majority opinion) (indicating that noncitizens must show substantial prejudice when challenging the denial of counsel before an IJ during a reasonable fear interview).

[58] *See Hernandez Lara*, 962 F.3d at 58 (Lipez, J., concurring) (noting that the five circuits in the majority acknowledge that the statutory right to counsel in immigration proceedings is so salient that a showing of prejudice is not required when it is denied); *Priva*, 34 F.4th at 961 (Wilson, J., dissenting) (same). The five-circuit majority is comprised of the U.S. Courts of Appeals for the Second, Third, Seventh, Ninth, and District of Columbia Circuits. *See* Montes-Lopez v. Holder, 694 F.3d 1085, 1092 (9th Cir. 2012) (holding that a noncitizen who was denied counsel in deportation proceedings is not required to show prejudice to obtain relief); Leslie v. U.S. Att'y Gen., 611 F.3d 171, 181 (3d Cir. 2010) (same); Montilla v. Immigr. & Naturalization Serv., 926 F.2d 162, 169 (2d Cir. 1991) (same); Castaneda-Delgado v. Immigr. & Naturalization Serv., 525 F.2d 1295, 1302 (7th Cir. 1975) (same); Cheung v. Immigr. & Naturalization Serv., 418 F.2d 460, 464 (D.C. Cir. 1969) (same). The Ninth Circuit applied this approach to reasonable fear hearings before an IJ. *See* Zuniga v. Barr, 946 F.3d 464, 469, 471 (9th Cir. 2019) (per curium) (holding that a noncitizen aggravated felon has a right to counsel during their reasonable fear interview before an IJ and does not need to show prejudice to prevail on a due process challenge to the violation of this right).

[59] *See infra* notes 61–69 and accompanying text.

B analyzes the majority approach, concentrating on the U.S. Court of Appeals for the Ninth Circuit's holding in *Zuniga v. Barr*.[60]

A. The Priva *"Blanket" Approach to Due Process Analysis*

In 2022, in *Priva*, the Eleventh Circuit joined the Fourth, Fifth, Eighth, and Tenth Circuits in requiring noncitizens to show prejudice to prevail on a due process challenge to the denial of counsel.[61] As a preliminary matter, the court declined to establish whether there is a statutory right to counsel before an IJ in reasonable fear proceedings.[62] Because Priva failed to meet his burden under the substantial prejudice standard, the court determined it was unnecessary to resolve whether noncitizens are entitled to counsel during reasonable fear proceedings before an IJ.[63]

The court did, however, note that the regulations promulgating reasonable fear proceedings are "silent" on the right to counsel.[64] Further, it highlighted that 8 C.F.R § 208.31 provided that noncitizens may be represented during their screening interview with the asylum officer, but did not explicitly extend this right to their hearing before the IJ.[65]

Based on the Eleventh Circuit's substantial prejudice requirement, Priva had to show that if counsel were present, the outcome of his reasonable fear hearing *would have* differed.[66] In support of this conclusion, the court cited

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[60] *See infra* notes 70–75 and accompanying text.

[61] *See Priva*, 34 F.4th at 954 (finding that noncitizens must show substantial prejudice when challenging the denial of counsel during a reasonable fear hearing); Farrokhi v. Immigr. & Naturalization Serv., 900 F.2d 697, 702 (4th Cir. 1990) (holding that a noncitizen who violated his student-nonimmigrant status was required to show prejudice by the denial of counsel during his deportation hearing before the IJ); Ogbemudia v. Immigr. & Naturalization Serv., 988 F.2d 595, 598 (5th Cir. 1993) (discussing the right to counsel before an IJ during deportation proceedings and holding that the absence of counsel only constitutes a due process violation if there was substantial prejudice); Njoroge v. Holder, 753 F.3d 809, 810, 812 (8th Cir. 2014) (holding that a noncitizen asylum seeker must show prejudice to prevail on a challenge to the denial of the statutory right to counsel); Michelson v. Immigr. & Naturalization Serv., 897 F.2d 465, 468 (10th Cir. 1990) (stating that before the court can act on a due process challenge to the lack of representation, a noncitizen subject to deportation proceedings "must demonstrate prejudice").

[62] *Priva*, 34 F.4th at 954.

[63] *Id.*

[64] *Id.* The court emphasized that 8 U.S.C. § 1228 not include "language on reasonable fear hearings," and attributed this to the fact that "the statute was enacted before regulations involving those types of proceedings were promulgated to conform to the CAT." *Id.*

[65] *Id. Compare* 8 C.F.R § 208.31(c) (2024) (stating that a noncitizen "may be represented by counsel" during their screening interview with the asylum officer), *with id.* § 208.31(g) (failing to state whether a noncitizen may be represented by counsel during their screening interview with the IJ).

[66] *See Priva*, 34 F.4th at 955 (invoking a substantial prejudice standard that requires petitioners to show that the result of the proceedings "*would have been* different" absent the alleged violations). The court asserted that the Eleventh Circuit has long held that noncitizens must demonstrate substantial prejudice in alleging due process challenges to removal proceedings. *Id.* at 954; *see* Ibrahim v. Im-

Eleventh Circuit precedent on due process challenges to removal proceedings, where the court required the petitioner to show substantial prejudice in such cases.[67]

Neither the *Priva* court nor the precedent it cited explained or justified why a showing of substantial prejudice is required.[68] Further, when situating Priva's claim within Eleventh Circuit precedent on due process challenges to deportation hearings, the court did not differentiate between the right to counsel and other procedural due process rights.[69]

migr. & Naturalization Serv., 821 F.2d 1547, 1550 (11th Cir. 1987) (stating that "[a noncitizen] must show substantial prejudice" to succeed "on a due process challenge to a deportation proceeding").

[67] *See id.* at 954 (referencing cases where the court required a showing of substantial prejudice to prevail on various due process claims); *see also* Flores-Panameno v. U.S. Att'y Gen., 913 F.3d 1036, 1040 (11th Cir. 2019) (stating that a noncitizen alleging "ineffective assistance of counsel" is required to "'show prejudice' as well as counsel's deficient performance") (quoting Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1274 (11th Cir. 2006)); Frech v. U.S. Att'y Gen., 491 F.3d 1277, 1281–82 (11th Cir. 2007) (holding that a petitioner who alleged he was unable to obtain counsel due to the expenses incurred traveling to the proceedings had to show that he was prejudiced). The dissent highlights that although the court "touched upon due process claims implicating the right to counsel," it did not directly address whether noncitizens alleging the improper denial of the statutory right to counsel in immigration proceedings must demonstrate prejudice. *Priva*, 34 F.4th at 960 (Wilson, J., dissenting). Unlike the majority, the dissent approaches the issue from the assumption that there is a statutory right to counsel. *See id.* at 959–60 (demonstrating that a statutory right to counsel exists during reasonable fear proceedings because they were promulgated under 8 U.S.C. § 1228's authority and § 1228 provides a right to counsel).

[68] *See id.* at 954 (majority opinion) (citing precedent to support the proposition that a showing of substantial prejudice is required to establish due process claims but not elaborating on why this is the state of affairs); *see, e.g.*, Indrawati v. U.S. Att'y. Gen., 779 F.3d 1284, 1299 (11th Cir. 2015) (stating that noncitizens must demonstrate substantial prejudice to establish a due process violation infringement without justifying or explaining why); Lapaix v. U.S. Atty. Gen., 605 F.3d 1138, 1143 (11th Cir. 2010); Garcia v. U.S. Att'y Gen., 329 F.3d 1217, 1222 (11th Cir. 2003) (same); Mullen-Cofee v. Immigr. & Naturalization Serv., 976 F.2d 1375, 1380 (11th Cir. 1992) (same). Like the *Priva* court, prior courts cite precedent to assert that substantial prejudice is required, but do not justify the requirement with substantive rationale. *See, e.g.*, *Ibrahim*, 821 F.2d at 1550 (citing Fifth Circuit precedent *Ka Fung Chan* to assert that noncitizens must demonstrate substantial prejudice); *see also* Ka Fung Chan v. Immigr. & Naturalization Serv., 634 F.2d 248, 258 (5th Cir. 1981) (stating that "proof of a denial of due process in an administrative proceeding requires a showing of substantial prejudice" without providing further justification or explanation for the requirement).

[69] *See Priva*, 34 F.4th at 954 (failing to discuss the distinctive nature of the right to counsel). Further, it did not discuss how the specific issue of the denial of counsel during reasonable fear proceedings was an issue of first impression before the court. *See id.* at 960 (Wilson, J., dissenting) (criticizing the majority's interpretation of the issue as overbroad and arguing that the Eleventh Circuit has yet to confront this circuit split issue: "whether the *specific procedural violation of the denial of counsel* requires a showing of prejudice") (emphasis added); *see also* Hernandez Lara v. Barr, 962 F.3d 45, 59 (1st Cir. 2020) (Lipez, J., concurring) (critiquing courts who require a showing of prejudice on denial of counsel claims for treating the right to counsel "more generically as a matter of procedural due process" and as a result "failing to recognize the distinctive nature of the statutory right to counsel, with its Sixth Amendment antecedents").

B. The Zuniga *Statutory Right Approach*

In 2019, in *Zuniga v. Barr*, the U.S. Court of Appeals for the Ninth Circuit held that because noncitizens have a statutory right to counsel before an IJ during reasonable fear proceedings, they are not required to show prejudice when this right is denied.[70] In doing so, the Ninth Circuit extended the Second, Third, Seventh, Ninth, and District of Columbia Circuits' practice of not requiring a showing of prejudice when counsel has been denied in deportation proceedings to the specific context of reasonable fear interviews.[71]

The court noted that 8 U.S.C. § 1228 unequivocally stipulated that noncitizens are entitled to representation by counsel, and did not contain any language limiting the right to counsel to particular types of proceedings.[72] Although acknowledging that the regulations were "silent" as to a noncitizen's right to counsel during reasonable fear proceedings, the court emphasized that this right was promulgated by Section 1228, which necessarily imputed a right to counsel in all deportation proceedings.[73]

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[70] Zuniga v. Barr, 946 F.3d 464, 469–71 (9th Cir. 2019) (per curiam). The petitioner, Baldemar Zuniga, was convicted of an aggravated felony and thus subject to expedited removal proceedings pursuant to § 1228(b). *Id.* at 465; *see* 8 U.S.C. § 1228(b) (promulgating expedited removals for noncitizens convicted of aggravated felonies). Zuniga, a Mexican national who "illegally entered the United States as a child . . . was convicted of participating in a conspiracy to manufacture and distribute drugs and launder money" in connection with a Mexican cartel. *Zuniga*, 946 F.3d at 465. During his removal proceedings, Zuniga expressed the fear that if he was removed to Mexico, he would be tortured or persecuted by the cartel due to his testimony in court against two of his co-conspirators involved with the cartel. *Id.* at 465–66. Thus, he was referred to an asylum officer for a reasonable fear screening interview. *Id.* at 466. The Ninth Circuit agreed with Zuniga that he was impermissibly denied his statutory right to counsel during his negative reasonable fear determination review before an IJ when the IJ failed to adequately obtain a waiver of that right. *Id.* at 471.

[71] *See Zuniga*, 946 F.3d. at 471 (holding that noncitizens are not required to show prejudice when their statutory right to counsel is denied during a reasonable fear interview); *See* Montes-Lopez v. Holder, 694 F.3d 1085, 1092 (9th Cir. 2012) (finding that noncitizens denied counsel in deportation proceedings are not required to show prejudice); Leslie v. U.S. Att'y Gen., 611 F.3d 171, 181 (3d Cir. 2010) (same); Montilla v. Immigr. & Naturalization Serv., 926 F.2d 162, 169 (2d Cir. 1991) (same); Castaneda-Delgado v. Immigr. & Naturalization Serv., 525 F.2d 1295, 1302 (7th Cir. 1975) (same); Cheung v. Immigr. & Naturalization Serv., 418 F.2d 460, 464 (D.C. Cir. 1969) (same). Circuits that do not require a showing of prejudice recognize that the denial of counsel is more prejudicial than other due process violations as the absence of counsel fundamentally affects a proceeding. *See, e.g.*, *Montes-Lopez*, 694 F.3d at 1092 (stating that the denial of counsel is more likely to be prejudicial than the ineffective assistance of counsel as counsel informs noncitizens' ability to make legal arguments); *Leslie*, 611 F.3d at 181 (explaining that noncitizens are entitled to a "fundamentally fair removal hearing" under the Fifth Amendment's due process protections and that counsel is fundamental to ensuring a fair hearing).

[72] *Zuniga*, 946 F.3d at 468; *see also* Rios-Berrios v. Immigr. & Naturalization Serv., 776 F.2d 859, 862 (9th Cir. 1985) (stating that due process engenders a right to counsel under the INA). The Ninth Circuit further noted that although the Sixth Amendment right to counsel does not apply to immigration proceedings, Congress acknowledged a right to counsel among the Fifth Amendment's due process guarantees by codifying it in the INA. *Zuniga*, 946 F.3d at 470.

[73] *See* 8 C.F.R § 208.31(g) (2024) (failing to state whether a noncitizen may be represented by counsel during their screening interview with the IJ); *Zuniga*, 946 F.3d at 468–70 (stating that § 238.1

More broadly, the court observed that the right to counsel before an IJ was consistent with the broader legislative history and statutory scheme of the INA.[74] Accordingly, the court concluded that due process required that noncitizens consciously and willingly waive the right to counsel and established that noncitizens denied the statutory right to counsel were not required to show that they were prejudiced.[75]

III. Representation by Counsel Is a Statutory Right That Does Not Require a Showing of Substantial Prejudice

In 2022, in *Priva v. U.S. Attorney General*, the U.S. Court of Appeals for the Eleventh Circuit erred by requiring noncitizens to demonstrate that they were prejudiced by the denial of counsel during a reasonable fear interview before an IJ.[76] Section A of this Part illustrates how a comprehensive statutory analysis affirms a noncitizen's right to counsel during reasonable fear proceed-

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was promulgated under the authority of 8 U.S.C. § 1228 and the language of § 1228 "makes clear that the statute contemplates a right to counsel in removal proceedings initiated under [§ 1228], which include reasonable fear review proceedings"); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8494 (Feb. 19, 1999) (indicating that § 1228 is the source of authority for 8. C.F.R. § 238.1). The government argued that the IJ has "discretion to decide whether a non-citizen may be represented by counsel" based on a 1999 memorandum written by the Executive Office for Immigration Review ("EOIR") that interpreted § 208.31's silence on the right to counsel in reasonable fear proceedings as endowing the IJ with discretion to decide if the noncitizen has a right to counsel. *Zuniga*, 946 F.3d at 470; *see* U.S. Dep't of Just., Exec. Off. of Immigr. Rev., Off. of the Chief Immigr. Judge, Operating Policies and Procedures Memorandum No. 99-5: Implementation of Article 3 of the UN Convention Against Torture 8 (1999) https://www.justice.gov/sites/default/files/eoir/legacy/1999/06/01/99_5.pdf [https://perma.cc/53XY-4EPY] (explaining that because the regulations are "silent" regarding the right to counsel in reasonable fear review proceedings, there is "no specific regulatory guidance" on the matter and thus "the issue is left to the discretion of the [IJ]"). The court rejected this argument, concluding that they need not adhere to the EOIR's interpretation because "[it] conflicts with the plain text of [§ 1228]" and they do not need to adhere to an agency's interpretation of a regulation if it is '"inconsistent with the statute under which the regulations were promulgated.'" *Zuniga*, 946 F.3d at 470 (citing Turtle Island Restoration Network v. U.S. Dep't of Com., 878 F.3d 725, 733 (9th Cir. 2017)).

[74] *Zuniga*, 946 F.3d at 469 (explaining that because § 1228 is "clear and consistent with the statutory scheme at issue, the plain language of the statute is conclusive in providing a statutory right to counsel") (quoting Emmert Indus. Corp. v. Artisan Assocs., Inc., 497 F.3d 982, 987 (9th Cir. 2007)) (internal quotations removed).

[75] *See id.* at 471 (foreclosing the government's argument that petitioner must show prejudice to prevail due to circuit precedent establishing that a noncitizen who was denied the statutory right to counsel is not required to show prejudice); *see also* Montes-Lopez v. Holder, 694 F.3d 1085, 1093–94 (9th Cir. 2012) (holding that a noncitizen who demonstrates that they were denied the statutory right to counsel during an immigration proceeding does not also need to show that they were prejudiced by the absence of counsel); Leslie v. U.S. Att'y Gen., 611 F.3d 171, 178–79 (3d Cir. 2010) (indicating that when fundamental statutory or constitutional rights are at issue, a showing of prejudice is not required).

[76] *See infra* notes 79–98 and accompanying text.

ings.[77] Section B highlights the persuasive policy grounds for protecting the right to counsel in removal proceedings.[78]

A. A Statutory Right to Counsel Should Be Presumed

Congress explicitly recognized the statutory right to counsel before an IJ by codifying it in the INA, and directly extended it to noncitizens convicted of aggravated felonies in 8 U.S.C. § 1228.[79] Reasonable fear proceedings fall under the purview of Section 1228 and supplement the expedited removal process to ensure compliance with CAT.[80]

Section 1228 repeatedly specifies the right to counsel in expedited removal proceedings.[81] Although the regulations promulgating reasonable fear proceedings do not directly stipulate a right to counsel before an IJ, because they were promulgated under the authority of Section 1228 and are part of the expedited removal process, it should be implied.[82] As such, it is immaterial that 8 C.F.R. § 238.1 fails to mention the right to counsel before an IJ.[83]

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[77] *See infra* notes 79–85 and accompanying text.

[78] *See infra* notes 86–98 and accompanying text.

[79] *See* 8 U.S.C. § 1362 (promulgating that noncitizens are entitled to representation by counsel at no expense to the government in "any removal proceedings before an [IJ] and in any appeal proceedings before the Attorney General from any such removal proceedings"); *id.* § 1228(a)(2) (providing that the Attorney General must make "reasonable efforts" to ensure that noncitizens' right and access to counsel pursuant to § 1362 are "not impaired"); Zuniga v. Barr, 946 F.3d 464, 470 (9th Cir. 2019) (per curiam) (elucidating that Congress acknowledged a right to counsel '"among the rights stemming from the Fifth Amendment guarantee of due process' by codifying it") (quoting Tawadrus v. Ashcroft, 364 F.3d 1099, 1103 (9th Cir. 2004)); *see also* 8. U.S.C. § 1362 (prescribing that in any removal hearings before an IJ noncitizens have the right to counsel); Priva v. U.S. Att'y Gen., 34 F.4th 946, 959 (11th Cir.) (Wilson, J., dissenting), *cert. denied sub nom*. Priva v. Garland, 143 S. Ct. 526 (2022) (pointing out that "Congress has provided that in 'any removal proceedings before an [IJ],' a noncitizen 'shall have the privilege of being represented' by counsel").

[80] *See Zuniga*, 946 F.3d at 468 (asserting that reasonable fear proceedings fall under the purview of § 1228); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999) (explaining that 8 C.F.R. § 238.1 creates "a new screening process to rapidly identify and assess" withholding of removal claims and claims seeking protection under the CAT by noncitizens subject to 8 U.S.C. § 1228's expedited administrative removal process for aggravated felons).

[81] *See* § 1228(a)(2) (extending the right to counsel before an IJ provided by § 1362 to noncitizen aggravated felons); *id.* § 1228(a)(1) (providing that expedited removals should comply with § 1229a which stipulates the right to counsel in typical removal proceedings).

[82] *See Zuniga*, 946 F.3d at 468–69 (demonstrating that the regulations establishing reasonable fear proceedings were promulgated under the authority of § 1228, that clearly stipulates noncitizen aggravated felons right to counsel in removal proceedings which includes reasonable fear proceedings, and that the right to counsel is woven throughout the statutory scheme of the INA).

[83] *Compare* § 1228(a)(2) (ensuring that expedited removals comply with § 1362's assurance of the right to counsel), *and id.* § 1362 (stating that in any removal proceeding before an IJ noncitizens have the right to counsel), *with* 8 C.F.R § 208.31(g) (2024) (failing to clarify that noncitizens may be represented by counsel during their reasonable fear screening interview with the IJ). *See Zuniga*, 946 F.3d at 470 (rejecting the government's argument that the regulations' silence on whether noncitizens have a right to counsel before an IJ endows the IJ with discretion to decide whether a noncitizen may be represented, and instead asserting that noncitizens have a statutory right).

It is more accurate to approach a noncitizen's due process challenge with the *presumption* that they have a statutory right to counsel.[84] Therefore, because the U.S. Court of Appeals for the Eleventh Circuit in *Priva v. U.S. Attorney General* abstained from deciding whether there is a statutory right to counsel having already decided the case on substantial prejudice, its analysis was flawed from the start.[85]

B. A Robust Policy Justification for Protecting the Right to Counsel

The *Priva* court further erred when treating the denial of counsel as indistinguishable from other due process challenges and ignoring the distinctive policy grounds for protecting the right to counsel.[86] The majority approach is grounded in two key policy rationales for protecting the right to counsel in removal proceedings which translate to reasonable fear proceedings.[87]

First, although there is no right to counsel in removal proceedings under the Sixth Amendment, removal proceedings are akin to criminal proceedings which mandate the right to counsel given the serious consequence of deportation.[88] Because a negative reasonable fear determination essentially mandates removal, this is no less true for noncitizen aggravated felons undergoing reasonable fear proceedings.[89]

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[84] *See Priva*, 34 F.4th at 959 (Wilson, J., dissenting) (indicating that the right to counsel before an IJ is consistent with the legislative intent and statutory scheme of the INA).

[85] *See id.* at 954 (majority opinion) (stating it was unnecessary to determine whether there is a statutory right to counsel because Priva failed to meet the substantial prejudice requirement).

[86] *See id.* at 954–56 (focusing on Priva's failure to demonstrate substantial prejudice by the denial of counsel and failing to recognize that the right to counsel is unlike other procedural due process claims). Unlike the majority, the dissent addressed policy issues inherent to the issue, and concluded that the "fundamental importance of the right to counsel, even where statutory, is too great" to require a showing of prejudice. *Id.* at 961 (Wilson, J., dissenting).

[87] *See* Hernandez Lara v. Barr, 962 F.3d 45, 58–59 (1st Cir. 2020) (Lipez J., concurring) (highlighting the policy rationales for protecting noncitizens right to counsel in deportation hearings without requiring a showing of prejudice and distinguishing the right to counsel from other procedural due process challenges); *Priva*, 34 F.4th at 961 (Wilson, J., dissenting) (indicating that the distinctive policy rationales for protecting the right to counsel in deportation hearings translate to protecting the right to counsel during a reasonable fear hearing before an IJ).

[88] *Hernandez Lara*, 962 F.3d at 59 (Lipez J., concurring); *see* Castaneda-Delgado v. Immigr. & Naturalization Serv., 525 F.2d 1295, 1301 (7th Cir. 1975) (stating that deportation hearings carry serious consequences). In 1945, in *Bridges v. Wixon*, the U.S. Supreme Court recognized that although deportation proceedings are "not technically a criminal proceeding" they engender "great hardship" on noncitizens and "[deprive them] of the right to stay and live and work in this land of freedom." 326 U.S. 135, 154 (1945). As such, the Supreme Court held that immense care must be employed to ensure that the deportation proceedings conform to fundamental paradigms of fairness. *Id.*

[89] *See* 8 C.F.R § 208.31(g)(1) (2024) (stating that if the immigration judge affirms the asylum officer's negative reasonable fear determination "the case shall be returned to [DHS] for removal of the [noncitizen]" and "[n]o appeal shall lie from the immigration judge's decision"). A noncitizen is only eligible for asylum or withholding of removal if they receive a positive reasonable fear determination—thus, their fate rests in the hands of the IJ during the final stage of the screening process. *See*

Second, counsel plays an essential role in advocating for noncitizens and ensuring that their case is appropriately presented.[90] Thus, the denial of counsel affects a proceeding so acutely that prejudice is presumable.[91] This is especially true given the complex statutory framework surrounding removal proceedings which are nearly impossible to traverse as an unrepresented noncitizen.[92]

Noncitizen aggravated felons face the most severe deportation consequences and are not entitled to protections typical of removal proceedings.[93] It follows that as a baseline protection, noncitizens should have the right to counsel without the erroneously formulated requirement to demonstrate substantial prejudice.[94]

Today, the aggravated felon label encompasses individuals convicted of non-violent crimes with sentences as low as one year.[95] That these individuals

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id. (noting that a noncitizen may apply for withholding of removal or asylum if they receive a positive reasonable fear determination).

[90] Montes-Lopez v. Holder, 694 F.3d 1085, 1092 (9th Cir. 2012) (stating that a lack of counsel affects a noncitizen's strategic decisions, and their ability to make meritorious legal arguments); Leslie v. U.S. Att'y Gen., 611 F.3d 171, 181 (3d Cir. 2010) (stating that counsel is fundamental to ensuring a fair proceeding).

[91] *See Castaneda-Delgado*, 525 F.2d at 1032 (stating that the denial of counsel to noncitizens facing deportation proceedings caused the proceedings to be "tainted from their roots"); *see also Hernandez Lara*, 962 F.3d at 59 (Lipez, J., concurring) (indicating that prejudice may be presumed by the denial of counsel because it inherently impacts a proceeding, and requiring prejudice "runs counter" to the principle that counsel is "essential" in adversary proceedings).

[92] *See Leslie*, 611 F.3d at 181 (stating that noncitizens subject to removal are often unfamiliar with the complex immigration law statutory framework and if a noncitizen is denied counsel, they may be prevented from "reasonably presenting" their case).

[93] *See* Carachuri-Rosendo v. Holder, 560 U.S. 563, 566 (2010) (indicating that noncitizens convicted of aggravated felonies face the "harshest deportation consequences"); *see also* 8 U.S.C. § 1228(b)(5) (stating that "[n]o [noncitizen aggravated felon] shall be eligible for any relief from removal that the Attorney General may grant in [their] discretion."); *id.* § 1226(c), (e) (promulgating that the Attorney General "shall take into custody" noncitizens convicted of aggravated felonies upon their release, and that the Attorney General's application of § 1226 "shall not be subject to review"); Demore v. Kim, 538 U.S. 510, 517, 531 (2003) (upholding the constitutionality of mandatory detentions under § 1226 and holding that noncitizens convicted of aggravated felonies may be detained without bail pursuant to § 1226(c)); Kennedy, *supra* note 22, at 1849 (stating that noncitizen aggravated felons are not allowed procedural safeguards, including asylum, appeals, and judicial discretion).

[94] *See Hernandez Lara*, 962 F.3d at 59 (Lipez, J., concurring) (explaining that denial of counsel inherently impacts a proceeding and indicating that requiring prejudice is inconsistent with ensuring a fair proceeding).

[95] *Compare* 8 U.S.C. § 1101(a)(43)(G) (defining "a theft offense (including receipt of stolen property) . . . for which the term of imprisonment [is] at least one year" as an aggravated felony), *with id.* § 1101(a)(43)(A) (defining "[m]urder, rape, or sexual abuse of a minor" as an aggravated felony). Since Congress imported into immigration law the idea of aggravated felonies, the definition has greatly expanded. *See* Kennedy, *supra* note 22, at 1853–57 (discussing the evolution of the aggravated felony concept in immigration law). Although the INA was introduced in 1954, Congress did not introduce the notion of aggravated felonies into immigration law until the Anti-Drug Abuse Act of 1988, that was designed to mitigate international drug trafficking. *Id.* at 1853. Accordingly, when the concept was introduced, it was much narrower in scope, focusing only on drug-related crimes, with an exception for murder and attempted murder. *Id.* at 1854. Congress has expanded the aggravated felony definition on multiple occasions since then. *Id.* at 1855–57. As it stands today, the definition of aggravated felony

may be subject to deportation under expedited removals manifests an asymmetry between the crime charged and consequence imposed, thereby elevating the need to protect the right to counsel.[96]

For these salient policy reasons, the U.S. Supreme Court should have granted Priva's petition for certiorari to resolve the circuit split.[97] Further, in the interest of justice, the Supreme Court should have ruled that noncitizen aggravated felons have a right to counsel at all stages of reasonable fear proceedings.[98]

CONCLUSION

In 2022, in *Priva v. U.S. Attorney General*, the U.S. Court of Appeals for the Eleventh Circuit conditioned noncitizen aggravated felons' due process challenges to the denial of counsel during their reasonable fear hearings before an IJ on their showing of substantial prejudice. The *Priva* court's approach is flawed: it neither recognized that 8 U.S.C. § 1228 imputes a statutory right to counsel to 8 C.F.R. § 238.1 reasonable fear proceedings, nor differentiated the right to counsel from other procedural due process challenges. Most circuits recognize that the denial of the statutory right to counsel in removal proceedings is so inherently prejudicial that no showing of prejudice is required. This was an approach that in 2019, in *Zuniga v. Barr*, the U.S. Court of Appeals for the Ninth Circuit applied to the specific context of reasonable fear hearings before an IJ. Given the grave consequences of a negative reasonable fear determination, and thus, the salience of counsel, other circuits should follow the *Zuniga* court's approach.

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encompasses twenty-one categories of offenses. *See* § 1101(43)(A)–(U) (enumerating aggravated felonies).

[96] *Compare* § 1101(a)(43)(F)–(G), (J), (R)–(S) (including in the definition of aggravated felonies crimes with sentences as low as a year), *with* 8 C.F.R. § 208.31(g)(1) (2024) (promulgating that if the IJ finds that the noncitizen aggravated felon does not have a reasonable fear, they will be removed). According to data published in 2020 by DHS, 164,296 noncitizens were removed from the United States through the expedited removal process, and 155,788 "criminal" noncitizens were removed. *See* Mike Guo, *Immigration Enforcement Actions: 2019*, DEP'T OF HOMELAND SECURITY OFF. OF IMMIGR. STAT.: ANN. FLOW REP. 10–11 (Sept. 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcementactions2019.pdf [https://perma.cc/SUB2-V8LL] (presenting published DHS data). Thus, from a numerical standpoint, barriers to due process in expedited removals have sweeping consequences. *See id.* (noting key takeaways from the data).

[97] *See* Priva v. Garland, 143 S. Ct. 526, 526 (2022) (denying certiorari).

[98] *See* Zuniga v. Barr, 946 F.3d 464, 471 (9th Cir. 2019) (per curium) (suggesting that noncitizens have a statutory right to counsel throughout their reasonable fear proceedings).