IMMIGRATION AND NATIONALITY LAW: PROBLEMS AND STRATEGIES

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Summer 2018 Update

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2018 Summary of Updates

July 30, 2018

The summer 2018 update to Immigration and Nationality Law: Problems and Strategies by Lenni Benson, Lindsay Curcio, Veronica Jeffers, and Stephen Yale-Loehr incorporates prior annual supplements and also contains many new developments, including:

Chapter 1:

- The most recent statistics on immigration to the United States, including nonimmigrants, immigrants, refugees, enforcement, and employer sanctions

- Update on unaccompanied children and families who are apprehended at the border

- Summary of Sessions v. Morales-Santana, 582 U.S. __, 2017 U.S. LEXIS 3724 (June 12, 2017), in which the Supreme Court held that Congress violated equal protection by imposing differing residence requirements on the U.S. citizen parents of children born abroad

- Summaries of recent federal cases involving preemption in the immigration context

- Summary of recent developments in the deferred action for childhood arrivals (DACA) litigation

- Summary of recent developments in immigration sanctuary laws, including County of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017)

Chapter 2:

- Summary of the Supreme Court's opinion in Hawaii v. Trump, __ U.S. __, 138 S. Ct. 2392 (June 26, 2018), concerning the travel ban executive proclamation

- Summaries of President Trump's immigration-related executive orders

- Recent developments in expedited removal

- An excerpt of Castro v. DHS, 835 F.3d 422 (3d Cir. 2016), which denied habeas corpus review to certain asylum seekers

- A summary of Jennings v. Rodriguez v. Robbins, xx, concerning whether detained immigrants are entitled to a bond hearing after six months

- New developments concerning noncitizens' rights at the border

Chapter 3:

- Updates concerning the Visa Waiver Program, STEM OPT, U visas, and the entrepreneurial parole program

- Summary of President Trump's April 2017 Executive Order on Buy and Hire American and implementing agency guidance

- Summary of new State Department guidance on the 30/60 day rule regarding nonimmigrant intent

- Summary of new USCIS efforts to restrict H-1B visas

- Summary of Matter of O- A-, Inc., Adopted Decision 2017-03 (AAO Apr. 17, 2017)

Chapter 4:

- Recent changes in the State Department's Visa Bulletin

- Updates concerning special immigrant juvenile status (SIJS)

- Summary of Matter of Dhanasar, 26 I. & N. Dec. 884 (AAO 2016), which sets forth a new test for determining eligibility for a national interest waiver green card

- Updates concerning the deferred action for childhood arrivals (DACA) program

- Updates concerning the I-601A provisional waiver of unlawful presence process

Chapter 5:

- Updates on the grounds of inadmissibility and waivers thereof

- Updates on cases explaining the categorical approach to determining if a state conviction is a conviction for immigration purposes

Chapter 6:

- The most recent statistics on removals

- Updates on current removal enforcement efforts by the Trump administration

- Recent cases testing the limits of what constitutes a crime involving moral turpitude

- New Problem 6-5 concerning deportability on a number of possible criminal grounds

- Summary of Esquivel-Quintana v. Sessions, 581 U.S. ___, 2017 U.S. LEXIS 3551 (2017), in which the Supreme Court determined when sexual abuse of a minor qualifies as an aggravated felony under INA § 101(a)(43)(A)

- Recent cases concerning the rights of children in removal proceedings, including an excerpt from C.J.L.G. v. Sessions, 880 F.3d 1122 (9th Cir. 2018)

- Recent cases concerning whether detained immigrants have a right to a bond hearing, including an excerpt of Jennings v. Rodriguez, 583 U.S. ___, 138 S. Ct. 830 (2018)

Chapter 7:

- Excerpt of Pereira v. Sessions, _ U.S. __, 138 S. Ct. 2105 (2018), concerning notice to appear requirements

- New Problem 7-3.1 concerning cancellation of removal, bond, and detention

- Recent cases concerning various types of relief from removal

- Recent cases concerning whether an admission in or out of immigration court establishes inadmissibility

- Recent updates concerning judicial and administrative removal under INA § 238

- Recent updates and cases concerning special immigrant juvenile status

- Recent updates concerning deferred action for childhood arrivals (DACA)

- Recent updates and cases concerning temporary protected status terminations

Chapter 8:

- New Problem 8-3.1 concerning whether a child fleeing gang violence might qualify for asylum as a member of a particular social group

- A discussion of the impact of President Trump's travel ban on refugees

- An update on Central American mothers and children applying for asylum at the U.S.-Mexico border

- Summaries of recent particular social group cases, particularly concerning, domestic violence victims, family members and gang members, including a summary of Matter of A-B-, 27 I. & N. Dec. 316, 317 (Att'y Gen. 2018)

Chapter 9:

- Updates on naturalization requirements and procedures

- Summary of Maslenjak v. United States, 137 S. Ct. 1918 (2017), which discussed what constitutes a material misrepresentation for naturalization purposes

Chapter 1: Immigration Law in Context: Exploring the Foundations of Constitutional Power and Immigration Controls from Criminal Penalties to Employer Sanctions

Page 1 (§ 1.01[A]): Add the following information about Mr. Chen Guangcheng:

During the initial negotiations in the U.S. embassy, Chen did not request asylum in the United States, but instead demanded to remain there as a free man. However, soon after leaving the embassy, Chen feared that Chinese authorities would renege on their promises or take punitive actions against his family members. After working as a visiting scholar at NYU for a year, in 2013 Chen accepted a position at a conservative research group called the Witherspoon Institute and also accepted a teaching position at Catholic University. See http://www.nytimes.com/2013/10/03/world/americas/chinese-activist-joins-conservative-research-group.html.

Refugee Resettlement Updates

The United States has historically led the world in terms of refugee resettlement, and today remains the top resettlement country. In fiscal year (FY) 2016, the United States resettled 84,994 refugees. In FY 2017, the resettlement numbers dropped to 53,000, in part due to the Trump administration's freeze of refugee admissions. In FY 2018, the number may not reach 20,000. Liz Robbins & Miriam Jordan, *Apartments Are Stocked, Toys Donated. Only the Refugees Are Missing.*, N.Y. TIMES, May 16, 2018, *at* https://www.nytimes.com/2018/05/16/us/refugee-admissions.html.

Besides accepting refugees for resettlement from countries of first asylum, the United States also grants humanitarian protection to asylum seekers who present themselves at U.S. ports of entry or claim asylum from within the country. In FY 2015 (the most recent year for which cumulative data is available), the United States granted asylum to 26,124 individuals. For more information see http://www.migrationpolicy.org/article/refugees-and-asylees-united-states

The DHS is no longer releasing the DHS Statistical Yearbook. The last published book was for fiscal year 2016. The data is difficult to piece together. The USCIS does release monthly filings and adjudication reports, but it can be difficult to assess overall approval rates. In a report reflecting just the adjudication of the asylum form itself, in Fiscal Year 2017, the USCIS received 142,760 forms and only approved 13,105 applications. However, many of those applications may have been pending for several years. Asylum and refugee admissions are discussed more fully in Chapter 8.

Page 1 (§ 1.01[A]): Add the following to the last paragraph:

From 2000 to 2014, the number of foreign students in the United States grew 72%. There are almost 900,000 foreign students currently in the United States. About half come from China (accounting for 31% of all foreign students), India, and South Korea. From 2013-2014, "[t]he Middle East and North Africa was the fastest growing region of origin for international students

in the U.S., increasing by 20 percent." *See* http://www.usnews.com/education/best-colleges/articles/2014/11/17/number-of-international-college-students-continues-to-climb.

NAFSA: Association of International Educators has useful tools on its website that help calculate the economic benefit of foreign students studying in the United States. For the academic year 2014-2015 NAFSA reported that nearly 975,000 foreign students generated an estimated $30 billion dollars for the U.S. economy. The website estimates that this student population generated 373,381 jobs related to the presence of the foreign students. See http://www.nafsa.org/Explore_International_Education/Impact/Data_And_Statistics/NAFSA_International_Student_Economic_Value_Tool/#stateData.

"International student enrollment in U.S. colleges and universities increased 10 percent between school year (SY) 2013-14 and SY 2014-15, the highest growth rate in 35 years, reaching a record high of 975,000 students." *See* http://www.migrationpolicy.org/article/international-students-united-states.

The Institute of International Education's Open Doors report for 2015 stated that the number of international students grew 10% in 2014-2015. The report lists India, China and Brazil as the leaders in countries sending students to the United States. *See* http://www.iie.org/en/Who-We-Are/News-and-Events/Press-Center/Press-Releases/2015/2015-11-16-Open-Doors-Data#.V3MSpo-cE5s.

In 2015 to 2016 Academic Year NAFSA reported that there were 1,043,839 foreign students studying in the United States continuing the trend of recent years. However, after the election in 2016, several universities reported a sharp decline in foreign students' applications. Several news organizations reported drops of 35 to 40%. *See*, *e.g.*, Aria Bendiz, "A Pause in International Students?" *The Atlantic Magazine*, (Mar. 13, 2017) reporting a 39% decrease in undergraduate applications for the Middle East.

The Migration Policy Institute has published a report analyzing the trends in foreign student enrollments. Numbers did exceed 1 million in 2017, but the rate of increase of new foreign students has declined by nearly 7%. The report is available at https://www.migrationpolicy.org/article/international-students-united-states.

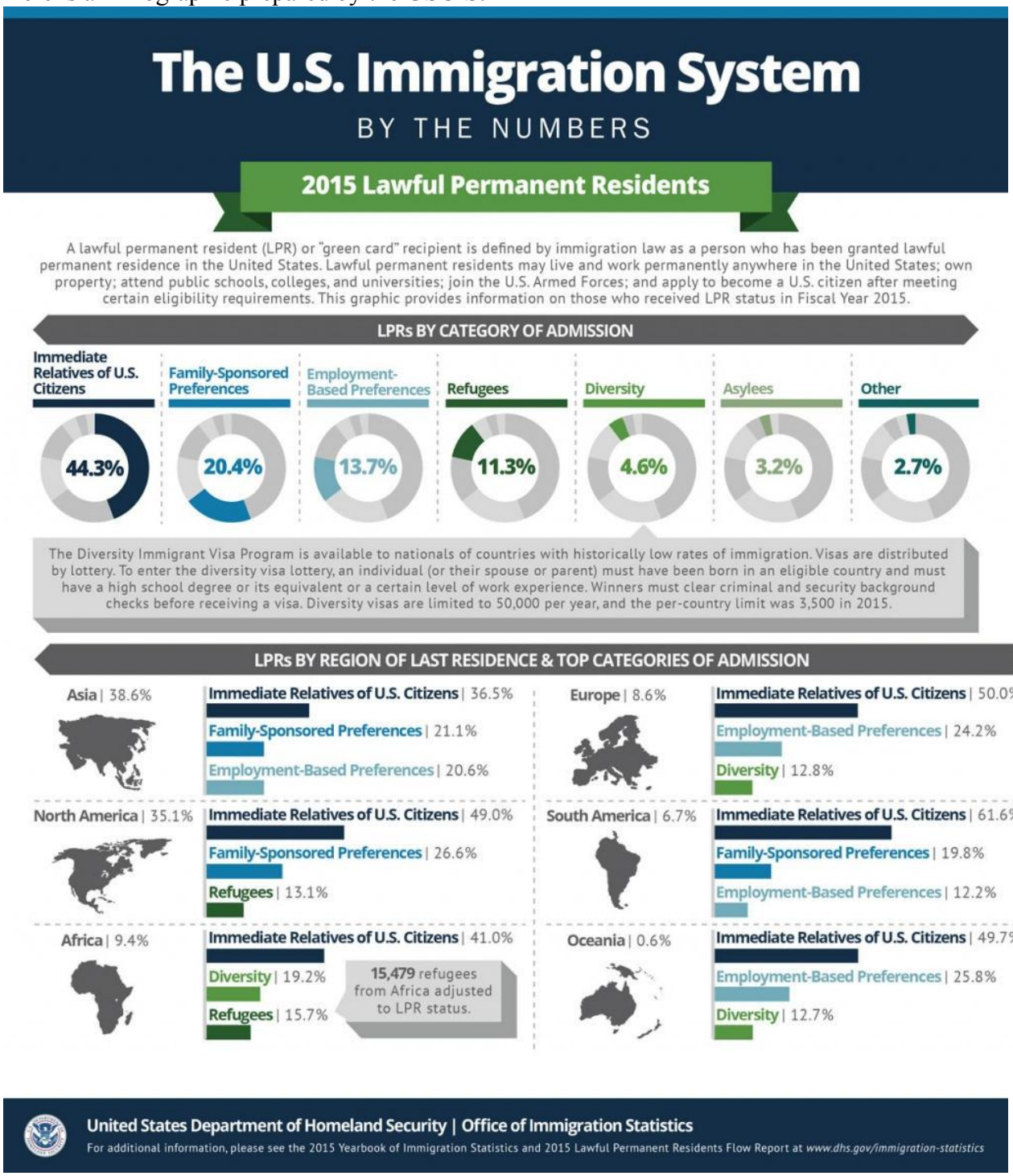
Page 2 ((§ 1.01[A]) Update on DHS data:

Again, the data is difficult to find. The last published report by DHS was as of January of 2014 and the estimate was an unauthorized population of 12.1 million. For a useful gathering of available reports and data as of May 2018, visit https://www.factcheck.org/2018/06/illegal-immigration-statistics/.

Page 4 (§ 1.01[C][1]) Add the following to the last paragraph:

As of June 2017, the DHS has not yet released fiscal year 2016 data.

Here is an infographic prepared by the USCIS:



In 2015, 465,068 people immigrated in one of the immediate relative categories. Of this total, spouses of U.S. citizens made up 265,367. The remaining immediate relatives were parents of an adult U.S. citizen (132,961) and unmarried minor children of U.S. citizens (66,740). Altogether, immediate relatives represented 44.2% of all new permanent immigrants. Spouses constituted

25.2% of this total. The total number of spouses continued to decline from prior years. For detailed tables and information about where these immigrants initially settle in the United States, *see* https://www.dhs.gov/sites/default/files/publications/Lawful_Permanent_Residents_2015.pdf.
In 2015, 265,367 people obtained lawful permanent resident status through marriage to a U.S. citizen. That represents a 1.7% increase from 2014. In 2015, immediate relatives of U.S. citizens as a category for admission increased (from 2014) by 3.2% of the total number of people who obtained lawful permanent resident status.

In 2014, 416,456 people immigrated in one of the immediate relative categories. Of this total, spouses of U.S. citizens represented 238,852. The remaining immediate relatives were parents of an adult U.S. citizen (116,387) and unmarried minor children of U.S. citizens (61,217). Altogether, immediate relatives represented 41% of all new permanent immigrants and spouses were 23.5% of this total. The total number of spouses continued to decline from prior years. For detailed tables and information about where these immigrants initially settle in the United States. *See* https://www.dhs.gov/sites/default/files/publications/Lawful_Permanent_Residents_2014.pdf

In 2013, 248,332 people obtained lawful permanent resident status through marriage to a U.S. citizen. That was a slight decline from 2011 and 2012. According to USCIS, this was the result of delays in processing. The number of employment-based grants of permanent residents, on the other hand, increased in 2013.
http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2013.pdf (see table 2).

One can try to piece together the updates by looking at the workload reports issued by USCIS describing each form it approved, but this is not an accurate reporting of total migration data.

Page 5 (§ 1.01[C][1]): See table below describing the numbers of unaccompanied children apprehended at the U.S.-Mexico border. In FY 2016 CBP stopped more than 58,000 children. Mexican children are usually immediately repatriated pursuant to a treaty agreement. Congress is considering legislation that would create border detention facilities and rapid adjudication for children from other nations as well. See H.R. 495, "The Protection of Children Act of 2017."

The trend of unaccompanied children arriving increased in the spring of 2018, as well as an increase in parents and children. As of the end of June of 2018, CBP reported apprehending over 37,450 unaccompanied children and 68,560 "family units." https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions.

This led to a new Trump administration policy of prosecuting parents for illegal entry and separating children by placing them into detention. Congress has not acted on any of the pending legislative proposals.

For more on separated children and unaccompanied minors at the border, see more below and in Chapter 2.

Page 6 (§ 1.01[C][1]): Add the following to the end of the family law subsection:

Immigration law is part of family life and should be an area of law that family law practitioners become more knowledgeable about.

As discussed in Chapters 3 and 4, the federal government now recognizes same-sex marriages that are valid in the place of formation as a basis for immigration sponsorship. *See generally* http://www.uscis.gov/family/same-sex-marriages.

Since 2003, the Office of Refugee Resettlement has cared for more than 190,000 unaccompanied children. The number of unaccompanied children referred to the program each year was generally in the range of 6,000 to 7,000 until fiscal year (FY) 2012. Those numbers increased from 13,625 in FY 2012 to 24,668 in FY 2013 and 57,496 in FY 2014. In FY 2015, 33,726 unaccompanied children were placed in ORR's care. *See* statement by Mark Greenberg, Acting Assistant Secretary, Administration for Children and Families, U.S. Department of Health and Human Services, before the Senate Committee on Homeland Security and Governmental Affairs (Jan. 28, 2016), available at http://www.acf.hhs.gov/programs/olab/resource/testimony-from-mark-greenberg-on-unaccompanied-children-0.

In 2013 the number of unaccompanied immigrant children doubled from the prior year, increasing to 24,000 apprehensions. In 2014 the number was dramatically higher: approximately 68,000 unaccompanied children were apprehended and placed into removal proceedings. *See* http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?_r=0. Compare this to an average of 7,000 – 8,000 for the first nine years of the program. *See* https://www.acf.hhs.gov/sites/default/files/orr/fact_sheet.pdf. "The children come primarily from Guatemala, El Salvador, and Honduras. In FY2014, approximately three-quarters of all children referred were over 14 years of age, and two-thirds were boys. Countries of origin of youth referred to the program were as follows in FY2014: Honduras (34%); Guatemala (32%); El Salvador (29%); Mexico (less than 2%), and Other Countries (less than 3%). Over the years, the breakdown per country of origin has remained relatively constant." *Id.*

Many of these children are seeking to join a parent or parents who is living in the United States. Some of these parents may have a form of temporary protected status but have been unable to petition for their children to come and live in the United States. As the text explains, Congress has been spending more on the apprehension and detention of these children. In June 2014, President Obama unsuccessfully sought more than two billion dollars to fund the costs associated with unaccompanied minors. Julia Preston, *Obama to Seek Funds to Stem Border Crossings and Speed Deportations*, N.Y. Times (June 28, 2014), available at http://www.nytimes.com/2014/06/29/us/obama-to-seek-funds-to-stem-border-crossings-and-speed-deportations.html.

The sharp decline in Fiscal Year 2015 was largely due to interdictions made by the government of Mexico. Approximately 70,000 children were apprehended in Mexico and deported to Central America that year. The federal government has reportedly sought to strengthen Mexico's ability to apprehend and deport children as part of its Frontera Sur (Sothern Border) program. For a critical report questioning Mexico's ability to care for and adequately address refugee claims for this

population, see Closed Doors: Mexico's Failure to Protect Refugee and Migrant Children, March 31, 2016, available at https://www.hrw.org/report/2016/03/31/closed-doors/mexicos-failure-protect-central-american-refugee-and-migrant-children. As of the end of May 2016, the United States had apprehended approximately 40,000 more children from the region since the beginning of October 2016. See https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016.

In 2016 the numbers rose again, with more than 58,000 children apprehended at the U.S.-Mexico border. *See* http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children.

Data here adapted from CBP reports.

Country	**FY 10**	**FY 11**	**FY 12**	**FY 13**	**FY 14**	**FY 15**	**FY 2016**	**FY 2017**	**FY2018***
El Salvador	1,910	1,394	3,314	5,990	16,404	9,389	17,512	9,143	3,279
Guatemala	1,517	1,565	3,835	8,068	17,057	13,589	18,913	14,827	17,649
Honduras	1,017	974	2,997	6,747	18,244	5,409	10,468	7,784	7,780
Mexico	13,724	11,768	13,974	17,240	15,634	11,012	11,926	8,877	7,682
Total:	**18,168**	**15,701**	**24,120**	**38,045**	**67,339**	**39,399**	**58,819**	**40,631**	**36,390**

***through June of 2018 (partial fiscal year)**

This book explores the rights of people at the border in Chapter 2 and specifically addresses relief for children in Chapter 7, where we discuss Special Immigrant Juvenile Status (SIJS), which is a path to permanent residence for children who have been abused, abandoned or neglected by one or both parents. We also have a new problem in the supplement for Chapter 8, where we explore both asylum and SIJS. Attorneys who regularly represent children in family court proceedings should become familiar with how immigration law will impact their clients.

Page 6 (§ 1.01[C][1]): The federal budget has grown to cover the costs of placing unaccompanied minor children in residential care. In fiscal year 2007, the budget was $105 million, a $28 million increase from the prior year. In 2007, more than 11,000 children were in the federal program.

In fiscal year 2014, nearly 57,500 children traveling without their parents or guardians (referred to as unaccompanied children) were apprehended by federal immigration officers and transferred to the care of the Department of Health and Human Services' Office of Refugee Resettlement (ORR). Most of these children were from Central America. The Government Accountability Office (GAO) found that ORR was initially unprepared to care for that many children. However, the agency increased its bed capacity to accommodate up to 10,000 children at a time. Given the unprecedented demand for capacity in 2014, ORR developed a plan to help prepare it to meet fiscal year 2015 needs. The number of children needing ORR's care declined significantly through most of fiscal year 2015, but began increasing again toward the end of the fiscal year. Given the inherent uncertainties associated with planning for capacity needs, ORR's lack of a process for annually updating and documenting its plan inhibits its ability to balance preparations for anticipated needs while minimizing excess capacity. *See* http://www.gao.gov/assets/680/675001.pdf.

In the "Secure and Manage our Borders" section of the fiscal year 2016 budget request by the U.S. Department of Homeland Security (DHS), the DHS stated that it provides funds for the costs

associated with apprehension and care of up to 104,000 unaccompanied children. A portion of these funds will be used to prepare facilities for families and unaccompanied children in the event of a surge that exceeds prior year apprehension levels. The request proposes up to $162 million in contingency obligation authority—enabling CBP and ICE to respond effectively if migration volume significantly surpasses prior year levels. *See* https://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf.

The following material describes the Health and Human Services budget for handling unaccompanied children in FY 2016:

> "HHS is responsible for ensuring that unaccompanied children who are apprehended by immigration authorities are provided shelter until they can be placed with sponsors, usually parents or other relatives, who assume responsibility for their care while their immigration cases are processed. [In the summer of 2016] the administration responded to a significant increase in the number of unaccompanied children who were apprehended on the southwest border, with an aggressive, coordinated federal response focused on providing humanitarian care for the children as well as on stronger deterrence, enforcement, foreign cooperation, and capacity for federal agencies to ensure that our border remains secure. In part as a result of those actions, the number of unaccompanied children apprehended at the border in FY 2015 is below FY 2014 and the number of children referred to ACF is projected to stabilize. To ensure ACF can take custody of all referred children in FY 2016, the Budget includes $948 million in base funding and creates a contingency fund that would trigger additional funds if caseloads exceed levels that could be supported with base funding."

See https://www.hhs.gov/about/budget/budget-factsheet/index.html.

For fiscal year 2017, the Administration provided the following description in its budget request:

> "Serving Refugees and Unaccompanied Children
>
> The United States has a proud history of welcoming refugees. In light of a global displacement crisis, the Obama administration has committed to expanding the Refugee Admissions Program in FY 2016 and FY 2017. All refugees are subject to the highest level of security checks of any category of traveler to the United States. ACF's role is to link these newly-arrived humanitarian populations, including refugees, asylees, special immigrant visa holders, and Cuban entrants, to key resources vital to becoming self-sufficient, integrated members of American society. The Budget provides initial cash and medical assistance for 213,000 entrants in FY 2017. This includes 100,000 refugees, consistent with the Administration's commitment to admit at least this number of refugees in 2017 as well as projected increases in other categories of humanitarian entrants. HHS is legally required to provide care and custody to all unaccompanied children apprehended by immigration authorities until they are released to an appropriate sponsor, while they await immigration proceedings. Based upon the recent increase in unaccompanied children apprehended at the southwest border, ACF is adding temporary capacity so that it is

> adequately prepared to care for these children, a prudent step to ensure that the Border Patrol can continue its vital national security mission. ACF is continuously monitoring the numbers of unaccompanied children referred for care, as well as the information received from interagency partners on conditions that may impact migration flows. The recent history of the program demonstrates the unpredictable nature of caseloads and the necessity of prudent planning and budgeting. To ensure that HHS can provide care for all unaccompanied children in FY 2017, the Budget includes the same amount of total base resources available in FY 2016, as well as a contingency fund that would trigger additional resources only if the caseload exceeds levels that could be supported with available funding."

See https://www.hhs.gov/about/budget/fy2017/budget-in-brief/index.html.

Page 6 (§ 1.01[C][3]): Update on international students**:**

Some worry that an influx of international students may crowd out U.S. students at colleges and universities. But increasing evidence shows that increases in international students actually expand domestic enrollment because foreign students often pay higher tuition, allowing universities to enroll more students overall. And because international students pay more than double the tuition paid by most of their U.S., in-state peers, their enrollment brings in revenues that are particularly beneficial to public colleges and universities.

NAFSA, the Association of International Educators, estimated the economic contributions of international students to be more than $32.8 billion, a 7.6 percent increase from the previous year. As a result of their spending, international students supported 400,812 jobs across the United States. See http://www.newamericaneconomy.org/feature/international-students-top-one-million-contributing-32-8-billion-to-u-s-economy/.

Page 7 (§ 1.01[C][4]): Criminal prosecution and defense:

Statistics update from 2010 to 2016: In 2016, defendant filings for immigration offenses constituted 26 percent of all criminal defendant filings, which is a decline of less than one percent from 2015. The total number is 21,016. Eighty percent of immigration defendant filings occurred in the five southwestern border districts. Filings decreased 27 percent in the Southern District of California and 3 percent in the Western District of Texas. Filings grew 12 percent in the Southern District of Texas, 11 percent in the District of New Mexico, and 3 percent in the District of Arizona. See http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2016.

With the introduction of the Trump administration's "zero tolerance" policy for illegal entries, some expected the overall rate of criminal prosecutions for illegal entries. to rise significantly. While the total number of prosecutions is increasing, so far it appears that the people targeted for prosecution changed to focus more on adults traveling with children. *See* Transactional Records Access Clearinghouse, Syracuse University, *Zero Tolerance at the Border: Rhetoric vs. Reality*, http://trac.syr.edu/immigration/reports/520.

Page 9 (§ 1.01[C][4]): Add the following to the end of the subsection concerning criminal prosecution and defense:

For updated statistics on overall prosecutions for illegal reentry, see Transactional Records Access Clearinghouse, Syracuse University, http://trac.syr.edu/tracreports/bulletins/immigration/monthlymay18/fil/. Overall, prosecutions were up by 56.6% in 2018, but still below the high of five years before.

In 2013, criminal prosecutions for illegal reentry after an order of removal or for misdemeanors for unlawful entry continued at a high pace. *See* Transactional Records Access Clearinghouse, Syracuse University, *Southern District of Texas Leading in Record Year for Immigration Prosecutions* (May 10, 2013), http://trac.syr.edu/immigration/reports/318/ (suggesting that more than 100,000 criminal immigration prosecutions would be held in 2013). A large number of convictions are plea bargains, and a significant number are for the crime of unlawful entry. Transactional Records Access Clearinghouse, Syracuse University, *Changes in Criminal Enforcement of Immigration Laws* (May 13, 2014). *See* http://trac.syr.edu/immigration/reports/354/.

Page 10 (§ 1.01[C][5]): Update to the BIA appointments information:

The BIA is authorized to have up to 21 Board Members, including a Chairman and Vice Chairman. There are current 15 sitting members and some temporary members. https://www.justice.gov/eoir/board-of-immigration-appeals-bios.

Page 12 (§ 1.01[C][5]): Figure 3 update. *See* https://www.justice.gov/eoir/eoir-organization-chart/chart

Additionally, the link to the chart on the DOJ's website does not work. Here is a new link: https://www.justice.gov/agencies/chart.

The 2016 immigration cases percentage in the federal appellate dockets listed in the U.S. Courts Judicial Business of 2016 report:

"Administrative agency appeals dropped 9 percent in 2016 to 6,469 and represented 11 percent of total appeals court filings. Appeals of Board of Immigration Appeals (BIA) decisions, which fell 12 percent, accounted for 81 percent of administrative agency appeals. Fifty-nine percent of BIA appeals were filed in the Ninth Circuit, and 14 percent were filed in the Second Circuit."
See http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2016 (about a quarter of the page down.)

In 2017 the number of appeals from the BIA were 5,210. *See* http://www.uscourts.gov/statistics/table/b-3/judicial-business/2017/09/30.

Page 13 (§ 1.01[C][5]): Update Figure 4 as follows:

Appeals to federal courts challenging BIA decisions increased 11 percent to 7,035 in fiscal year 2012. The total number of appeals in federal courts in 2012 was 57,501. *See* http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-courts-of-appeals.aspx. In fiscal year 2013, appeals challenging BIA decisions rose 3 percent to 7,225. The total number of appeals in federal courts in 2013 was 56,475. *See* http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-courts-of-appeals.aspx.

In fiscal year 2014, appeals challenging BIA decisions fell by 17 percent, yet still accounted for 86 percent of all administrative agency appeals in the federal courts. *See* http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2014.

Page 15 (§ 1.01[C][7]): Updated statistics on the foreign born population in the United States: *see* http://www.pewhispanic.org/2017/05/03/statistical-portrait-of-the-foreign-born-population-in-the-united-states-2015/.

Page 21 (§ 1.01[D][2][a]): Add the following at the end of this subsection:

On June 12, 2017, the Supreme Court ruled in *Sessions v. Morales-Santana*, 582 U.S. __,198 L. Ed. 2d 150 (2017). While the unanimous Court found that Congress had violated equal protection by imposing differing residence requirements on the U.S. citizen parents of children born abroad, the Court determined that only Congress could provide a remedy of granting citizenship. In this case, Mr. Morales-Santana was born in the Dominican Republic to a U.S. citizen father who was not married to his mother, a citizen of the Dominican Republic. The statutes at that time required the father to have resided in the United States for ten years, of which five years were after his 14th birthday. For U.S. citizen mothers of children born out of wedlock, the requirement was only one year of residency. The particular statute that applied to Mr. Morales-Santana was amended in 1986 and the residency period was reduced to two years, but Congress did not make the reduction retroactive.

Morales-Santana's father was born in the United States but left 20 days short of his 19th birthday, leaving him 20 days short of the requirement. He moved to the Dominican Republic, where Morales-Santana was born out of wedlock. Morales-Santana raised his claim to citizenship as a defense when he was placed into removal proceeding as an adult. He had entered the United States and lived here since he was 13. Due to a conviction, he was put into removal proceedings. He argued that the exception for unwed mothers should apply to him because the failure to do so would violate the equal protection principle implicit in the Fifth Amendment because the law essentially treated men and women differently. Justice Ginsburg, stating that laws that differentiate between genders deserve "the highest level of scrutiny," agreed with Morales-Santana that the exception was unconstitutional. "We must therefore leave it to Congress to select, going forward, a physical-presence requirement (ten years, one year, or some other period) uniformly applicable to all children born abroad with one U. S. citizen and one alien parent, wed or unwed. In the interim, the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination." 198 L. Ed. 2d at 159.

Page 57 (§ 1.02[B]) Sanctions in the Preemption debate [Criminal or Civil Sanctions]: Add the following paragraph at end of this section, just before [2]:

As mentioned in the text, some analysts have suggested that many of the people residing without status in the United States entered lawfully. The Center for Migration Studies uses a figure of 45 percent based on comparing data gathered from the American Community Survey, the U.S. Census and DHS apprehension and removal rates. See article at http://jmhs.cmsny.org/index.php/jmhs/article/view/58.

In Chapter 2 we will explore the U.S. border inspection process.

At the current time, the United States does not have a complete electronic monitoring system of who departs. In March of 2107, DHS Secretary John F. Kelly submitted a report that provided data collected on "departures" for those people who originally entered by air or at a seaport. The DHS does not yet have a reliable method of measuring departures are the Southern Border. At the Northern Border, the DHS has entered into a cooperative agreement with Canada that shares data about foreign nationals who depart the United States and enter Canada. Using data gathered from carrier manifests and a few pilot exit monitoring systems, DHS estimated that 98.05 percent of all nonimmigrants admitted to the United States depart on time. Still, even with a low rate of overstay, the agency estimated that approximately 628,799 people remained in the United States in violation of their status. As we will discuss throughout this text, understanding the limits of status and when an individual has violated status can be quite technical and complicated.

Remaining in the United States without permission is a status violation and is generally not a criminal act. Should Congress consider criminalizing overstays?

Page 58 (§ 1.02[B][2]): Add the following at the top of page 58, just before Problem 1-2:

In spring 2018, DHS began to release more data about employment enforcement. In a May 2018 press release ICE reported:

"From Oct. 1, 2017, through May 4, HSI opened 3,510 worksite investigations; initiated 2,282 I-9 audits; and made 594 criminal and 610 administrative worksite-related arrests, respectively. In comparison, for fiscal year 2017 – running October 2016 to September 2017 – HSI opened 1,716 worksite investigations; initiated 1,360 I-9 audits; and made 139 criminal arrests and 172 administrative arrests related to worksite enforcement." See https://www.ice.gov/news/releases/ice-worksite-enforcement-investigations-already-double-over-last-year.

While the ICE news release stated that over $ 96 million in fines had been assessed, it appears the majority was against one company for $95 million. https://www.ice.gov/news/releases/asplundh-tree-experts-co-pays-largest-civil-settlement-agreement-ever-levied-ice. The Asplundh Tree Experts Company was fined for years of noncompliance.

The Immigration and Customs Enforcement web pages include a chart providing guidance on fines and a flow chart that describes the typical enforcement investigation. This website reports that for

a first tier offense, over 50% of the fines are $1,900. *See* http://www.ice.gov/factsheets/i9-inspection.

The agency does not report aggregate fine data. ICE press releases report some employer sanctions cases. For example, in June 2015, an orchard in the Seattle area was fined over $2 million due to faulty I-9 verification procedures. *See* https://www.ice.gov/news/releases/washington-apple-orchard-fined-millions-following-ice-audit.

For a report on the use of employer sanctions, see Andorra Bruno, "Immigration-Related Worksite Enforcement: Performance Measures" Congressional Research Service (Aug. 7, 2013). Here is a chart on the overall use of sanctions from that report:

Table 1. Final Orders and Administrative Fines, FY1999-FY2012

Fiscal Year	Number of Final Orders Issued	Administrative Fines Imposed
1999	215	$1,674,672
2000	312	$3,337,472
2001	297	$2,037,509
2002	91	$485,128
2003	52	$289,814
2004	10	$90,249
2005	10	$455,870
2006	0	$0
2007	2	$26,560
2008	18	$675,209
2009	52	$1,033,291
2010	237	$6,956,026
2011	385	$10,463,988
2012	495	$12,475,575

The same report shows a significant recent increase in people being charged criminally for employment-related violations. In fiscal year 2012, 520 people were criminally charged.

In 2015 the Congressional Research Service updated the report to include data through the end of fiscal year 2014.

2013	637	$15,808,365
2014	642	$16,275,821

That report is at https://fas.org/sgp/crs/homesec/R40002.pdf.

Page 58 (§ 1.02[B][2]): Add the following after note 6:

7. Don't Overdo It. Employers cannot play it safe and demand more or different documents. In 2015, the Department of Justice's Office of Anti-discrimination for Immigration Related Employment settled a case of over-documenting workers with three cab companies in Nevada.

The companies had required foreign-born workers to provide additional documentation. The Department of Justice obtained a $445,000 penalty for violating INA § 274B.

The violations were described in an interview with Law 360: "The errors cited by the government were the result of complex regulations regarding verification of work authorization, and not an intent to discriminate against applicants for employment at the company. . . . There was no finding by the government that anyone affected by the clerical errors during this process was denied employment." Kelly Knaub, *Vegas Cab Cos. Settle Citizenship Discrimination Claims*, Law360, Oct. 21, 2015, at http://www.law360.com/articles/716536/vegas-cab-cos-settle-citizenship-discrimination-claims.

In January of 2017 the DOJ Office for Special Counsel was renamed as the "Immigrant and Employee Rights Section." *See* https://www.justice.gov/crt/technical-assistance-letters. That office enforces the anti-discrimination provisions, and announced several large enforcement actions against employers who were over-documenting or employing discriminatory practices in hiring. See https://www.justice.gov/crt/immigrant-and-employee-rights-section. All of these settlements were announced after the change in administration. In one case against an onion farm in New Mexico, the company rejected U.S. workers. The settlement agreement requires Carrillo Farm to pay civil penalties to the United States, undergo department-provided training on the anti-discrimination provision of the INA, and comply with departmental monitoring and reporting requirements. In a separate agreement with workers represented by Texas Rio Grande Legal Aid, Carrillo Farm agreed to pay a total of $44,000 in lost wages to affected U.S. workers. In another case, the company required all workers to produce a permanent resident or green card.

In the spring of 2017, the EOIR, which houses the Office of the Chief Administrative Hearing Office that hears the sanctions cases, also published a new form to facilitate people filing complaints under the anti-discrimination statute. See new Form EOIR-58 at https://www.justice.gov/sites/default/files/pages/attachments/2017/04/21/eoir-58.pdf.

Page 65 (§ 1.02[B][2]): Add the following to Note 2 concerning back pay and state employment law:

The Second Circuit followed *Hoffman Plastics* in rejecting back pay for undocumented workers, but it remanded the case to the NLRB to determine if a conditional reinstatement order could be made for those workers who now could satisfy the employment verification requirements of the immigration law. *Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013).

Page 65 (§ 1.02[B][2]): Add new Note 3:

In June 2015, the Appellate Division for the Second Judicial Department of New York granted Cesar Adrian Vargas a license to practice law. In a unanimous opinion, the court addressed whether Vargas, a recipient of Deferred Action for Childhood Arrivals (DACA), satisfied the requisite standard of good character and general fitness for admission to the bar. The court held that Vargas' "undocumented immigration status, in and of itself, does not reflect adversely upon his general fitness to practice law." *Matter of the Application of Cesar Adrian Vargas for Admission to the Bar of the States of New York,* 2015 N.Y. App. Div. LEXIS 4587 (N.Y. App. Div. June 3, 2015).

See http://www.nytimes.com/reuters/2015/06/04/world/americas/04reuters-new-york-immigrant.html?_r=0; *see also* http://www.cnn.com/2014/01/02/justice/california-immigrant-lawyer/ (discussing undocumented Sergio Garcia's admission to the California state bar in January of 2014).

Vargas is limited to DACA recipients. The California Supreme Court's decision in *In re Garcia*, 58 Cal. 4th 440 (Cal. 2014), which held that Sergio Garcia may be admitted to the California bar notwithstanding his lack of immigration status, is not so limited–Garcia was not a DACA recipient. How can the holding in *Garcia* be reconciled with federal law that prohibits the employment of an undocumented immigrant?

Page 74 (§ 1.02[B][2]): Update the citation for Chamber of Commerce v. Whiting to 563 U.S. 582 (2011).

Page 98 (§ 1.02[B][2]): Add the following to Note 2 concerning whether the Arizona employer sanctions law is being enforced:

As of July 1, 2018, only two employers have been sanctioned and reported on the Arizona State Attorney General's website. In the ten years since Arizona enacted its statute, only three enforcement actions are reported.

AZ Central reports that the law has been enforced three times since 2008, with the third case pending. http://archive.azcentral.com/business/news/articles/20131102arizona-employer-sanctions-law-seldom-used.html. The Arizona Attorney General's website updated its link: https://www.azag.gov/legal-az-workers-act/court-orders. As of June 2017, there have been no new court orders added to the government site.

Given the vehemence with which Arizona sought special sanctions and pursued Supreme Court litigation to secure the authority to have its own sanction program, is it surprising that little enforcement is reported?

Page 101 (§ 1.02[B][2]): Add to end of Note 8:

For a short video on how social security cards are used as Identification Cards and some of the policy debate about adopting the card as a formal national I.D., see https://www.youtube.com/watch?v=Erp8IAUouus.

Page 102 (§ 1.02[B][2]): Add to end of Note 9:

DHS provides a webinar explaining the E-Verify program, its purpose, how to enroll, *et cetera*, at http://www.uscis.gov/e-verify/e-verify-webinar-demand-entire-video.

Page 102 (§1.02[C]): Add the following paragraph to the start of section C concerning state criminal sanctions:

As you have read and will continue to explore in this chapter, the state of Arizona has recently adopted legal provisions and amended its constitution by popular referendum. Subsequently it has become more difficult for undocumented or overstayed noncitizens to live in Arizona. In 2006, the people of Arizona amended the state constitution to preclude bail for a wide variety of felony charges for any person who is a noncitizen, or who could not prove he or she was in lawful status. The Ninth Circuit, en banc, struck down the constitutional amendment by finding that this provision violated the substantive due process protections found in the 14th Amendment. "The Due Process Clauses of the Fifth and Fourteenth Amendments protect every person within the nation's borders from deprivations of life, liberty or property without due process of law." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014), *cert. denied*, ___ U.S.___, 135 S. Ct. 236 (2015). The court found that although Arizona had a compelling interest to ensure that persons accused of serious crimes appear for trial, Arizona law was insufficiently tailored to satisfy heightened scrutiny. The court further found the provision created an irrebuttable presumption rather than an individualized hearing. *Id*. at 784. In general, the Supreme Court has long held that in criminal enforcement, noncitizens are entitled to the same protections as citizens such as the right to counsel for the indigent, the right to have a jury trial, etc. *See, e.g., Wong Wing v. United States,* 163 U.S. 228 (1896) (rejecting a criminal sanction for immigration violation without a full trial).

In August 2017, President Trump granted Mr. Arpaio a pardon for his contempt conviction. *See* https://www.whitehouse.gov/briefings-statements/president-trump-pardons-sheriff-joe-arpaio/.

Page 102 (*Arizona v. United States)*: Update the citation to *Arizona v. United States*, 567 U.S. 387 (2012).

In the second full paragraph, the Court cites *Padilla v. Kentucky*. Note that the full citation is 559 U.S. 356.

Page 119 (second full paragraph in Note 1): change link to: http://topics.nytimes.com/top/reference/timestopics/people/a/joseph_m_arpaio/index.html?8qa.

Page 119: Add to second paragraph in Note 1 reporting on the U.S. Department of Justice suit against Sheriff Arpaio:

In June 2015, the federal district court found that Sheriff Arpaio could be estopped from denying that his office used unconstitutional racially motivated stops in conducting traffic sweeps that stopped people who appeared Latino. Order of Roslyn O. Silver, Senior United States District Judge, June 15, 2015, No. CV-12-00981-PHX-ROS. The case was settled in September 2015 when the Maricopa County government agreed to an injunction.

The Department of Justice joined in another suit brought by the ACLU against Sheriff Arpaio and the county. The government won both an injunction and the appointment of a monitor. Later, the Ninth Circuit narrowed one aspect of the Monitor's authority to limit the scope of the injunction

to misconduct allegations related to the scope of the complaint. *Ortega-Melendres v. Arpaio,* 989 F. Supp. 2d 822 (D. Ariz. 2013), *aff'd in part,* 784 F. 3d 1254 (9th Cir. 2015), *cert. denied,* 136 S. Ct. 799 (2016). The legal documents can be found on the ACLU website at https://www.aclu.org/cases/ortega-melendres-et-al-v-arpaio-et-al.

In a 162-page order in the *Melendres* case, the federal district court found Sheriff Arpaio and other members of the Maricopa county sheriff's office in civil contempt for continuing to arrest and hold immigrants without any charges and without authority to act for ICE. See Order of May 13, 2016, available at https://www.aclu.org/legal-document/ortega-melendres-et-al-v-arpaio-et-al-2016-order. As mentioned above, Mr. Arpaio was found in contempt but then pardoned by President Trump in August 2017. https://www.whitehouse.gov/briefings-statements/president-trump-pardons-sheriff-joe-arpaio/.

Page 119 (§ 1.02[C]): Add the following to the end of Note 1:

In the fall of 2013, the Ninth Circuit upheld the federal district court's injunction of one of the key provisions of Arizona's SB 1070 statute. *Valle Del Sol Inc. V. Whiting*, 732 F.3d 1006 (9th Cir. 2013). The Supreme Court had already found section 5(c) to be preempted in *Arizona v United States*, 567 U.S. 387 (2012), reprinted in relevant part on page 102 above.

This suit addressed Subsection A of Section 5 of S.B. 1070, which stated:

> Section 5.
> A. It is unlawful for a person who is in violation of a criminal offense to:
> 1. Transport or move or attempt to transport or move an alien in this state, in furtherance of the illegal presence of the alien in the United States, in a means of transportation if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law.
> 2. Conceal, harbor or shield or attempt to conceal, harbor or shield an alien from detection in any place in this state, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law.
> 3. Encourage or induce an alien to come to or reside in this state if the person knows or recklessly disregards the fact that such coming to, entering or residing in this state is or will be in violation of law.

The Ninth Circuit affirmed the lower court's injunction on two grounds. First, it found that the statute was void for vagueness because the phrase "[i]t is unlawful for a person who is *in violation of a criminal offense*" was unintelligible because an offense is an action and one cannot be in violation of an action. *Valle Del Sol Inc. v Whiting*, 732 F3d 1006, 1013 (9th Cir. 2013).

Second, and very similar to the holdings in the related litigation, the Ninth Circuit found that Arizona's attempts to criminalize immigration violations were preempted by federal immigration law. The decision closely mirrored the Supreme Court's reasoning in finding field preemption due to the scope of the INA provision on harboring in 8 U.S.C. § 1324 and also conflict preemption.

Update to Note 3. In November 2014, DHS announced new enforcement priorities in a detailed memorandum shared with state and local government officials. Memorandum from DHS Secretary Jeh Johnson to DHS officials, Secure Communities (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf. In general, DHS Secretary Jeh Johnson was using three enforcement priorities--national security, border security, and public safety--to clarify how the DHS components will direct agency resources. The ICE FAQs released with the memorandum instruct local law enforcement about when to seek ICE enforcement in areas such as criminal prosecutions involving driving under the influence, domestic violence, identity theft, and national security concerns. *See* https://www.ice.gov/immigrationAction/faqs.

Page 120 – Figure 7: New map (January to December 2014) found at Georgetown Public Policy Review published in 2015: http://gppreview.com/2015/12/09/states-take-on-immigration-policy-not-new-but-a-growing-trend/. This article also has interesting information on the use and accuracy of E-Verify.

The Trump Administration rescinded these enforcement priorities.

Page 122 (§ 1.02[C]): Add new Notes 9, 10, 11, and 12:

9. States and Local Governments Resisting ICE Immigration Detainers. In the past few years a number of local governments and some states have begun to allow local law enforcement to resist or question ICE immigration detainers. The basic policy motivation behind these initiatives is to prevent noncitizens with minor arrests or convictions from detention and possible deportation. For examples of some of these provisions and an analysis, see Christopher Lasch, *The Faulty Legal Reasoning Behind ICE Detainers* (Dec. 2013), http://www.immigrationpolicy.org/sites/default/files/docs/lasch_on_detainers.pdf; Christopher Lasch, *Preempting Immigration Detainer Enforcement Under* Arizona v. United States, 3 WAKE FOREST J. L. & POL'Y 281 (2013).

10. Use of Fraudulent Documents: An Ongoing Offense? In *United States v. Tavarez-Levario,* 788 F.3d 433 (5th Cir. 2015), the Fifth Circuit addressed whether the use of fraudulent immigration documents constitutes a "continuous" or "ongoing" offense for statute of limitations purposes. The government argued that the offense continues as long as the defendant continues to live and work in the United States based on the fraudulent document(s). The court disagreed: "Even a crime that naturally occurs in a single, finite incident can produce prolonged benefits to an offender; this does not mean that the statute of limitations refrains from running until all benefits of the criminal act dissipate." *Id.* at 440. The Fifth Circuit later revised the decision and issued its final decision that the indictment must be dismissed in June 2015. *See id.*

11. Conflict and Field Preemption in Ongoing Arizona Litigation. In a well-written decision by U.S. District Judge David G. Campbell in *Puente Arizona v. Arpaio,* 76 F. Supp. 3d 833 (D. Ariz. 2015), the court granted a preliminary injunction, suspending the enforcement of two Arizona identity theft laws because federal law preempted the state laws. Rebutting the state's contention that the preemption analysis did not apply because the laws did not discriminate against immigrants, the court looked to the title of the identity theft laws (the "Legal Arizona Workers'

Act" and "Employment of Unauthorized Aliens") and the legislative history: "Senator O'Halleran stated that people convicted under the identity theft law would be encouraged to 'self-deport' instead of serving long prison sentences … [Senator] Burns supported [the bill] because it would show that Arizona was tough on illegal immigration … [Representative] Pearce … made clear that [the bill] was designed to address the problem of illegal immigration." *Id*. at 855. The court held that notwithstanding the laws' facial neutrality, "a primary purpose and effect of the identity theft laws is to impose criminal penalties on unauthorized aliens who seek or engage in unauthorized employment." *Id*. Citing *Arizona*, the court acknowledged that Congress had not preempted the field of unauthorized-alien employment. However, the court concluded that "the narrower field [of] … unauthorized-alien fraud in seeking employment … has been heavily and comprehensively regulated by Congress," and held that "Congress has occupied the field." *Id.* at 856.

Addressing conflict preemption, the court explained that with respect to obtaining employment through the use of fraudulent documents, the Arizona identity theft laws impose a criminal penalty–creating a felony punishable by over five years in prison. Federal law, however, allows for civil, immigration, *or* criminal consequences–the criminal sanction being for a prison sentence of five years or less. The court explained: "The overlapping penalties created by the Arizona identity theft statutes, which 'layer additional penalties atop federal law,' likely result in conflict preemption." *Id*. at 858 (citing *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1267 (11th Cir. 2012)).

However, in 2016, a three-judge panel of the Ninth Circuit reversed the finding of preemption, dissolved the preliminary injunction, and remanded the case to the district court to resolve whether the "as applied" challenges to the use of the Arizona identity theft statutes could be sustained. *Puente Ariz. v. Arpaio*, 821 F.3d 1098 (9th Cir. 2016).

On remand, the District Court again issued an injunction prohibiting the use of the federal I-9 forms in state prosecutions. The court held that "Congress clearly and manifestly intended to prohibit the use of the Form I-9, documents attached to the Form I-9, and documents submitted as part of the I-9 employment verification process, whether attached to the form or not, for state law enforcement purposes." *Puente Ariz. v. Arpaio*, No. CV-14-01356-PHX-DGC, 2017 U.S. Dist. LEXIS 44517, at *24-25 (D. Ariz. Mar. 24, 2017). The court also rejected the defendants' arguments that the election of a new Sherriff in Maricopa County, Arizona made the challenge moot.

One common issue for employers and workers is how to amend employment and social security records after a grant of status. In *State v. Martinez*, No. 15-0671, 2017 Iowa Sup. LEXIS 66 (June 9, 2017)., a young woman who was brought to the United States without inspection at age 11 had worked for an Iowa employer using a pseudonym and where she had presented a Iowa Driver's License secured under another name. She was later gained protection under Deferred Action for Childhood Arrivals (DACA). Pursuant to that program she received a new federal issued identification card and work authorization. After the approval of her DACA application, Martinez applied for a driver's license in her real name. The application was flagged for potential fraud activity when her photo matched that of her illegally obtained driver's license, and Martinez was charged with identity theft. The Iowa Supreme Court decided that federal immigration

law preempts the state criminal charges, as essentially the state was trying to criminalize seeking employment. The charges were dismissed.

12. City of Hazleton, PA. In *Lozano v. City of Hazleton,* 724 F.3d 297 (3d Cir. 2015), the court addressed a Hazleton, Pennsylvania ordinance that made lawful immigration status a condition precedent to leasing a residential property. Citing *Arizona*, the court held that these housing provisions were field-preempted. The court reasoned that the housing provisions interfered with federal executive branch's exclusive power of removal, and therefore were also conflict-preempted.

Page 122 (§ 1.02[C]): Add the following to the end of Chapter 1:

State Power to Seek Injunctions of Federal Immigration Policies

As we have seen, at least since 2007 state governments have attempted to exert independent control of immigration issues such as employer sanctions, housing limitations, and efforts to create state enforcement of federal immigration laws. As we will see in Chapter 2, some states are now challenging the Trump Administration's authority to require their participation in more robust enforcement. This movement is generally called the "sanctuary movement," but that is a broad label for a wide range of state and local objections to DHS enforcement activity. In Chapter Two we will see states suing to enjoin the federal government from implementing wide ranging visa and entry bans through Executive Orders.

While a group of states seeking to enjoin an immigration policy may have seemed unusual in 2014, as we will see, the expanded ability of states to meet the standing requirements is creating a lot of litigation over immigration policy. The case excerpted below began when Texas objected to an expansion of benefits for undocumented immigrants. Now litigation by states is also seeking to enjoin policies by the federal government that expand enforcement efforts. See *County of Santa Clara*, excerpted below. The area of law is in flux and it is difficult to predict when and how the U.S. Supreme Court might curtail a state's authority to litigate issues of immigration policy and enforcement. Of course, the new trend in state litigation is not limited to immigration. Similar challenges are occurring in areas like environmental protection and health insurance requirements, e.g., *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (plaintiffs included 26 states and challenged the constitutionality of the Affordable Care Act or 'ObamaCare') or Massachusetts v. EPA, 549 U.S. 457 (2007) (challenging federal environmental enforcement as insufficient).

In 2014 and 2015, a key tussle between the states and the federal government occurred when 26 states, led by Texas, challenged the creation of a new prosecutorial discretion policy. President Obama had warned Congress that if it could not enact immigration reform, he would instruct the Department of Homeland Security to grant temporary protection from removal and work authorization to certain broad classes of people who had resided for long periods within the United States.

In the following case excerpt, the U.S. Court of Appeals for the Fifth Circuit upheld the district court's injunction of the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA). First, the Fifth Circuit held that the states have special expanded

standing to challenge the executive action under Article III of the Constitution and under the Administrative Procedure Act (APA). According to the court, Texas has standing under Article III because of the financial burden the state would suffer should DAPA go into effect, and under the APA because this same financial interest falls within the "zone of interests" protected or regulated by the INA. Second, the appeals court sustained the lower court's preliminary injunction because it concluded that the states met their burden of showing a likelihood of success on the merits of their claim that DAPA's "grant of lawful presence and accompanying eligibility for benefits" is a substantive rule under the APA, requiring notice and comment before rulemaking.

DAPA does not, in fact, grant "lawful presence," as that term is used in immigration law. Like DACA, DAPA is a form of prosecutorial discretion that would defer deportation for certain unauthorized foreign nationals. It is not a grant of legal status, but would provide temporary employment authorization on a discretionary basis to qualifying applicants. We defer our discussion of DACA and DAPA to a discussion of relief from removal found in chapter 7's updates below. However, the DHS formally repealed the DAPA memorandum on June 15, 2017. Whether the existing DACA program will continue is unknown. As of June 2017, people who received work authorization under the original DACA program have been able to secure extensions of the work authorization and deferred status.

The Supreme Court granted the writ of certiorari to Texas' challenge to DAPA and the DACA expansion and heard oral argument on April 18, 2016. On June 23, 2016, the Supreme Court issued a one-line order stating "The judgment is affirmed by an equally divided Court." 579 U.S. __, 136 S. Ct. 2271 (2016).

In effect, this means that the lower court's preliminary injunction of the expanded DACA and the new DAPA programs remains in place and the litigation may continue in the federal district court.

Excerpted here is part of the Fifth Circuit opinion:

TEXAS v. UNITED STATES

809 F.3d 134 (5th Cir. 2015), *affirmed by equally divided Court*, 579 U.S. __, 136 S. Ct. 2271 (2016).

JERRY E. SMITH, Circuit Judge:

The United States appeals a preliminary injunction, pending trial, forbidding implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA"). Twenty-six states (the "states") challenged DAPA under the Administrative Procedure Act ("APA") and the Take Care Clause of the Constitution;[1] in an impressive and thorough Memorandum Opinion and Order issued February 16, 2015, the district court enjoined the program on the ground that the states are likely to succeed on their claim that DAPA is subject to the APA's procedural requirements. *Texas v. United States,* 86

[1] (n.3 in original) We find it unnecessary, at this early stage of the proceedings, to address or decide the challenge based on the Take Care Clause. [Ed. Note: The Supreme Court requested briefing on this issue in the grant of the writ of certiorari; however, the final order did not address this issue.]

F.Supp.3d 591, 677 (S.D.Tex.2015).

The government appealed and moved to stay the injunction pending resolution of the merits. After extensive briefing and more than two hours of oral argument, a motions panel denied the stay after determining that the appeal was unlikely to succeed on its merits. *Texas v. United States,* 787 F.3d 733, 743 (5th Cir.2015). Reviewing the district court's order for abuse of discretion, we affirm the preliminary injunction because the states have standing; they have established a substantial likelihood of success on the merits of their procedural and substantive APA claims; and they have satisfied the other elements required for an injunction.

I.

A.

In June 2012, the Department of Homeland Security ("DHS") implemented the Deferred Action for Childhood Arrivals program ("DACA"). In the DACA Memo to agency heads, the DHS Secretary "set forth how, in the exercise of ... prosecutorial discretion, [DHS] should enforce the Nation's immigration laws against certain young people" and listed five "criteria [that] should be satisfied before an individual is considered for an exercise of prosecutorial discretion." The Secretary further instructed that "[n]o individual should receive deferred action ... unless they [*sic*] first pass a background check and requests for relief ... are to be decided on a case by case basis." Although stating that "[f]or individuals who are granted deferred action ..., [U.S. Citizenship and Immigration Services ('USCIS')] shall accept applications to determine whether these individuals qualify for work authorization," the DACA Memo purported to "confer no substantive right, immigration status or pathway to citizenship." At least 1.2 million persons qualify for DACA, and approximately 636,000 applications were approved through 2014. Dist. Ct. Op., 86 F.Supp.3d at 609.

In November 2014, by what is termed the "DAPA Memo," DHS expanded DACA by making millions more persons eligible for the program and extending "[t]he period for which DACA and the accompanying employment authorization is granted ... to three-year increments, rather than the current two-year increments." The Secretary also "direct[ed] USCIS to establish a process, similar to DACA," known as DAPA, which applies to "individuals who ... have, [as of November 20, 2014], a son or daughter who is a U.S. citizen or lawful permanent resident" and meet five additional criteria. The Secretary stated that, although "[d]eferred action does not confer any form of legal status in this country, much less citizenship[,] it [does] mean that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States." Of the approximately 11.3 million illegal aliens in the United States, 4.3 million would be eligible for lawful presence pursuant to.

…

As for state benefits, although "[a] State may provide that an alien who is *not lawfully present* in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a)," § 1621(d),

Texas has chosen not to issue driver's licenses to unlawfully present aliens. Texas maintains that documentation confirming lawful presence pursuant to DAPA would allow otherwise ineligible aliens to become eligible for state-subsidized driver's licenses. Likewise, certain unemployment compensation "[b]enefits are not payable based on services performed by an alien unless the alien ... was *lawfully present* for purposes of performing the services...." Texas contends that DAPA recipients would also become eligible for unemployment insurance.

B.

The states sued to prevent DAPA's implementation on three grounds. First, they asserted that DAPA violated the procedural requirements of the APA as a substantive rule that did not undergo the requisite notice-and-comment rulemaking. *See* 5 U.S.C. § 553. Second, the states claimed that DHS lacked the authority to implement the program even if it followed the correct rulemaking process, such that DAPA was substantively unlawful under the APA. *See* 5 U.S.C. § 706(2)(A)–(C). Third, the states urged that DAPA was an abrogation of the President's constitutional duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

The district court held that Texas has standing. It concluded that the state would suffer a financial injury by having to issue driver's licenses to DAPA beneficiaries at a loss. … Alternatively, the court relied on a new theory it called "abdication standing": Texas had standing because the United States has exclusive authority over immigration but has refused to act in that area. The court also considered but ultimately did not accept the notions that Texas could sue as *parens patriae* on behalf of citizens facing economic competition from DAPA beneficiaries and that the state had standing based on the losses it suffers generally from illegal immigration.…

The court temporarily enjoined DAPA's implementation after determining that Texas had shown a substantial likelihood of success on its claim that the program must undergo notice and comment. Despite full briefing, the court did not rule on the "Plaintiffs' likelihood of success on their *substantive* APA claim or their constitutional claims under the Take Care Clause/separation of powers doctrine." *Id.* On appeal, the United States maintains that the states do not have standing or a right to judicial review and, alternatively, that DAPA is exempt from the notice-and-comment requirements. The government also contends that the injunction, including its nationwide scope, is improper as a matter of law.

…

III.

The government claims the states lack standing to challenge DAPA. As we will analyze, however, their standing is plain, based on the driver's-license rationale, so we need not address the other possible grounds for standing.

…

A.

We begin by considering whether the states are entitled to "special solicitude" in our standing inquiry under *Massachusetts v. EPA*. They are.

The Court held that Massachusetts had standing to contest the EPA's decision not to regulate greenhouse-gas emissions from new motor vehicles, which allegedly contributed to a rise in sea levels and a loss of the state's coastal land. *Massachusetts v. EPA,* 549 U.S. at 526, 127 S. Ct. 1438. "It is of considerable relevance that the party seeking review here is a sovereign State and not ... a private individual" because "States are not normal litigants for the purposes of invoking federal jurisdiction." *Id.* at 518…

….

In enacting the APA, Congress intended for those "suffering legal wrong because of agency action" to have judicial recourse, and the states fall well within that definition. …

… DAPA would have a major effect on the states' fiscs, causing millions of dollars of losses in Texas alone, and at least in Texas, the causal chain is especially direct: DAPA would enable beneficiaries to apply for driver's licenses, and many would do so, resulting in Texas's injury.

….

Therefore, the states are entitled to "special solicitude" in the standing inquiry. We stress that our decision is limited to these facts. In particular, the direct, substantial pressure directed at the states and the fact that they have surrendered some of their control over immigration to the federal government mean this case is sufficiently similar to *Massachusetts v. EPA,* but pressure to change state law may not be enough—by itself—in other situations.

B.

At least one state—Texas—has satisfied the first standing requirement by demonstrating that it would incur significant costs in issuing driver's licenses to DAPA beneficiaries. Under current state law, licenses issued to beneficiaries would necessarily be at a financial loss. The Department of Public Safety "shall issue" a license to a qualified applicant. TEX. TRANSP. CODE § 521.181. A noncitizen "must present ... documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States." *Id.* § 521.142(a).

If permitted to go into effect, DAPA would enable at least 500,000 illegal aliens in Texas to satisfy that requirement with proof of lawful presence or employment authorization. Texas subsidizes its licenses and would lose a minimum of $130.89 on each one it issued to a DAPA beneficiary. Even a modest estimate would put the loss at "several million dollars." Dist. Ct. Op., 86 F.Supp.3d at 617.

Instead of disputing those figures, the United States claims that the costs would be offset by other benefits to the state. It theorizes that, because DAPA beneficiaries

would be eligible for licenses, they would register their vehicles, generating income for the state, and buy auto insurance, reducing the expenses associated with uninsured motorists. The government suggests employment authorization would lead to increased tax revenue and decreased reliance on social services.

Even if the government is correct, that does not negate Texas's injury, because we consider only those offsetting benefits that are of the same type and arise from the same transaction as the costs. "Once injury is shown, no attempt is made to ask whether the injury is outweighed by benefits the plaintiff has enjoyed from the relationship with the defendant. Standing is recognized to complain that some particular aspect of the relationship is unlawful and has caused injury." "Our standing analysis is not an accounting exercise...."

….

Here, none of the benefits the government identifies is sufficiently connected to the costs to qualify as an offset. The only benefits that are conceivably relevant are the increase in vehicle registration and the decrease in uninsured motorists, but even those are based on the independent decisions of DAPA beneficiaries and are not a direct result of the issuance of licenses. ***

In the instant case, the states have alleged an injury, and the government predicts that the later decisions of DAPA beneficiaries would produce offsetting benefits. Weighing those costs and benefits is precisely the type of "accounting exercise," *id.* at 223, in which we cannot engage. Texas has shown injury.

….

IV.

Because the states are suing under the APA, they "must satisfy not only Article III's standing requirements, but an additional test: The interest [they] assert must be 'arguably within the zone of interests to be protected or regulated by the statute' that [they] say[ ] was violated." That "test ... 'is not meant to be especially demanding' " and is applied "in keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.' "

….

Contrary to the government's assertion, Texas satisfies the zone-of-interests test not on account of a generalized grievance but instead as a result of the same injury that gives it Article III standing—Congress has explicitly allowed states to deny public benefits to illegal aliens. Relying on that guarantee, Texas seeks to participate in notice and comment before the Secretary changes the immigration classification of millions of illegal aliens in a way that forces the state to the Hobson's choice of spending millions of dollars to subsidize driver's licenses or changing its statutes.

V.

The government maintains that judicial review is precluded even if the states are proper plaintiffs. "Any person 'adversely affected or aggrieved' by agency action ... is entitled to 'judicial review thereof,' as long as the action is a 'final agency

action for which there is no other adequate remedy in a court.' "[82] "But before any review at all may be had, a party must first clear the hurdle of 5 U.S.C. § 701(a). That section provides that the chapter on judicial review 'applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.' " *Chaney,* 470 U.S. at 828, 105 S. Ct. 1649.

"[T]here is a 'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,' and we will accordingly find an intent to preclude such review only if presented with 'clear and convincing evidence.' " The " 'strong presumption' favoring judicial review of administrative action ... is rebuttable: It fails when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Mach Mining, LLC v. EEOC,* —— U.S. ——, 135 S. Ct. 1645, 1651, 191 L.Ed.2d 607 (2015).

Establishing unreviewability is a "heavy burden," and "where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block v. Cmty. Nutrition Inst.,* 467 U.S. 340, 351, 104 S. Ct. 2450, 81 L.Ed.2d 270 (1984). "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* at 345, 104 S. Ct. 2450.

The United States relies on 8 U.S.C. § 1252(g) for the proposition that the INA expressly prohibits judicial review. But the government's broad reading is contrary to *Reno v. American–Arab Anti–Discrimination Committee ("AAADC"),* 525 U.S. 471, 482, 119 S. Ct. 936, 142 L.Ed.2d 940 (1999), in which the Court rejected "the unexamined assumption that § 1252(g) covers the universe of deportation claims—that it is a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review.' " The Court emphasized that § 1252(g) is not "a general jurisdictional limitation," but rather "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.' "

None of those actions is at issue here—the states' claims do not arise from the Secretary's "decision or action ... to commence proceedings, adjudicate cases, or execute removal orders against any alien," § 1252(g); instead, they stem from his decision to grant lawful presence to millions of illegal aliens on a class-wide basis. Further, the states are not bringing a "cause or claim by or on behalf of any alien"—they assert their own right to the APA's procedural protections. *Id.* Congress has expressly limited or precluded judicial review of many immigration decisions, including some that are made in the Secretary's "sole and unreviewable discretion," but DAPA is not one of them.

Judicial review of DAPA is consistent with the protections Congress affords to

states that decline to provide public benefits to illegal aliens. "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens," but, through § 1621, Congress has sought to protect states from "bear[ing] many of the consequences of unlawful immigration." Texas avails itself of some of those protections through Section 521.142(a) of the Texas Transportation Code, which allows the state to avoid the costs of issuing driver's licenses to illegal aliens.

If 500,000 unlawfully present aliens residing in Texas were reclassified as lawfully present pursuant to DAPA, they would become eligible for driver's licenses at a subsidized fee. Congress did not intend to make immune from judicial review an agency action that reclassifies millions of illegal aliens in a way that imposes substantial costs on states that have relied on the protections conferred by § 1621.
….

A.

Title 5 § 701(a)(2) "preclude[s] judicial review of certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion.' " *Lincoln v. Vigil,* 508 U.S. 182, 191, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993) (citation omitted). For example, "an agency's decision not to institute enforcement proceedings [is] presumptively unreviewable under § 701(a)(2)." *Id.* (citation omitted). Likewise, "[t]here is no judicial review of agency action 'where statutes [granting agency discretion] are drawn in such broad terms that in a given case there is no law to apply,' " such as "[t]he allocation of funds from a lump-sum appropriation." *Vigil,* 508 U.S. at 192, 113 S.Ct. 2024.

1.

The Secretary has broad discretion to "decide whether it makes sense to pursue removal at all" and urges that deferred action—a grant of "lawful presence" and subsequent eligibility for otherwise unavailable benefits—is a presumptively unreviewable exercise of prosecutorial discretion. "The general exception to reviewability provided by § 701(a)(2) for action 'committed to agency discretion' remains a narrow one, but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise." Where, however, "an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers."

Part of DAPA involves the Secretary's decision—at least temporarily—not to enforce the immigration laws as to a class of what he deems to be low-priority illegal aliens. But importantly, the states have not challenged the priority levels he has established, and neither the preliminary injunction nor compliance with the APA requires the Secretary to remove any alien or to alter his enforcement priorities.

Deferred action, however, is much more than nonenforcement: It would affirmatively confer "lawful presence" and associated benefits on a class of unlawfully present aliens. Though revocable, that change in designation would trigger (as we have already explained) eligibility for federal benefits—for example, under title II and XVIII of the Social Security Act—and state benefits—for example, driver's licenses and unemployment insurance—that would not otherwise be available to illegal aliens.

The United States maintains that DAPA is presumptively unreviewable prosecutorial discretion because " 'lawful presence' is not a status and is not something that the alien can legally enforce; the agency can alter or revoke it at any time." The government further contends that "[e]very decision under [DAPA] to defer enforcement action against an alien necessarily entails allowing the individual to be lawfully present.... Deferred action under DAPA and 'lawful presence' during that limited period are thus two sides of the same coin."

Revocability, however, is not the touchstone for whether agency is action is reviewable. Likewise, to be reviewable agency action, DAPA need not directly confer public benefits—removing a categorical bar on receipt of those benefits and thereby making a class of persons newly eligible for them "provides a focus for judicial review." *Chaney,* 470 U.S. at 832, 105 S.Ct. 1649.

Moreover, if deferred action meant only nonprosecution, it would not necessarily result in lawful presence. "[A]lthough prosecutorial discretion is broad, it is not 'unfettered.' " Declining to prosecute does not transform presence deemed unlawful by Congress into lawful presence and confer eligibility for otherwise unavailable benefits based on that change. Regardless of whether the Secretary has the authority to offer lawful presence and employment authorization in exchange for participation in DAPA, his doing so is not shielded from judicial review as an act of prosecutorial discretion.

….

Under DAPA, "[d]eferred action ... means that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States," a change in designation that confers eligibility for substantial federal and state benefits on a class of otherwise ineligible aliens. Thus, DAPA "provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers."

2.

"The mere fact that a statute grants broad discretion to an agency does not render the agency's decisions completely unreviewable under the 'committed to agency discretion by law' exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." In *Perales,* 903 F.2d at 1051, we held that the INS's decision *not* to grant pre-hearing voluntary departures and work authorizations to a group of aliens

was committed to agency discretion because "[t]here are no statutory standards for the court to apply.... There is nothing in the [INA] expressly providing for the grant of employment authorization or pre-hearing voluntary departure to [the plaintiff class of aliens]." Although we stated that "the agency's decision to grant voluntary departure and work authorization has been committed to agency discretion by law," *id.* at 1045, that case involved a challenge to the *denial* of voluntary departure and work authorization.

….

The United States asserts that 8 C.F.R. § 274a.12(c)(14), rather than DAPA, makes aliens granted deferred action eligible for work authorizations. But if DAPA's deferred-action program must be subjected to notice-and-comment, then work authorizations may not be validly issued pursuant to that subsection until that process has been completed and aliens have been "granted deferred action." § 274a.12(c)(14).

Moreover, the government's limitless reading of that subsection—allowing for the issuance of employment authorizations to any class of illegal aliens whom DHS declines to remove—is beyond the scope of what the INA can reasonably be interpreted to authorize, as we will explain. And even assuming, *arguendo,* that the government does have that power, Texas is also injured by the grant of lawful presence itself, which makes DAPA recipients newly eligible for state-subsidized driver's licenses. As an affirmative agency action with meaningful standards against which to judge it, DAPA is not an unreviewable "agency action ... committed to agency discretion by law." § 701(a)(2).

B.

The government urges that this case is not justiciable even though " 'a federal court's 'obligation' ' to hear and decide cases within its jurisdiction is 'virtually unflagging.' '' We decline to depart from that well-established principle. And in invoking our jurisdiction, the states do not demand that the federal government "control immigration and ... pay for the consequences of federal immigration policy" or "prevent illegal immigration."

Neither the preliminary injunction nor compliance with the APA requires the Secretary to enforce the immigration laws or change his priorities for removal, which have expressly not been challenged. Nor have the states "merely invited us to substitute our judgment for that of Congress in deciding which aliens shall be eligible to participate in [a benefits program]." *Diaz,* 426 U.S. at 84, 96 S.Ct. 1883. DAPA was enjoined because the states seek an opportunity to be heard through notice and comment, not to have the judiciary formulate or rewrite immigration policy. "Consultation between federal and state officials is an important feature of the immigration system," and the notice-and-comment process, which "is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making," facilitates that communication.

At its core, this case is about the Secretary's decision to change the immigration

classification of millions of illegal aliens on a class-wide basis. The states properly maintain that DAPA's grant of lawful presence and accompanying eligibility for benefits is a substantive rule that must go through notice and comment, before it imposes substantial costs on them, and that DAPA is substantively contrary to law. The federal courts are fully capable of adjudicating those disputes.

VI.

Because the interests that Texas seeks to protect are within the INA's zone of interests, and judicial review is available, we address whether Texas has established a substantial likelihood of success on its claim that DAPA must be submitted for notice and comment. The United States urges that DAPA is exempt as an "interpretative rule[ ], general statement[ ] of policy, or rule [ ] of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). "In contrast, if a rule is 'substantive,' the exemption is inapplicable, and the full panoply of notice-and-comment requirements must be adhered to scrupulously. The 'APA's notice and comment exemptions must be narrowly construed.' "

A.

The government advances the notion that DAPA is exempt from notice and comment as a policy statement. We evaluate two criteria to distinguish policy statements from substantive rules: whether the rule (1) "impose[s] any rights and obligations" and (2) "genuinely leaves the agency and its decision-makers free to exercise discretion." There is some overlap in the analysis of those prongs "because '[i]f a statement denies the decisionmaker discretion in the area of its coverage ... then the statement is binding, and creates rights or obligations.' " "While mindful but suspicious of the agency's own characterization, we ... focus[ ] primarily on whether the rule has binding effect on agency discretion or severely restricts it." "[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." *Gen. Elec.,* 290 F.3d at 383 (citation omitted).

Although the DAPA Memo facially purports to confer discretion, the district court determined that "[n]othing about DAPA '*genuinely* leaves the agency and its [employees] free to exercise discretion,' " a factual finding that we review for clear error. That finding was partly informed by analysis of the implementation of DACA, the precursor to DAPA.

Like the DAPA Memo, the DACA Memo instructed agencies to review applications on a case-by-case basis and exercise discretion, but the district court found that those statements were "merely pretext" because only about 5% of the 723,000 applications accepted for evaluation had been denied, and "[d]espite a request by the [district] [c]ourt, the [g]overnment's counsel did not provide the number, if any, of requests that were denied [for discretionary reasons] even though the applicant met the DACA criteria...." The finding of pretext was also based on a declaration by Kenneth Palinkas, the president of the union representing the USCIS employees processing the DACA applications, that "DHS management has taken

multiple steps to ensure that DACA applications are simply rubberstamped if the applicants meet the necessary criteria"; DACA's Operating Procedures, which "contain nearly 150 pages of specific instructions for granting or denying deferred action"; and some mandatory language in the DAPA Memo itself. In denying the government's motion for a stay of the injunction, the district court further noted that the President had made public statements suggesting that in reviewing applications pursuant to DAPA, DHS officials who "don't follow the policy" will face "consequences," and "they've got a problem."

The DACA and DAPA Memos purport to grant discretion, but a rule can be binding if it is "applied by the agency in a way that indicates it is binding," and there was evidence from DACA's implementation that DAPA's discretionary language was pretextual. For a number of reasons, any extrapolation from DACA must be done carefully.

First, DACA involved issuing benefits to self-selecting applicants, and persons who expected to be denied relief would seem unlikely to apply. But the issue of self-selection is partially mitigated by the finding that "the [g]overnment has publicly declared that it will make no attempt to enforce the law against even those who are denied deferred action (absent extraordinary circumstances)." Dist. Ct. Op., 86 F.Supp.3d at 663 (footnote omitted).

Second, DACA and DAPA are not identical: Eligibility for DACA was restricted to a younger and less numerous population, which suggests that DACA applicants are less likely to have backgrounds that would warrant a discretionary denial. Further, the DAPA Memo contains additional discretionary criteria: Applicants must not be "an enforcement priority as reflected in the [Prioritization Memo]; and [must] present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." DAPA Memo at 4. But despite those differences, there are important similarities: The Secretary "direct[ed] USCIS to *establish a process, similar to DACA,* for exercising prosecutorial discretion," *id.* (emphasis added), and there was evidence that the DACA application process *itself* did not allow for discretion, regardless of the rates of approval and denial.

Instead of relying solely on the lack of evidence that any DACA application had been denied for discretionary reasons, the district court found pretext for additional reasons. It observed that "the 'Operating Procedures' for implementation of DACA contains nearly 150 pages of specific instructions for granting or denying deferred action to applicants" and that "[d]enials are recorded in a 'check the box' standardized form, for which USCIS personnel are provided templates. Certain denials of DAPA must be sent to a supervisor for approval [, and] there is no option for granting DAPA to an individual who does not meet each criterion." Dist. Ct. Op., 86 F.Supp.3d at 669 (footnotes omitted). The finding was also based on the declaration from Palinkas that, as with DACA, the DAPA application process itself would preclude discretion: "[R]outing DAPA applications through service centers instead of field offices ... created an application process that bypasses traditional

in-person investigatory interviews with trained USCIS adjudications officers" and "prevents officers from conducting case-by-case investigations, undermines officers' abilities to detect fraud and national-security risks, and ensures that applications will be rubber-stamped." *See id.* at 609–10 (citing that declaration).

….

Reviewing for clear error, we conclude that the states have established a substantial likelihood that DAPA would not genuinely leave the agency and its employees free to exercise discretion.

B.

A binding rule is not required to undergo notice and comment if it is one "of agency organization, procedure, or practice." § 553(b)(A). "[T]he substantial impact test is the primary means by which [we] look beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation." "An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply." DAPA undoubtedly meets that test—conferring lawful presence on 500,000 illegal aliens residing in Texas forces the state to choose between spending millions of dollars to subsidize driver's licenses and amending its statutes.

….

Further, "a procedural rule generally may not 'encode a substantive value judgment or put a stamp of approval or disapproval on a given type of behavior,' " but "the fact that the agency's decision was based on a value judgment about procedural efficiency does not convert the resulting rule into a substantive one." "A corollary to this principle is that rules are generally considered procedural so long as they do not 'change the *substantive standards* by which the [agency] evaluates' applications which seek a benefit that the agency has the power to provide."

Applying those considerations to DAPA yields the same result as does our substantial-impact test. Although the burden imposed on Texas is derivative of conferring lawful presence on beneficiaries, DAPA establishes " 'the *substantive standards* by which the [agency] evaluates applications' which seek a benefit that the agency [purportedly] has the power to provide"—a critical fact requiring notice and comment.

Thus, DAPA is analogous to "the rules [that] changed the substantive criteria for [evaluating station allotment counter-proposals]" in *Reeder v. FCC,* 865 F.2d 1298, 1305 (D.C.Cir.1989) (per curiam), holding that notice and comment was required. In contrast, the court in *JEM Broadcasting,* 22 F.3d at 327, observed that "[t]he critical fact here, however, is that the 'hard look' rules did not change the *substantive standards* by which the FCC evaluates license applications," such that the rules were procedural. Further, receipt of DAPA benefits implies a "stamp of approval" from the government and "encodes a substantive value judgment," such that the program cannot be considered procedural. *Am. Hosp.,* 834 F.2d at 1047.

C.

Section 553(a)(2) exempts rules from notice and comment "to the extent that there is involved ... a matter relating to ... public property, loans, grants, benefits, or contracts." To avoid "carv[ing] the heart out of the notice provisions of Section 553", the courts construe the public-benefits exception very narrowly as applying only to agency action that "clearly and directly relate[s] to 'benefits' as that word is used in section 553(a)(2)."

DAPA does not "clearly and directly" relate to public benefits as that term is used in § 553(a)(2). That subsection suggests that "rulemaking requirements for agencies managing benefit programs are ... voluntarily imposed," but USCIS—the agency tasked with evaluating DAPA applications—is not an agency managing benefit programs. Persons who meet the DAPA criteria do not directly receive the kind of public benefit that has been recognized, or was likely to have been included, under this exception.

In summary, the states have established a substantial likelihood of success on the merits of their procedural claim. We proceed to address whether, in addition to that likelihood on the merits, the states make the same showing on their substantive APA claim.

VII.

A "reviewing court shall ... hold unlawful and set aside agency action ... found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ... [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). Although the district court enjoined DAPA solely on the basis of the procedural APA claim, "it is an elementary proposition, and the supporting cases too numerous to cite, that this court may affirm the district court's judgment on any grounds supported by the record." Therefore, as an alternate and additional ground for affirming the injunction, we address this substantive issue, which was fully briefed in the district court.

Assuming *arguendo* that *Chevron* applies, we first "ask whether Congress has 'directly addressed the precise question at issue.' " It has. "Federal governance of immigration and alien status is extensive and complex." *Arizona v. United States,* 132 S.Ct. at 2499. The limited ways in which illegal aliens can lawfully reside in the United States reflect Congress's concern that "aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates," 8 U.S.C. § 1601(3), and that "[i]t is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy," § 1601(5).

In specific and detailed provisions, the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present and confers eligibility for "discretionary relief allowing [aliens in deportation proceedings] to

remain in the country." Congress has also identified narrow classes of aliens eligible for deferred action, including certain petitioners for immigration status under the Violence Against Women Act of 1994, immediate family members of lawful permanent residents ("LPRs") killed by terrorism, and immediate family members of LPRs killed in combat and granted posthumous citizenship. Entirely absent from those specific classes is the group of 4.3 million illegal aliens who would be eligible for lawful presence under DAPA were it not enjoined. *See* DAPA Memo at 4.

Congress has enacted an intricate process for illegal aliens to derive a lawful immigration classification from their children's immigration status: In general, an applicant must (i) have a U.S. citizen child who is at least twenty-one years old, (ii) leave the United States, (iii) wait ten years, and then (iv) obtain one of the limited number of family-preference visas from a United States consulate. Although DAPA does not confer the full panoply of benefits that a visa gives, DAPA would allow illegal aliens to receive the benefits of lawful presence solely on account of their children's immigration status without complying with any of the requirements, enumerated above, that Congress has deliberately imposed. DAPA requires only that prospective beneficiaries "have ... a son or daughter who is a U.S. citizen or lawful permanent resident"—without regard to the age of the child—and there is no need to leave the United States or wait ten years or obtain a visa. Further, the INA does not contain a family-sponsorship process for parents of an LPR child, but DAPA allows a parent to derive lawful presence from his child's LPR status.

The INA authorizes cancellation of removal and adjustment of status if, *inter alia,* "the alien has been physically present in the United States for a continuous period of *not less than 10 years* immediately preceding the date of such application" and if "removal would result in *exceptional and extremely unusual hardship* to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(A) (emphasis added). Although LPR status is more substantial than is lawful presence, § 1229b(b)(1) is the most specific delegation of authority to the Secretary to change the immigration classification of removable aliens that meet only the DAPA criteria and do not fit within the specific categories set forth in § 1229b(b)(2)–(6).

Instead of a ten-year physical-presence period, DAPA grants lawful presence to persons who "have continuously resided in the United States since before January 1, 2010," and there is no requirement that removal would result in exceptional and extremely unusual hardship. DAPA Memo at 4. Although the Secretary has discretion to make immigration decisions based on humanitarian grounds, that discretion is conferred only for particular family relationships and specific forms of relief—none of which includes granting lawful presence, on the basis of a child's immigration status, to the class of aliens that would be eligible for DAPA.

The INA also specifies classes of aliens eligible and ineligible for work authorization, including those "eligible for work authorization and deferred

action"—with no mention of the class of persons whom DAPA would make eligible for work authorization. Congress " 'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law,' " in part by "establishing an extensive 'employment verification system,' designed to deny employment to aliens who ... are not *lawfully present* in the United States."

The INA's careful employment-authorization scheme "protect[s] against the displacement of workers in the United States," and a "primary purpose in restricting immigration is to preserve jobs for American workers." DAPA would dramatically increase the number of aliens eligible for work authorization, thereby undermining Congress's stated goal of closely guarding access to work authorization and preserving jobs for those lawfully in the country.

DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits, and "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." DAPA undoubtedly implicates "question[s] of deep 'economic and political significance' that [are] central to this statutory scheme; had Congress wished to assign that decision to an agency, it surely would have done so expressly." But assuming *arguendo* that *Chevron* applies and that Congress has not directly addressed the precise question at hand, we would still strike down DAPA as an unreasonable interpretation that is "manifestly contrary" to the INA. *See Mayo Found.,* 562 U.S. at 53, 131 S.Ct. 704.

….

For the authority to implement DAPA, the government relies in part on 8 U.S.C. § 1324a(h)(3), a provision that does not mention lawful presence or deferred action, and that is listed as a "[m]iscellaneous" definitional provision expressly limited to § 1324a, a section concerning the "Unlawful employment of aliens"—an exceedingly unlikely place to find authorization for DAPA. Likewise, the broad grants of authority in 6 U.S.C. § 202(5), 8 U.S.C. § 1103(a)(3), and 8 U.S.C. § 1103(g)(2) cannot reasonably be construed as assigning "decisions of vast 'economic and political significance,' " such as DAPA, to an agency.

The interpretation of those provisions that the Secretary advances would allow him to grant lawful presence and work authorization to any illegal alien in the United States—an untenable position in light of the INA's intricate system of immigration classifications and employment eligibility. Even with "special deference" to the Secretary, the INA flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization.

Presumably because DAPA is not authorized by statute, the United States posits that its authority is grounded in historical practice, but that "does not, by itself, create power," and in any event, previous deferred-action programs are not analogous to DAPA. "[M]ost ... discretionary deferrals have been done on a

country-specific basis, usually in response to war, civil unrest, or natural disasters," but DAPA is not such a program. Likewise, many of the previous programs were bridges from one legal status to another, whereas DAPA awards lawful presence to persons who have never had a legal status and may never receive one.

Although the "Family Fairness" program did grant voluntary departure to family members of legalized aliens while they "wait[ed] for a visa preference number to become available for family members," that program was interstitial to a statutory legalization scheme. DAPA is far from interstitial: Congress has repeatedly declined to enact the Development, Relief, and Education for Alien Minors Act ("DREAM Act"), features of which closely resemble DACA and DAPA.

Historical practice that is so far afield from the challenged program sheds no light on the Secretary's authority to implement DAPA. Indeed, as the district court recognized, the President explicitly stated that "it was the failure of Congress to enact such a program that prompted him ... to 'change the law.' " At oral argument, and despite being given several opportunities, the attorney for the United States was unable to reconcile that remark with the position that the government now takes. …
….
Through the INA's specific and intricate provisions, "Congress has 'directly addressed the precise question at issue.' " *Mayo Found.,* 562 U.S. at 52, 131 S.Ct. 704. As we have indicated, the INA prescribes how parents may derive an immigration classification on the basis of their child's status and which classes of aliens can achieve deferred action and eligibility for work authorization. DAPA is foreclosed by Congress's careful plan; the program is "manifestly contrary to the statute" and therefore was properly enjoined.
….

IX.

The government claims that the nationwide scope of the injunction is an abuse of discretion and requests that it be confined to Texas or the plaintiff states. But the Constitution requires "an *uniform* Rule of Naturalization"; Congress has instructed that "the immigration laws of the United States should be enforced vigorously and *uniformly* "; and the Supreme Court has described immigration policy as "a comprehensive and *unified* system." Partial implementation of DAPA would "detract [ ] from the 'integrated scheme of regulation' created by Congress," and there is a substantial likelihood that a geographically-limited injunction would be ineffective because DAPA beneficiaries would be free to move among states.

Furthermore, the Constitution vests the District Court with "the judicial Power of the United States." That power is not limited to the district wherein the court sits but extends across the country. It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction.

"We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.' " *Util. Air,* 134 S.Ct. at 2444 (citation

omitted). Agency announcements to the contrary are "greet[ed] ... with a measure of skepticism." *Id.*

The district court did not err and most assuredly did not abuse its discretion. The order granting the preliminary injunction is AFFIRMED.

KING, Circuit Judge, dissenting:

Although there are approximately 11.3 million removable aliens in this country today, for the last several years Congress has provided the Department of Homeland Security (DHS) with only enough resources to remove approximately 400,000 of those aliens per year. Recognizing DHS's congressionally granted prosecutorial discretion to set removal enforcement priorities, Congress has exhorted DHS to use those resources to "mak[e] our country safer." In response, DHS has focused on removing "those who represent threats to national security, public safety, and border security." The DAPA Memorandum at issue here focuses on a subset of removable aliens who are unlikely to be removed unless and until more resources are made available by Congress: those who are the parents of United States citizens or legal permanent residents, who have resided in the United States for at least the last five years, who lack a criminal record, and who are not otherwise removal priorities as determined by DHS. The DAPA Memorandum has three primary objectives for these aliens: (1) to permit them to be lawfully employed and thereby enhance their ability to be self-sufficient, a goal of United States immigration law since this country's earliest immigration statutes; (2) to encourage them to come out of the shadows and to identify themselves and where they live, DHS's prime law enforcement objective; and (3) to maintain flexibility so that if Congress is able to make more resources for removal available, DHS will be able to respond.

Plaintiffs do not challenge DHS's ability to allow the aliens subject to the DAPA Memorandum—up to 4.3 million, some estimate—to remain in this country indefinitely. Indeed, Plaintiffs admit that such removal decisions are well within DHS's prosecutorial discretion. Rather, Plaintiffs complain of the consequences of DHS's decision to use its decades-long practice of granting "deferred action" to these individuals, specifically that these "illegal aliens" may temporarily work lawfully for a living and may also eventually become eligible for some public benefits. Plaintiffs contend that these consequences and benefits must be struck down even while the decision to allow the "illegal aliens" to remain stands. But Plaintiffs' challenge cannot be so easily bifurcated. For the benefits of which Plaintiffs complain are not conferred by the DAPA Memorandum—the only policy being challenged in this case—but are inexorably tied to DHS's deferred action decisions by a host of unchallenged, preexisting statutes and notice-and-comment regulations enacted by Congresses and administrations long past. Deferred action decisions, such as those contemplated by the DAPA Memorandum, are quintessential exercises of prosecutorial discretion. As the Supreme Court put it sixteen years ago, "[a]t each stage [of the removal process] the Executive has discretion to abandon the endeavor, [including by] engaging in a regular practice

> (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience."[3] Because all parties agree that an exercise of prosecutorial discretion itself is unreviewable, this case should be dismissed on justiciability grounds.
>
> Even if this case were justiciable, the preliminary injunction, issued by the district court, is a mistake. If the Memorandum is implemented in the truly discretionary, case-by-case manner it contemplates, it is not subject to the APA's notice-and-comment requirements, and the injunction cannot stand. Although the very face of the Memorandum makes clear that it must be applied with such discretion, the district court concluded on its own—prior to DAPA's implementation, based on improper burden-shifting, and without seeing the need even to hold an evidentiary hearing—that the Memorandum is a sham, a mere "pretext" for the Executive's plan "not [to] enforce the immigration laws as to over four million illegal aliens." *Texas v. United States,* 86 F.Supp.3d 591, 638 (S.D.Tex.2015) [hereinafter Dist. Ct. Op.]. That conclusion is clearly erroneous. The majority affirms and goes one step further today. It holds, in the alternative, that the Memorandum is contrary to the INA and substantively violates the APA. These conclusions are wrong. The district court expressly declined to reach this issue without further development, *id.* at 677, and the limited briefing we have before us is unhelpful and unpersuasive. For these reasons … I dissent.

Notes

1. One of the concerns in the Fifth Circuit's opinion is that it calls into question other forms of discretionary grants of work authorization found in 8 C.F.R. § 274a.12. The Fifth Circuit's opinion states that granting work authorization without express authority in the INA exceeds the agency authority. There are many categories of people who are granted deferred action status by the DHS and traditionally these people have been able to seek work authorization under the longstanding regulations.

2. For an on-line symposium debating some of the issues presented in this litigation both before and after the Supreme Court ruling see http://www.scotusblog.com/case-files/cases/united-states-v-texas/.

3. Although the media coverage might characterize it differently, the lawsuit does not truly address the power of the President to use executive discretion to confer work authorization, or to grant reprieve from removal proceedings. The litigation technically is a review of a preliminary injunction and findings about APA procedural requirements. The APA issues have become quite prominent in challenges mounted by states after the 2016 election. Now the federal government is being challenged by states who are opposed to stricter immigration enforcement using these same procedural arguments.

New Developments in Sanctuary Movements and State Litigation Over the Immigration Power

1. State Authority to Control Localities That Wish to Provide Privacy and "Sanctuary":

As noted above, the Texas litigation over deferred action benefits and the power of the executive branch to grant work authorization did not end with the 2016 election.

The Trump administration began to increase ICE enforcement with some very visible arrests, including an arrest within a family court in San Antonio. For one example in El Paso, see https://www.washingtonpost.com/news/morning-mix/wp/2017/02/16/this-is-really-unprecedented-ice-detains-woman-seeking-domestic-abuse-protection-at-texas-courthouse/?utm_term=.5d7ccccd4816. Local and state government began to explore and define their own policing policies. In several states the Chief Justice of the State Court wrote to ICE asking them to refrain from arresting people at state court proceedings. *See* Jeannie O'Sullivan, Calif., *NJ Chief Justice Slam Court House ICE Arrests*, Law 360 (Apr. 19, 2017), https://www.law360.com/articles/915113/calif-nj-chief-justices-slam-courthouse-ice-arrests.

In May of 2017, the state legislature in Texas adopted a new state statute that forbids state and local governments from adopting "sanctuary policies." The legislation was in part a reaction to the decision of the Sheriff for Houston. For the Sheriff's reasoning watch this video from the Houston Chronicle at http://www.houstonchronicle.com/news/houston-texas/houston/article/Sheriff-cuts-ties-with-ICE-program-over-immigrant-10949617.php. The legislation, known as S.B. 4, also criminalizes the failure of state and local officials to comply with an ICE detainer request to hold an individual.

S.B. 4 has many provisions and it deserves a close reading. You can find the text of the legislation at https://legiscan.com/TX/text/SB4/2017.

The National Immigration Forum and the American Immigration Lawyers Association have compared the Texas legislation to Arizona's S.B. 1070, discussed above starting on page 102. Critically, the Texas law requires local governments to honor ICE detainers that are typically served without a judicial warrant. Further, the legislation creates fines and possible criminal sentences for state and local authorities who do not fully cooperate with ICE or DHS enforcement.

Comparison: Texas S.B. 4 vs. Arizona S.B. 1070

	Texas SB 4 (2017)	**Arizona SB 1070 (2010)**
Prohibits local policies limiting enforcement of federal immigration laws (these policies aim to increase trust with immigrant communities)	Yes	Yes
Prohibits local policies limiting state and local officials from transmitting information to federal authorities	Yes (specifies transmission of information relating to immigration status)	Yes (specifies transmission of information relating to immigration status, but also eligibility for public benefits, claims of residence/domicile, verification of identity, and compliance with alien registration laws)
Requires or permits police officers to check the immigration status of a person they encounter when there is reasonable suspicion that the individual is undocumented	Permits	Requires (though Arizona's attorney general has instructed officers to ignore this provision as part of a settlement)
Requires that localities honor all ICE detainer requests	Yes	No
Provides for transfer of undocumented individuals convicted of state or local offenses to federal custody	Yes	Yes
Provides authority to state and local law enforcement to transport noncitizens held in custody to federal authorities, even when outside the local jurisdiction	No	Yes
Establishes process for members of the public to bring civil complaints against local jurisdictions and government officials in violation of the act	Yes (complaint to attorney general)	Yes (private right of action)
Establishes complaint process for investigations of employers alleged to be hiring undocumented workers	No	Yes
Includes broad harboring and transportation provisions that create criminal penalties for routine conduct; mandates impoundment of vehicles used for these purposes	No	Yes
Creates criminal penalties for knowingly employing undocumented workers and/or attempting to hire day laborers	No	Yes
Creates criminal penalties for government officials who violate provisions of the act	Yes	No

Creates separate state criminal offenses for federal immigration law violations	No	Yes
Creates civil penalties against localities that violate provisions of the act	Yes	Yes
Permits warrantless arrests of individuals who have committed a deportable offense	No	Yes
Requires employers maintain records of verification of employment eligibility for three years or term of employment	No	Yes
Provides for defense and/or indemnification for good-faith compliance with the act	Yes, but only for localities after state attorney general has agreed to assist in the defense (if the state attorney general determines good-faith compliance) and locality is found liable or settles	Yes, but only for individual law enforcement officers found to be attempting good-faith compliance with the act. Does not provide for defense, just indemnification, but indemnification includes costs and attorney's fees

Table by National Immigration Forum: Original
https://immigrationforum.org/wp-content/uploads/2017/05/Texas-SB-4-AZ-SB-1070-Comparison-Chart.pdf

Several suits seek to enjoin S.B. 4. In general, these suits argue that Texas is chilling political speech and unduly interfering with policing policies adopted by local officials. They also assert that the state is preempted from creating additional liabilities. The first was filed by the City of San Antonio. The city o, a border town, and El Paso County and the ACLU have also filed suits challenging S.B. 4. Travis County, Texas, which was joined by Bexar County, has sought a declaratory judgment supporting the legality of the legislation. You can track the litigation at the AILA website. http://www.aila.org/infonet/keep-track-of-litigation-related-to-sb-4. *USA Today* has a good summary of who has sued as of June 19, 2017: https://www.usatoday.com/story/news/politics/2017/06/02/texas-sanctuary-city-lawsuit/366448001/
The National conference of State Legislatures has a similar overview of the current lawsuits: http://www.ncsl.org/blog/2017/05/12/dueling-lawsuits-challenge-and-defend-texas-sanctuary-laws.aspx.

In the spring of 2018, the Fifth Circuit vacated a preliminary injunction, ruling that the cities were not entitled to enjoin the state statute. *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018). The Fifth Circuit panel found that the plaintiffs had not succeeded in establishing a congressional "field preemption." The panel also found that neither the ICE detainer mandates nor information sharing violated the Fourth Amendment.

2. Federal Authority to "Fine" States and Cities that Provide "Sanctuary."

Shortly after his inauguration, President Trump issued several Executive Orders directing federal agencies to enforce a variety of immigration policies. In Chapter Two we will explore the Executive Orders known as the "travel bans." Here we explore the order directing greater interior enforcement and warning state and local government that 8 U.S.C. § 1373 provides that failure to honor federal immigration detainers and requests can result in a loss of funds.

In the following excerpt, the County of Santa Clara, California and the City of San Francisco sought declaratory and injunctive relief against the new Executive Order threatening the sanctuary policies they had adopted. The court granted the permanent injunction.

COUNTY OF SANTA CLARA v. TRUMP
United States District Court for the Northern District of California
250 F. Supp. 3d 497 (N.D. Cal. 2017)

Opinion by: William H. Orrick

ORDER GRANTING THE COUNTY OF SANTA CLARA'S AND CITY AND COUNTY OF SAN FRANCISCO'S MOTIONS TO ENJOIN SECTION 9(a) OF EXECUTIVE ORDER 13768

INTRODUCTION

This case involves Executive Order 13768, "Enhancing Public Safety in the Interior of the United States," which, in addition to outlining a number of immigration enforcement policies, purports to "[e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law" and to establish a procedure whereby "sanctuary jurisdictions" shall be ineligible to receive federal grants. Executive Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (the "Executive Order"). In two related actions, the County of Santa Clara and the City and County of San Francisco have challenged Section 9 of the Executive Order as facially unconstitutional and have brought motions for preliminary injunction seeking to enjoin its enforcement.

The Counties challenge the enforcement provision of the Order, Section 9(a), on several grounds: first, it violates the separation of powers doctrine enshrined in the Constitution because it improperly seeks to wield congressional spending powers; second, it is so overbroad and coercive that even if the President had spending powers, the Order would clearly exceed them and violate the Tenth Amendment's prohibition against commandeering local jurisdictions; third, it is so vague and standardless that it violates the Fifth Amendment's Due Process Clause and is void for vagueness; and, finally, because it seeks to deprive local jurisdictions of congressionally allocated funds without any notice or opportunity to be heard, it violates the procedural due process requirements of the Fifth Amendment.[21]

[21] San Francisco also brings a facial challenge to 8 U.S.C. § 1373, arguing that the statute is

The Government does not respond to the Counties' constitutional challenges but argues that the Counties lack standing because the Executive Order did not change existing law and because the Counties have not been named "sanctuary jurisdictions" pursuant to the Order. It explained for the first time at oral argument that the Order is merely an exercise of the President's "bully pulpit" to highlight a changed approach to immigration enforcement. Under this interpretation, Section 9(a) applies only to three federal grants in the Departments of Justice and Homeland Security that already have conditions requiring compliance with 8 U.S.C. § 1373. [**Authors' Note:** This section of law was not incorporated into the Immigration and Nationality Act and therefore there is no parallel INA citation. The Section was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and also as part of the Omnibus Consolidated Appropriations Act, 1997.] This interpretation renders the Order toothless; the Government can already enforce these three grants by the terms of those grants and can enforce 8 U.S.C. § 1373 to the extent legally possible under the terms of existing law. Counsel disavowed any right through the Order for the Government to affect any other part of the billions of dollars in federal funds the Counties receive every year.

It is heartening that the Government's lawyers recognize that the Order cannot do more constitutionally than enforce existing law. But Section 9(a), by its plain language, attempts to reach all federal grants, not merely the three mentioned at the hearing. The rest of the Order is broader still, addressing all federal funding. And if there was doubt about the scope of the Order, the President and Attorney General have erased it with their public comments. The President has called it "a weapon" to use against jurisdictions that disagree with his preferred policies of immigration enforcement, and his press secretary has reiterated that the President intends to ensure that "counties and other institutions that remain sanctuary cites don't get federal government funding in compliance with the executive order." The Attorney General has warned that jurisdictions that do not comply with Section 1373 would suffer "withholding grants, termination of grants, and disbarment or ineligibility for future grants," and the "claw back" of any funds previously awarded. Section 9(a) is not reasonably susceptible to the new, narrow interpretation offered at the hearing.

Although the Government's new interpretation of the Order is not legally plausible, in effect it appears to put the parties in general agreement regarding the Order's constitutional limitations. The Constitution vests the spending powers in Congress, not the President, so the Order cannot constitutionally place new conditions on federal funds. Further, the Tenth Amendment requires that conditions on federal funds be unambiguous and timely made; that they bear some relation to the funds at issue; and that the total financial incentive not be coercive. Federal funding that bears no meaningful relationship to immigration enforcement cannot be threatened merely because a jurisdiction chooses an immigration enforcement strategy of

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unconstitutional under the Tenth Amendment because "the whole object" of that section is to "direct the functioning" of state governments.*** [This was not yet addressed by the court.]

which the President disapproves.

To succeed in their motions, the Counties must show that they are likely to face immediate irreparable harm absent an injunction, that they are likely to succeed on the merits, and that the balance of harms and public interest weighs in their favor. The Counties have met this burden. They have demonstrated that they have standing to challenge the Order and are currently suffering irreparable harm, not only because the Order has caused and will cause them constitutional injuries by violating the separation of powers doctrine and depriving them of their Tenth and Fifth Amendment rights, but also because the Order has caused budget uncertainty by threatening to deprive the Counties of hundreds of millions of dollars in federal grants that support core services in their jurisdictions. They have established that they are likely to succeed on the merits of their claims and that the balance of harms and public interest decisively weigh in favor of an injunction. The Counties' motions for preliminary injunction against Section 9(a) of the Executive Order are GRANTED as further described below.

That said, this injunction does nothing more than implement the effect of the Government's flawed interpretation of the Order. It does not affect the ability of the Attorney General or the Secretary to enforce existing conditions of federal grants or 8 U.S.C. § 1373, nor does it impact the Secretary's ability to develop regulations or other guidance defining what a sanctuary jurisdiction is or designating a jurisdiction as such. It does prohibit the Government from exercising Section 9(a) in a way that violates the Constitution.

BACKGROUND
I. THE EXECUTIVE ORDER

On January 25, 2017, President Donald J. Trump issued Executive Order 13768, "Enhancing Public Safety in the Interior of the United States."***. In outlining the Executive Order's purpose, Section 1 reads, in part, "Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States." EO § 1. Section 2 states that the policy of the executive branch is to "[e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except [as mandated by law." EO § 2(c).

Section 9, titled "Sanctuary Jurisdictions" lays out this policy in more detail. It reads:

Sec. 9. Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. § 1373.

(a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with8 U.S.C. § 1373 (sanctuary jurisdictions) are not

eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. § 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.

(b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.

(c) The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction. EO § 9.

Section 3 of the Order, titled "Definitions," incorporates the definitions listed in [INA § 101] 8 U.S.C. § 1101 EO §3. Section 1101 does not define "sanctuary jurisdiction." The term is not defined anywhere in the Executive Order. Similarly, neither section 1101 nor the Order defines what it means for a jurisdiction to "willfully refuse to comply" with 8 U.S.C. § 1373 or for a policy to "prevent[] or hinder[] the enforcement of Federal law." EO § 9(a).

II. Section 1373

Section 1373 to which Section 9 refers, prohibits local governments from restricting government officials or entities from communicating immigration status information to ICE. It states in relevant part:

(a) In General. Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional Authority of Government Entities. Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity. 8 U.S.C. § 1373.

In July, 2016, the U.S. Department of Justice issued guidance linking two federal grant programs, the State Criminal Alien Assistance Program ("SCAAP") and Edward Byrne Memorial Justice Assistance Grant ("JAG") to compliance with 8 U.S.C. § 1373.

This guidance states that all applicants for these two grant programs are required to "assure and certify compliance with all applicable federal statutes, including Section 1373 as well as all applicable federal regulations, policies, guidelines, and requirements." *Id.*The Department has indicated that the Community Oriented Policing Services Grant (COPS) is also conditioned on compliance with Section 1373.

III. CIVIL DETAINER REQUESTS

An ICE civil detainer request asks a local law enforcement agency to continue to hold an inmate who is in local jail because of actual or suspected violations of state criminal laws for up to 48 hours after his or her scheduled release so that ICE can determine if it wants to take that individual into custody. *See* 8 C.F.R. § 287.7; [references to Declarations deleted throughout.] ICE civil detainer requests are voluntary and local governments are not required to honor them. *See* 8 C.F.R. § 287.7(a); *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) ("[S]ettled constitutional law clearly establishes that [immigration detainers] must be deemed requests" because any other interpretation would render them unconstitutional under the Tenth Amendment. Several courts have held that it is a violation of the Fourth Amendment for local jurisdictions to hold suspected or actual removable aliens subject to civil detainer requests because civil detainer requests are often not supported by an individualized determination of probable cause that a crime has been committed. *See Morales v. Chadbourne*, 793 F.3d 208, 215-217 (1st Cir. 2015); ***. ICE does not reimburse local jurisdictions for the cost of detaining individuals in response to a civil detainer request and does not indemnify local jurisdictions for potential liability they could face for related Fourth Amendment violations. *See* 8 C.F.R. § 287.7(e). ***

IV. THE COUNTIES' POLICIES

A. Santa Clara's Policies

Santa Clara asserts that its local policies and practices with regard to federal immigration enforcement are at odds with the Executive Order's provisions regarding Section 1373. … In 2010, the Santa Clara County Board of Supervisors adopted a Resolution prohibiting Santa Clara employees from using County resources to transmit any information to ICE that was collected in the course of

providing critical services or benefits. ***The Resolution also prohibits employees from initiating an inquiry or enforcement action based solely on the individual's actual or suspected immigration status, national origin, race or ethnicity, or English-speaking ability, or from using County resources to pursue an individual solely because of an actual or suspected violation of immigration law. *Id.*In October, 2016, after receiving DOJ guidance that JAG and SCAAP funds would be conditioned on compliance with Section 1373, Santa Clara decided not to participate in those programs. ***

Santa Clara also asserts that its policies with regard to ICE civil detainer requests are inconsistent with the Executive Order and the President's stated immigration enforcement agenda. Prior to late 2011, Santa Clara responded to and honored ICE civil detainer requests, housing an average of 135 additional inmates each day at a daily cost of approximately $159 per inmate. *** When the County raised concerns about the costs associated with complying with detainer requests and potential civil liability, ICE confirmed that it would not reimburse the County or indemnify it for the associated costs and liabilities. *** Santa Clara subsequently convened a task force and adopted a new policy where the County agreed to honor requests for individuals with serious or violent felony convictions, but only if ICE would reimburse the County for the cost of holding those individuals. ***ICE has never agreed to reimburse the County for any costs, so since November 2011 the County has declined to honor all ICE detainer requests. Id.

B. San Francisco's Policies

San Francisco's sanctuary city policies are contained in Chapters 12H and 12I of its Administrative Code. *** The stated purpose of these laws is "to foster respect and trust between law enforcement and residents, to protect limited local resources, to encourage cooperation between residents and City officials, including especially law enforcement and public health officers and employees, and to ensure community security, and due process for all." S.F. Admin Code § 12I.1.

As relevant to Section 1373, Chapter 12H prohibits San Francisco departments, agencies, commissions, officers, and employees from using San Francisco funds or resources to assist in enforcing federal immigration law or gathering or disseminating information regarding an individual's release status, or other confidential identifying information (which as defined does not include immigration status), unless such assistance is required by federal or state law. S.F. Admin Code § 12H.2. Although Chapter 12H previously prohibited city employees from sharing information regarding individuals' immigration status, the San Francisco Board of Supervisors removed this restriction in July, 2016, due to concerns that the provision violated Section 1373.

With regard to civil detainer requests, Chapter 12I prohibits San Francisco law enforcement from detaining an individual, otherwise eligible for release from custody, solely on the basis of a civil immigration detainer request. S.F. Admin

Code § 12I.3. It also prohibits local law enforcement from providing ICE with advanced notice that an individual will be released from custody, unless the individual meets certain criteria. S.F. Admin Code § 12I.3. Chapter 12I.3.(e) provides that a "[l]aw enforcement official shall not arrest or detain an individual, or provide any individual's personal information to a federal immigration officer, on the basis of an administrative warrant, prior deportation order, or other civil immigration document based solely on alleged violations of the civil provisions of immigration laws." S.F. Admin Code § 12I.3.(e). San Francisco explains that it adopted these policies due to concerns that holding people in response to civil detainers would violate the Fourth Amendment and require it to dedicate scarce law enforcement personnel and resources to holding these individuals.***

V. THE COUNTIES' FEDERAL FUNDING

A. Santa Clara's Federal Funding

In the 2015-2016 fiscal year, Santa Clara received approximately $1.7 billion in federal and federally dependent funds, making up roughly 35% of the County's total revenues.*** This figure includes federal funds provided through entitlement programs.

***

In the 2014-2015 fiscal year, the County received over $565 million in non-entitlement federal grants. *** This $565 million represents approximately 11% of the County's budget.

B. San Francisco's Federal Funding

San Francisco's yearly budget is approximately $9.6 billion; it receives approximately $1.2 billion of this from the federal government. ***

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat'l Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008). This has been interpreted as a four-part conjunctive test, not a four-factor balancing test. However, the Ninth Circuit has held that a plaintiff may also obtain an injunction if he has demonstrated "serious questions going to the merits" that the balance of hardships "tips sharply" in his favor, that he is likely to suffer irreparable harm, and that an injunction is in the public interest.***

DISCUSSION
I. JUSTICIABILITY

The Government argues that the Counties' claims against the Executive Order are not justiciable because the Counties cannot establish an injury-in-fact, which is necessary to establish standing, and because their claims are not ripe for review. These principles of standing and ripeness go to whether this court has jurisdiction to hear the Counties' claims. I conclude that the Counties have demonstrated Article III standing to challenge the Executive Order and that their claims are ripe for review.

[**Authors' Note:** The discussion of standing and ripeness are largely omitted, but the court refers frequently to *Arizona v. United States* and *Texas v. United* States, previously discussed in this chapter and supplement. The District Court took judicial notice of Attorney General Sessions' press conference and the directives in the Executive Order to the Attorney General and the Secretary of the DHS to implement and enforce § 1373. The opinion also noted statements by Press Secretary Sean Spicer.]
***

The President and the Attorney General have also repeatedly held up San Francisco specifically as an example of how sanctuary policies threaten public safety. In his statements to the press on March 27, 2017, Attorney General Sessions referenced the tragic death of Kate Steinle and noted that her killer "admitted the only reason he came to San Francisco was because it was a sanctuary city." Sessions Press Conference at 1. In an op-ed recently published in the San Francisco Chronicle, the Attorney General wrote that "Kathryn Steinle might be alive today if she had not lived in a 'sanctuary city' " and implored "San Francisco and other cities to re-evaluate these policies." ***.[312]

These statements indicate not only the belief that San Francisco is a "sanctuary jurisdiction" but that its policies are particularly dangerous and in need of change. They also reveal a choice by the Government to hold up San Francisco as an exemplar of a sanctuary jurisdiction.

The Government argues that despite these public statements, San Francisco and Santa Clara cannot demonstrate a credible threat of enforcement because the Government has not actually threatened to enforce the Executive Order against them. ***

The Government's specific criticisms of San Francisco, Santa Clara, and California support a well-founded fear that San Francisco and Santa Clara will face

[312] I take judicial notice of Attorney General Sessions's statements in his op-ed as the veracity of these statements "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. § 201(b)(2).

enforcement directly under the Executive Order, or could be subject to defunding indirectly through enforcement against California.[413]

San Francisco and Santa Clara have shown that their current practices and policies are targeted by the Order. They have demonstrated that, in the less-than-three months since the Order was signed, the Government has repeatedly indicated its intent to enforce it. And they have established that the Government has specifically highlighted Santa Clara and San Francisco as jurisdictions with sanctuary policies. On these facts, Santa Clara and San Francisco have demonstrated that the "threat of enforcement [is] credible, not simply imaginary or speculative." ***

c. The Counties' claims implicate a constitutional interest

The Counties' claims implicate a constitutional interest, the rights of states and local governments to determine their own local policies and enforcement priorities pursuant to the Tenth Amendment. ***

The Counties explain that their sanctuary policies "reflect local determinations about the best way to promote public health and safety."*** In contrast to the Order's assertion that sanctuary jurisdictions are a "public safety threat[]," the Counties contend that, in their judgment and experience, sanctuary policies make the community safer by fostering trust between residents and local law enforcement. Among other things, this community trust encourages undocumented residents to cooperate with police and report crimes, [**Authors' Note:** citing to Amici] It also improves schools' ability to provide quality education to all children. [citing to Amici and noting dozens of similar briefs.]

The Counties have demonstrated that their sanctuary policies reflect their local judgment of what policies and practices are most effective for maintaining public safety and community health. Because they argue that the Executive Order seeks to undermine this judgment by attempting to compel them to change their policies and enforce the Federal government's immigration laws in violation of the Tenth Amendment, their claims implicate a constitutional interest. ***

d. The Counties are threatened with the loss of federal grants and face a present injury in the form of budgetary uncertainty

[Authors' Note: the court accepted this argument**.]** ***

e. The Counties meet the requirements for pre-enforcement standing

In sum, the Counties have established a well-founded fear of enforcement under the

[413] Amicus briefs on behalf of numerous California cities and counties, public school districts and the State Superintendent of Instruction echo the reasons given by the Counties to demonstrate standing here.

Executive Order. They have demonstrated that, under their reasonable interpretation of the Order, their local policies are proscribed by Section 9's language. They have demonstrated that the Government intends to enforce the Order against them specifically. And they have demonstrated that their claims against the Order implicate a constitutional interest — their Tenth Amendment rights to self-governance. The Counties have shown "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." ***Further, the Counties have demonstrated that the Order threatens to withhold federal grant money and that the threat of the Order is presently causing the Counties injury in the form of significant budget uncertainty. The Counties' well-founded fear of enforcement of Section 9(a) is sufficient to demonstrate Article III standing.

B. Ripeness

[Authors' Note: the district court found the claims to be ripe**.]**

***Without clarity the Counties do not know whether they should start slashing essential programs or continue to spend millions of dollars and risk a financial crisis in the near future. *** Waiting for the Government to decide how it wants to apply the Order would only cause more hardship and would not resolve the legal question at issue: whether Section 9(a) as written is unconstitutional. The Counties' claims are prudentially ripe.

The Counties have established Article III standing and their claims are justiciable. They have also demonstrated that their claims are prudentially ripe for review.

II. LIKELIHOOD OF SUCCESS ON THE MERITS

The Counties challenge the Executive Order on several constitutional grounds and bear the burden of demonstrating a likelihood of success on the merits. The Government presents no defense to these constitutional arguments; it focused on standing and ripeness. I conclude that the Counties have demonstrated likely success on the merits in several ways.

A. Separation of Powers

The Counties argue that the Executive Order is unconstitutional because it seeks to wield powers that belong exclusively to Congress, the spending powers. Article I of the Constitution grants Congress the federal spending powers. *See* U.S. Const. art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.' "*South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ***(emphasis added). While the President may veto a Congressional enactment under the Presentment Clause, he must "either

'approve all the parts of a Bill, or reject it in toto.' " *City of New York*, 524 U.S. at 438 (quoting 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940)). He cannot "repeal[] or amend[] parts of duly enacted statues" after they become law.***

This is true even if Congress has attempted to expressly delegate such power to the President. *Id.* In *City of New York*, the Supreme Court concluded that the Line Item Veto Act, which sought to grant the President the power to cancel particular direct spending and tax benefit provisions in bills, was unconstitutional as it ran afoul of the " 'finely wrought' procedures commanded by the Constitution" for enacting laws. Id. at 448 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)). While Congress can delegate some discretion to the President to decide how to spend appropriated funds, any delegation and discretion is cabined by these constitutional boundaries.

After a bill becomes law, the President is required to "take Care that the Law be faithfully executed." *See* U.S. Const. art. II, § 3, cl. 5. Where Congress has failed to give the President discretion in allocating funds, the President has no constitutional authority to withhold such funds and violates his obligation to faithfully execute the laws duly enacted by Congress if he does so. *** Further, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . ." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952). (Jackson, J., concurring). Congress has intentionally limited the ability of the President to withhold or "impound" appropriated funds and has provided that the President may only do so after following particular procedures and after receiving Congress's express permission. ***

The Executive Order runs afoul of these basic and fundamental constitutional structures. The Order's stated purpose is to "ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." EO § 2. To effectuate this purpose, the Order directs that "the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary." EO § 9(a). Section 9 purports to give the Attorney General and the Secretary the power to place a new condition on federal funds (compliance with Section 1373) not provided for by Congress. But the President does not have the power to place conditions on federal funds and so cannot delegate this power.

Section 9 is particularly problematic as Congress has repeatedly, and frequently, declined to broadly condition federal funds or grants on compliance with Section 1373 or other federal immigration laws as the Executive Order purports to do. *See*, e.g., Ending Sanctuary Cities Act of 2016, H.R. 6252, 114th Cong. (2016); Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. (2016); Stop Dangerous Sanctuary Cities Act, H.R. 5654, 114th Cong. (2016); Stop Sanctuary Policies and

Protect Americans Act, S. 2146, 114th Cong. (2016). This puts the President's power "at its lowest ebb." Youngstown, 343 U.S. at 647. The Order's attempt to place new conditions on federal funds is an improper attempt to wield Congress's exclusive spending power and is a violation of the Constitution's separation of powers principles.

B. Spending Clause Violations

The Counties also argue that, even if the President had the spending power, the Executive Order would be unconstitutional under the Tenth Amendment as it exceeds those powers. The Counties are likely to succeed on this claim as well.

While Congress has significant authority to encourage policy through its spending power, the Supreme Court has articulated a number of limitations to the conditions Congress can place on federal funds. The Executive Order likely violates at least three of these restrictions: (1) conditions must be unambiguous and cannot be imposed after funds have already been accepted; (2) there must be a nexus between the federal funds at issue and the federal program's purpose; and (3) the financial inducement cannot be coercive.

1. Unambiguous Requirement

When Congress places conditions on federal funds "it must do so unambiguously" so that states and local jurisdictions contemplating whether to accept such funds can "exercise their choice knowingly, cognizant of the consequences of their participation." *** Because states must opt-in to a federal program willingly, fully aware of the associated conditions, Congress cannot implement new conditions after-the-fact. *See Nat'l Fed. of Indep. Bus. v. Sebelius ("NFIB")*, 567 U.S. 519 (2012) "The legitimacy of Congress's exercise of the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the contract" at the time Congress offers the money. *Id.*at 2602.

The Executive Order purports to retroactively condition all "federal grants" on compliance with Section 1373. As this condition was not an unambiguous condition that the states and local jurisdictions voluntarily and knowingly accepted at the time Congress appropriated these funds, it cannot be imposed now by the Order. In addition, while the Order's language refers to all federal grants, the Government's lawyers say it only applies to three grants issued through the Departments of Justice and Homeland Security. If the funds at stake are not clear, the Counties cannot voluntarily and knowingly choose to accept the conditions on those funds.

Finally, as discussed infra in Section II.D., the Order's vague language does not make clear what conduct it proscribes or give jurisdictions a reasonable opportunity to avoid its penalties. *See* discussion re vagueness infra Section II.D. The unclear and untimely conditions in the Executive Order fail the "unambiguous" restriction because the Order does not make clear to states and local governments what funds

are at issue and what conditions apply to those funds, making it impossible for them to "voluntarily and knowingly accept[] the terms of the contract." *NFIB*, at 2602.

2. Nexus Requirement

The conditions placed on congressional spending must have some nexus with the purpose of the implicated funds. "Congress may condition grants under the spending power only in ways reasonable related to the purpose of the federal program." *** This means that funds conditioned on compliance with Section 1373 must have some nexus to immigration enforcement.

The Executive Order's attempt to condition all federal grants on compliance with Section 1373 clearly runs afoul of the nexus requirement: there is no nexus between Section 1373 and most categories of federal funding, including without limitation funding related to Medicare, Medicaid, transportation, child welfare services, immunization and vaccination programs, and emergency preparedness. The Executive Order inverts the nexus requirement, directing the Attorney General and Secretary to cut off all federal grants to "sanctuary jurisdictions" but giving them discretion to allow "sanctuary jurisdictions" to receive grants "deemed necessary for law enforcement purposes." EO § 9(a). As the subset of grants "deemed necessary for law enforcement purposes" likely includes any federal funds related to immigration enforcement, the Executive Order expressly targets for defunding grants with no nexus to immigration enforcement at all. This is the precise opposite of what the nexus test requires.

3. Not Coercive Requirement

Finally, Congress cannot use the spending power in a way that compels local jurisdictions to adopt certain policies. Congress cannot offer "financial inducement . . . so coercive as to pass the point at which pressure turns to compulsion." *** Legislation that "coerces a State to adopt a federal regulatory system as its own" "runs contrary to our system of federalism." *NFIB*, at 2602. States must have a "legitimate choice whether to accept the federal conditions in exchange for federal funds." *Id.*at 2602-03.

In NFIB, the Supreme Court concluded that the Affordable Care Act's threat of denying Medicaid funds, which constituted over 10 percent of the State's overall budget, was unconstitutionally coercive and represented a "gun to the head." *Id.*at 2064.The Executive Order threatens to deny sanctuary jurisdictions all federal grants, hundreds of millions of dollars on which the Counties rely. The threat is unconstitutionally coercive.

C. Tenth Amendment Violations

The Counties argue that Section 9(a) violates the Tenth Amendment because it attempts to conscript states and local jurisdictions into carrying out federal

immigration law. The Counties are likely to succeed on this claim as well.

"The Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188. "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). "That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *NIFB*, 132 S. Ct. at 2602.

As discussed with regard to the Counties' standing arguments, the Counties have demonstrated that under their reasonable interpretation, the Order equates "sanctuary jurisdictions" with "any jurisdiction that ignored or otherwise failed to honor any detainers" and therefore places such jurisdictions at risk of losing all federal grants. *See* EO § 9(b). The Counties have shown that losing all of their federal grant funding would have significant effects on their ability to provide services to their residents and that they may have no legitimate choice regarding whether to accept the government's conditions in exchange for those funds. To the extent the Executive Order seeks to condition all federal grants on honoring civil detainer requests, it is likely unconstitutional under the Tenth Amendment because it seeks to compel the states and local jurisdictions to enforce a federal regulatory program through coercion.

Even if the Order does not condition federal grants on honoring detainer requests, it certainly seeks to compel states and local jurisdictions to comply with civil detainers by directing the Attorney General to "take appropriate enforcement action against any entity that violates 8 U.S.C. § 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." EO §9(a).

*** By seeking to compel states and local jurisdictions to honor civil detainer requests by threatening enforcement action, the Executive Order violates the Tenth Amendment’s provisions against conscription.

The Supreme Court has repeatedly held that, "The Federal Government cannot compel the States to enact or administer a federal regulatory program."*** The Government cannot command them to adopt certain policies, ***command them to carry out federal programs, *Printz*, 521 U.S. at 935, or otherwise to "coerce them into adopting a federal regulatory system as their own," *NFIB*, 132 S. Ct. at 2602. The Executive Order uses coercive means in an attempt to force states and local jurisdictions to honor civil detainer requests, which are voluntary "requests" precisely because the federal government cannot command states to comply with them under the Tenth Amendment. The Executive Order attempts to use coercive methods to circumvent the Tenth Amendment direct prohibition against conscription. While the federal government may incentivize states to adopt federal

programs voluntarily, it cannot use means that are so coercive as to compel their compliance. The Executive Order's threat to pull all federal grants from jurisdictions that refuse to honor detainer requests or to bring "enforcement action" against them violates the Tenth Amendment's prohibitions against commandeering.

D. Fifth Amendment Void for Vagueness

The Counties assert that the Executive Order is unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause. A law is unconstitutionally vague and void under the Fifth Amendment if it fails to make clear what conduct it prohibits and if it fails to lay out clear standards for enforcement. *See Gaynard v. City of Rockford*, 408 U.S. 104, 108 (1972). To satisfy due process we insist that laws (1) "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and (2) "provide explicit standards for those who apply them." *Id.* The Executive Order does not meet either of these requirements.

The Executive Order does not make clear what conduct might subject a state or local jurisdiction to defunding or enforcement action, making it impossible for jurisdictions to determine how to modify their conduct, if at all, to avoid the Order's penalties. The Order clearly directs the Attorney General and Secretary to ensure that jurisdictions that "willfully refuse to comply" with Section 1373, "sanctuary jurisdictions," are not eligible to receive federal grants. The Government repeatedly emphasizes in its briefing that it does not know what it means to "willfully refuse to comply" with Section 1373. *** Past DOJ guidance and various court cases interpreting Section 1373 have not reached consistent conclusions as to what 1373 requires. In the face of conflicting guidance, and no clear standard from the Government, jurisdictions do not know how to avoid the Order's defunding penalty.

Further, because the Order does not clearly define "sanctuary jurisdictions" the conduct that will subject a jurisdiction to defunding under the Order is not fully outlined. This is further complicated because the Order gives the Secretary unlimited discretion to make "sanctuary jurisdiction" designations. But, at least as of two months ago, the Secretary himself stated that he "do[esn't] have a clue" how to define "sanctuary city." *** If the Secretary has unbounded discretion to designate "sanctuary jurisdictions" but has no idea how to define that term, states and local jurisdictions have no hope of deciphering what conduct might result in an unfavorable "sanctuary jurisdiction" designation.

In addition, the Order directs the Attorney General to take "appropriate enforcement action" against any jurisdiction that willfully refuses to comply with Section 1373 or otherwise has a policy or practice that "hinders the enforcement of Federal law." This provision vastly expands the scope of the Order. What does it mean to "hinder" the enforcement of federal law? What federal law is at issue: immigration laws? All federal laws? The Order offers no clarification.

The Order also fails to provide clear standards to the Secretary and the Attorney General to prevent "arbitrary and discriminatory enforcement." *Id.* ***The Order directs the Attorney General to take "appropriate enforcement action" against any jurisdiction that "hinders the enforcement of Federal law." This expansive, standardless language creates huge potential for arbitrary and discriminatory enforcement, leaving the Attorney General to figure out what "appropriate enforcement action" might entail and what policies and practices might "hinder[] the enforcement of Federal law." This language is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008).

The Order gives the Counties no clear guidance on how to comply with its provisions or what penalties will result from non-compliance. Its standardless guidance and enforcement provisions are also likely to result in arbitrary and discriminatory enforcement. It does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *** The Counties are likely to succeed in their argument that Section 9(a) is void for vagueness under the Fifth Amendment.

E. Fifth Amendment Procedural Due Process Violations

The Counties assert that the Executive Order fails to provide them with procedural due process in violation of the Fifth Amendment. To sustain a valid procedural due process claim a person must demonstrate that he has a legally protectable property interest and that he has suffered or will suffer a deprivation of that property without adequate process. ***

To have a legitimate property interest, a person "must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. Of Regents v. Roth*, 408 U.S. 564 (1972). A state or local government has a legitimate claim of entitlement to congressionally appropriated funds, which are akin to funds owed on a contract. *** The Counties have a legitimate property interest in federal funds that Congress has already appropriated and that the Counties have accepted.

The Executive Order purports to make the Counties ineligible to receive these funds through a discretionary and undefined process. *** It does not direct the Attorney General or Secretary to provide "sanctuary jurisdictions" with any notice of an unfavorable designation or impending cut to funding. And it does not set up any administrative or judicial procedure for states and local jurisdictions to be heard, to challenge enforcement action, or to appeal any action taken against them under the Order. This complete lack of process violates the Fifth Amendment's due process requirements. *Matthews v. Eldridge*, 424 U.S. 319, 349 (1976) "The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.") (internal alterations and

quotations omitted).

The Government's only defense of the Order's lack of process is to claim that Section 9's provision that it be implemented "consistent with law" reads in all necessary procedural requirements. Again, the Government's attempt to resolve all of the Order's constitutional infirmities with a "consistent with law" bandage is not convincing. There is no dispute that while the Order commands the Secretary to designate certain jurisdictions as ineligible for federal grants and directs the Attorney General to bring an "enforcement action" against them, it provides no process at all for notifying jurisdictions about such a determination and provides them no opportunity to be heard. The Counties are likely to succeed on their claim that the Order fails to provide adequate due process in violation of the Fifth Amendment.

III. IRREPARABLE HARM

[Authors' Note: The court found harm based on budgetary uncertainty and constitutional injury by controlling local government.]

IV. BALANCE OF HARMS AND PUBLIC INTEREST

A party seeking a preliminary injunction must "establish . . . that the balance of equities tips in his favor, and that an injunction is in the public interest." *** When the federal government is a party, these factors merge. ***

The Government argues that the balance of harms and the public interest weigh against a preliminary injunction because the "most pertinent and concretely expressed public interest" in this case is contained in Section 1373, and Section 9 simply seeks to ensure compliance with that section. This argument is unconvincing given the Government's flawed argument that Section 9 does not change the law. If Section 9 does not change the law, or if the Government does not intend to enforce Section 9's unlawful directives, then it provides the Government with no concrete benefit but to highlight the President's enforcement priorities. The President certainly has the right to use the bully pulpit to encourage his policies. But Section 9(a) is not simply rhetorical. The Counties have a strong interest in avoiding unconstitutional federal enforcement and the significant budget uncertainty that has resulted from the Order's broad and threatening language. To the extent the Government wishes to use all lawful means to enforce 8 U.S.C. § 1373, it does not need Section 9(a) to do so. The confusion caused by Section 9(a)'s facially unconstitutional directives and its coercive effects weigh heavily against leaving it in place. The balance of harms weighs in favor of an injunction.

V. NATIONWIDE INJUNCTION

The Government argues that, if an injunction is issued, it should be issued only with regards to the plaintiffs and should not apply nationwide. But where a law is

unconstitutional on its face, and not simply in its application to certain plaintiffs, a nationwide injunction is appropriate. *See California v. Yamasaki*, 442 U.S. 682 (1979). ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff."); *Washington*, 847 F.3d at 1166-67 (affirming nationwide injunction against executive travel ban order). The Counties have demonstrated that they are likely to succeed on their claims that the Executive Order purports to wield powers exclusive to Congress, and violates the Tenth and Fifth Amendments. These constitutional violations are not limited to San Francisco or Santa Clara, but apply equally to all states and local jurisdictions. Given the nationwide scope of the Order, and its apparent constitutional flaws, a nationwide injunction is appropriate.

VI. INJUNCTION AGAINST THE PRESIDENT

The Government also argues that, if an injunction is issued, it should not issue against the President. An injunction against the President personally is an "extraordinary measure not lightly to be undertaken." ***The Counties assert that the court "has discretion to determine whether the constitutional violations in the Executive Order may be remedied by an injunction against the named inferior officers, or whether this is an extraordinary circumstance where injunctive relief against the President himself is warranted."

I conclude that an injunction against the President is not appropriate. The Counties *See*k to enjoin the Executive Order which directs the Attorney General and the Secretary to carry out the provisions of Section 9. The President has no role in implementing Section 9. It is not clear how an injunction against the President would remedy the constitutional violations the Counties have alleged. On these facts, the extraordinary remedy of enjoining the President himself is not appropriate.

CONCLUSION

The Counties have demonstrated that they are likely to succeed on the merits of their challenge to Section 9(a) of the Executive Order, that they will suffer irreparable harm absent an injunction, and that the balance of harms and public interest weigh in their favor. The Counties' motions for a nationwide preliminary injunction, enjoining enforcement of Section 9(a), are GRANTED. The defendants (other than the President) are enjoined from enforcing Section 9(a) of the Executive Order against jurisdictions they deem as sanctuary jurisdictions. This injunction does not impact the Government's ability to use lawful means to enforce existing conditions of federal grants or 8 U.S.C. § 1373, nor does it restrict the Secretary from developing regulations or preparing guidance on designating a jurisdiction as a "sanctuary jurisdiction."

IT IS SO ORDERED.

Notes

1. Sanctuary city challenges continue. The Seventh Circuit ruled in *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), that a nationwide national preliminary injunction was appropriate. In essence, this decision affirms the County of Santa Clara suit. Litigation continues in the summer of 2018.

2. The City of Philadelphia was also successful in a suit to protect its federal funding despite threats of restriction due to noncompliance with ICE detainers. *See City of Phila. v. Sessions*, 2018 U.S. Dist. LEXIS 94709 (E.D. Pa. June 6, 2018).

Chapter 2: Immigration Power: Finding the Dividing Lines

Page 125-26 (§ 2.01[B][1]): Replace the current paragraph with the following paragraph:

On a typical day in fiscal year 2016, the agency processed 1,069,266 passengers and pedestrians, 74,417 truck, rail and sea containers, and 1,140 apprehensions for illegal entry. *See* U.S. Customs and Border Protection, *On a Typical Day in Fiscal Year 2016, CBP, available at* https://www.cbp.gov/newsroom/stats/typical-day-fy2016.

For Fiscal Year 2017 the CBP website provides this snapshot of daily activities:
1,088,300 passengers and pedestrians –
- 340,444 incoming international air passengers and crew
- 55,709 passengers and crew on arriving ship/boat
- 691,549 incoming land travelers
» 283,664 incoming privately owned vehicles » 78,137 truck, rail, and sea containers
» $6.5 billion worth of imported goods
• Conducted 851 apprehensions between U.S. ports of entry
• Arrested 21 wanted criminals at U.S. ports of entry
• Encountered 592 inadmissible persons at U.S. ports of entry
• Identified 1,607 individuals with suspected national security concerns
• Intercepted 12 fraudulent documents
For the full day in the life of the CBP, see https://www.cbp.gov/sites/default/files/assets/documents/2018-Mar/cbp-snapshot-20180320.pdf.

Page 127 (§ 2.01[B][1]): Replace the link under the chart with the following:

Since 2008, there have been significant increases in inbound travel and trade volumes. U.S. Customs and Border Protection (CBP) processed nearly 375 million passengers arriving by land, sea, and air in FY 2014, up from 362 million in FY 2013. International air passenger volume increased by over 17 percent between FY 2009 and FY 2014 and is currently at a record level. CBP estimates more than 115 million international air passenger arrivals in FY 2016 (comprised of 43 percent U.S. citizens and 57 percent foreign nationals). In FY 2014, $2.46 trillion worth of goods were processed through the ports of entry (POEs). Inbound trade volume grew by more than 24 percent between FY 2010 and FY 2014 ($1.99 billion) and is expected to exceed previous records in the air, land, and sea environments in FY 2016. This is taken from the 2015 Resource Optimization Congressional Report. It can be found at https://www.cbp.gov/sites/default/files/documents/Resource%20Optimization%20Model%20FY%202015%20Public%2005-13-15.pdf.

The following table is from the Fiscal Year 2016 Entry/Exit Overstay Report released by the Department of Homeland Security. [Authors' Note: No report has been issued for 2017 as of July 26, 2018. See also critique of this report below.]

A. Overstay Rate Summary
The table below provides a high-level summary of the country-by-country data identified in Tables 2 through 6. Footnotes have been omitted.

Table 1
FY 2016 Summary Overstay rates for Nonimmigrant Visitors admitted to the United States via air and sea POEs

Admission Type	Expected Departures	Out-of-Country	Suspected In-Country Overstay	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay
VWP Countries Business or Pleasure Visitors (Table 2)	21,616,034	18,476	128,806	147,282	0.68%	0.60%
Non-VWP Countries Business or Pleasure Visitors (excluding Canada and Mexico) (Table 3)	13,848,480	23,637	263,470	287,107	2.07%	1.90%
Student and Exchange Visitors (excluding Canada and Mexico) (Table 4)	1,457,556	38,869	40,949	79,818	5.48%	2.81%
All Other In-Scope Nonimmigrant Visitors (excluding Canada and Mexico) (Table 5)	1,427,188	13,504	29,498	43,002	3.01%	2.07%
Canada and Mexico Nonimmigrant Visitors (Table 6)	12,088,020	16,193	166,076	182,269	1.51%	1.37%
TOTAL	**50,437,27**	**110,679**	**628,799**	**739,478**	**1.47%**	**1.25%**

B. VWP Nonimmigrant Business or Pleasure Overstay Rates (Edited Selections)

Table 2
FY 2016 Overstay rates for nonimmigrant visitors admitted to the United States for business or pleasure (WB/WT/B-1/B-2) via air and sea POEs for VWP Countries

Country of Citizenship	Expected Departur	Out-of-Countr	Suspected In-Country	Total Overstays	Total Overstay Rate	Suspected In-Country
France	**1,751,53**	**1,629**	**10,358**	**11,987**	**0.68%**	**0.59%**
Germany	**2,061,112**	**1,416**	**18,780**	**20,196**	**0.98%**	**0.91%**
Japan	**3,007,800**	**441**	**4,401**	**4,842**	**0.16%**	**0.15%**
Korea, South	**1,266,83**	**1,368**	**4,507**	**5,875**	**0.46%**	**0.36%**
Spain	940,218	1,969	11,716	13,685	1.46%	1.25%
Sweden	560,320	370	2,601	2,971	0.53%	0.46%
Switzerland	434,189	289	2,257	2,546	0.59%	0.52%
Taiwan	388,713	681	1,522	2,203	0.57%	0.39%
United Kingdom	4,709,633	2,802	20,670	23,472	0.50%	0.44%

C. Non-VWP Country B1/B2 Overstay Rates (Edited)

Table 3
FY 2016 Overstay rates for nonimmigrants admitted to the United States for business or pleasure via air and sea POEs for non-VWP Countries (excluding Canada, Mexico,

Country Of Citizenship	Expected Departures	Out-of-Country	Suspected In-Country Overstay	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay
Afghanistan	2,123	**8**	**291**	299	**14.08 %**	**13.71%**
Brazil	2,074,363	2,526	36,929	39,455	1.90%	1.78%
China	2,058,311	2,493	17,108	19,601	0.95%	0.83%
Colombia	863,417	1,062	18,404	19,466	2.26%	2.13%
Cuba	48,719	194	712	906	1.86%	1.46%
Dominican Republic	341,628	442	9,211	9,653	2.83%	2.70%
Ecuador	392,521	387	7,356	7,743	1.97%	1.87%
Egypt	80,716	201	1,715	1,916	2.37%	2.13%
El Salvador	183,255	308	4,771	5,079	2.77%	2.60%
Guatemala	247,084	362	5,442	5,804	2.35%	2.20%
Honduras	182,601	272	5,085	5,357	2.93%	2.79%
India	1,004,24	2,040	15,723	17,763	1.77%	1.57%
Indonesia	80,936	115	1,196	1,311	1.62%	1.48%
Russia	256,280	334	3,344	3,678	1.44%	1.31%
Vanuatu	126	1	1	2	1.59%	0.79%
Venezuela	551,048	915	22,906	23,821	4.32%	4.16%

D. Nonimmigrant Student and Exchange Visitors Overstay Rates (Edited)

Table 4
FY 2016 Overstay rates for nonimmigrant students and exchange visitors (F, M, J) admitted to the United States via air and sea POEs (excluding Canada and Mexico)

Country of Citizenship	Expected Departures	Out-of-Country	Suspected In-Country Overstays	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay
Afghanistan	556	14	88	102	18.35%	15.83%
Brazil	49,029	1,371	1,510	2,881	5.88%	3.08%

China	360,334	10,530	7,545	18,075	5.02%	2.09%
Burkina Faso	699	12	327	339	48.50%	46.78%
Dominican Republic	6,011	140	198	338	5.62%	3.29%
Ecuador	5,729	170	111	281	4.91%	1.94%
Egypt	5,562	157	290	447	8.04%	5.21%
El Salvador	1,833	49	55	104	5.67%	3.00%
Equatorial Guinea	284	37	58	95	33.45%	20.42%
Eritrea	117	3	88	91	77.78%	75.21%
France	38,462	652	338	990	2.57%	0.88%
Germany	45,843	540	431	971	2.12%	0.94%
India	98,970	1,561	3,014	4,575	4.62%	3.05%
Indonesia	10,018	311	350	661	6.60%	3.49%
Iran	3,567	81	238	319	8.94%	6.67%
Iraq	1,300	84	215	299	23.00%	16.54%
Korea, North	11	-	3	3	27.27%	27.27%
Korea, South	101,027	3,043	2,068	5,111	5.06%	2.05%
Saudi Arabia	100,024	5,170	1,658	6,828	6.83%	1.66%
Russia	12,707	377	497	874	6.88%	3.91%
Honduras	2,516	91	89	180	7.15%	3.54%
Guatemala	2,336	83	43	126	5.39%	1.84%

E. Overstay Rates for All Other In-scope Classes of Admission (Edited)

Table 5
FY 2016 Overstay rates for other in-scope nonimmigrant classes of admissions admitted to the United States via air and sea POEs for all countries (excluding Canada and Mexico)[34]

Country of Citizenship	Expected Departures	Out-of-Country	Suspected In-Country	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay
Afghanistan	204	3	116	119	58.33%	56.86%
Cabo Verde	160	6	116	122	76.25%	72.50%
Cambodia	301	13	125	138	45.85%	41.53%
China	53,405	552	833	1,385	2.59%	1.56%
Colombia	18,163	155	585	740	4.07%	3.22%
El Salvador	2,398	29	245	274	11.43%	10.22%
Equatorial Guinea	41	1	1	2	4.88%	2.44%
Eritrea	56	2	22	24	42.86%	39.29%
France	72,391	478	346	824	1.14%	0.48%

Germany	73,187	281	308	589	0.81%	0.42%
Guatemala	6,555	767	1,090	1,857	28.33%	16.63%
Guinea	89	2	33	35	39.33%	37.08%
Guinea-Bissau	4	-	2	2	50.00%	50.00%
Guyana	167	3	46	49	29.34%	27.55%
Haiti	1,498	13	575	588	39.25%	38.39%
India	339,076	2,402	5,659	8,061	2.38%	1.67%
Indonesia	2,512	47	121	168	6.69%	4.82%
Iran	632	21	82	103	16.30%	12.98%
Korea, North	5	-	-	-	0.00%	0.00%
Korea, South	36,818	273	447	720	1.96%	1.21%
Laos	194	7	120	127	65.46%	61.86%
Liberia	73	-	49	49	67.12%	67.12%
Philippines	22,604	971	5,552	6,523	28.86%	24.56%
South Africa	9,157	204	206	410	4.48%	2.25%
Syria	271	9	72	81	29.89%	26.57%
Vietnam	2,727	64	752	816	29.92%	27.58%

F. Canada and Mexico Nonimmigrant Overstay Rates

Table 6
FY 2016 Overstay rates for Canadian and Mexican nonimmigrants admitted to the United States via air and sea POEs

Country of Citizenship (admission	Expected Departures	Out–of-Country	Suspected In-Country Overstay	Total Overstays	Total Overstay Rate	Suspected In-Country Overstay
Canada (B1/B2)	8,620,361	7,128	117,267	124,395	1.44%	1.36%
Mexico (B1/B2)	2,927,848	4,110	43,742	47,852	1.63%	1.49%
B1/B2 Total	***11,548,209***	***11,238***	***161,009***	***172,247***	***1.49%***	***1.39%***
Canada (F, M, J)	54,786	783	806	1,589	2.90%	1.47%
Mexico (F, M, J)	37,157	789	738	1,527	4.11%	1.99%
F, M, J Total	***91,943[35]***	***1,572[36]***	***1,544[37]***	***3,116***	***3.39%***	***1.68%***
Canada (Other In-	333,349	1,982	1,345	3,327	1.00%	0.40%
Mexico (Other In-	114,519	1,401	2,178	3,579	3.13%	1.90%
Other In-Scope Total	***447,868***	***3,383***	***3,523***	***6,906***	***1.54%***	***0.79%***
Canada Total	*9,008,496*	*9,893*	*119,418*	*129,311*	*1.44%*	*1.33%*
Mexico Total	*3,079,524*	*6,300*	*46,658*	*52,958*	*1.72%*	*1.52%*
Grand Total	**12,088,020**	**16,193**	**166,076**	**182,269**	**1.51%**	**1.37%**

> Table 6 represents Canadian and Mexican nonimmigrant visitors admitted at air and sea ports of entry (POEs) who were expected to depart in FY 2016. Unlike all other countries, the overwhelming majority of travelers from Canada or Mexico enter the United States by land. Overstay data concerning land entries will be incorporated into future iterations of this report as projects progress.

The full report is at https://www.dhs.gov/sites/default/files/publications/Entry%20and%20Exit%20Overstay%20Report%2C%20Fiscal%20Year%202016.pdf**.**

Critique of the Entry Exit Overstay Report
Robert Warren published a detailed critique of the methodology and conclusions of the 2016 Entry Exit Overstay report above. He noted that one of the main problems is that the report did not explain that many departures are not verified or captured under our current system and that resulted in a large error in the estimated number of people remaining without permission in the United States. One of the main conclusions was that "slightly more than *half* of the 628,799 reported to be overstays by DHS actually left the country but their departures were not recorded." (emphasis in original). The critique is available at http://cmsny.org/publications/jmhs-dhs-visa-overstays/.

Pages 128-49 (§ 2.01[B] and [C]):

Various pages in this section discuss the I-94 card. At the time the book was drafted, the I-94 was a paper card. Now, however, it is electronic. *See* http://www.cbp.gov/travel/international-visitors/i-94-instructions. Noncitizens who need to prove their legal-visitor status—to employers, schools/universities or government agencies—can access their CBP arrival/departure record information online at https://i94.cbp.dhs.gov/I94/#/home.

CBP inspectors may make errors in the electronic entry record. Attorneys and clients may have to return to the point of inspection and apply for formal corrections to the I-94 entry records. As we will see in Chapter 3, the individual who enters with a nonimmigrant visa has to prove both lawful entry and maintenance of status to change, extend or adjust status. While it may not seem important, the admissions process and these new electronic records are of vital importance to individuals.

Page 131 (§ 2.01 PROBLEM 2-1: ESSENTIAL MATERIALS):

Insert these additional materials to the essential materials.

In re Peña, 26 I. & N. Dec. 613 (BIA 2015).

INA § 101(a)(13); 8 U.S.C. § 1101(a)(13)

8 C.F.R. § 1.2 Definition of "arriving alien"

Page 132 (NOTES AND QUESTIONS) Read the following paragraph and case at the end of Note 1 BEFORE you read Note 2.

In this recent case, the Board of Immigration Appeals, a division of the Department of Justice, issued a precedent decision that binds immigration courts and is usually viewed as controlling administrative authority by the immigration agencies within the Department of Homeland Security. The case contains a discussion of when a lawful permanent resident can be deemed to be making an "entry." How might Joseph Brown in Problem 2.1 use this authority?

IN RE PEÑA
26 I. & N. Dec. 613 (BIA 2015)

COLE, Board Member:

In a decision dated November 14, 2011, an Immigration Judge found the respondent inadmissible under sections 212(a)(6)(C)(i), (ii)(I), and (7)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(6)(C)(i), (ii)(I), and (7)(A)(i)(I) (2006), and ordered him removed from the United States. The respondent has appealed from that decision. The appeal will be sustained and the record will be remanded to the Immigration Judge.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of the Dominican Republic. The record reflects that he was married to a United States citizen who filed a visa petition on his behalf. Based on the September 9, 1996, approval of the visa petition, the respondent filed an application for adjustment of status on December 1, 1999. He indicated on his application that he had no prior arrests. However, at an interview in connection with his application, the Government notified the respondent that its records showed that he had been charged with passport fraud by the Department of State passport office on December 28, 1998. The respondent was asked to provide documentation regarding the final disposition of these charges, which he submitted. On June 5, 2000, the respondent's application for adjustment of status was granted and he was accorded lawful permanent resident status.

On May 24, 2010, the respondent sought to reenter the United States after a trip abroad. At that time he gave a sworn statement in an interview with immigration officials. When asked whether he had ever been arrested, the respondent first replied that he had been arrested in 1998 for applying for a United States passport using the birth certificate and Social Security card of another person. When asked why he indicated that he had never been arrested on his adjustment of status application, the respondent said he thought he had not been arrested in relation to the passport application because he had voluntarily appeared at the passport office after learning from his wife that he was being investigated. He stated that he was fingerprinted at the office and released. He further explained that he was neither charged with nor convicted of passport fraud or any other offense.

After the respondent's interview on May 24, 2010, the Department of Homeland Security ("DHS") issued a notice to appear charging the respondent as inadmissible based on his alleged fraud and prior ineligibility for adjustment of status. [Authors' Note: The DHS began regular removal proceedings, not expedited removal under INA § 235.] …[T] he Immigration Judge found that the respondent made a false claim to United States citizenship by knowingly purchasing an illegally obtained birth certificate and Social Security card and that he did not disclose his arrest in this regard in his adjustment of status application.

Based on these findings, the Immigration Judge concluded that the respondent's permanent resident status was unlawfully obtained and that he could therefore be deemed an "arriving alien" and charged under section 212(a) of the Act. He then found the respondent inadmissible as charged. The Immigration Judge further found the respondent ineligible for relief from removal and ordered him removed from the United States.

II. ISSUE

The threshold issue in this case is whether the respondent, who was granted lawful permanent resident status, can be charged in removal proceedings under section 212(a) of the Act as an arriving alien seeking admission, since he does not fall within any of the exceptions listed in section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C) (2012), which allow for an alien lawfully admitted for permanent residence to be regarded as seeking admission to the United States.

We must resolve the question whether a returning lawful permanent resident can be treated as an arriving alien based on an allegation that he acquired his status unlawfully. We conclude that an alien returning to the United States who has been granted lawful permanent resident status cannot be regarded as seeking admission and may not be charged with inadmissibility under section 212(a) of the Act if he does not fall within any of the exceptions in section 101(a)(13)(C) of the Act.

III. ANALYSIS

The respondent argues that he has not been properly charged and that these proceedings should have been terminated. He first contends that he should not have been charged as an arriving alien when he returned to the United States because his eligibility for adjustment of status had not been determined at the time of his return. He asserts that if the DHS suspected he was inadmissible at the time he adjusted his status, he should have been allowed to enter as a returning resident and charged with a ground of deportability in section 237(a) of the Act, 8 U.S.C. § 1227(a) (2012).

. . .

A. Returning Lawful Permanent Residents as Arriving Aliens

In deciding whether the respondent is an arriving alien, we examine the language of the statute to determine whether Congress expressed a plain and unambiguous intent that aliens in the respondent's circumstances should be considered applicants for admission under section 101(a)(13)(C) of the Act. . . .

The plain language of section 101(a)(13)(C) indicates that an alien who does not fall within one of the statutory exceptions and who presents a colorable claim to lawful permanent resident status is not to be treated as seeking an admission and should not be regarded as an arriving alien. *See also Matter of Huang*, 19 I&N Dec. 749, 754 (BIA 1988) (stating that the Government has the burden to show that an alien should be deprived of his lawful permanent resident status if he has a colorable claim to returning resident status).

In addition to the plain language of the statute, we find further support for our position in our case law interpreting the "*Fleuti* doctrine," which predated section 101(a)(13)(C) of the Act. *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). For example, in *Matter of Rangel*, 15 I&N Dec. 789 (BIA 1976), we addressed whether a lawful permanent resident's attempted return constituted an "entry" where her original admission for permanent residence was unlawful because it involved a false claim. In that case, we had to decide first whether the proper forum in which to adjudicate the lawfulness of an original admission was a deportation proceeding or an exclusion proceeding. We held that the alien was not making an entry within the meaning of the Act and, therefore, that the proper forum for adjudicating the lawfulness of her original admission was a deportation proceeding.….

. . .Our decision in *Rangel* comported with the Supreme Court's recognition of the constitutional right of due process that is owed to lawful permanent residents. *See Landon v. Plasencia*, 459 U.S. 21, 30−32 (1982) (citing *Chew v. Colding*, 344 U.S. 590 (1953)).

Prior to the 1996 enactment of section 101(a)(13)(C) of the Act, the proper forum for determining whether a lawful permanent resident had unlawfully obtained his status would have been a deportation proceeding, rather than an exclusion proceeding, unless he was making an "entry." Applying the same rationale to the current law, an alien in the respondent's circumstances should be charged under section 237(a) of the Act, rather than section 212(a), unless he can be regarded as seeking an admission under section 101(a)(13)(C).

In light of the plain statutory language of section 101(a)(13)(C) of the Act and the above-mentioned decisions of the Supreme Court and the Board, we believe that the long-established principles regarding the constitutional rights of lawful permanent residents are equally applicable to returning lawful permanent residents today as they were in the past. . . . Therefore, we conclude that a returning lawful permanent resident who does not fall within one of the exceptions in section

101(a)(13)(C) of the Act cannot be regarded as seeking admission to the United States.

B. Application to Respondent

The Immigration Judge found that the respondent was never "lawfully admitted" as a permanent resident because he had obtained his status through fraud. . . .the Immigration Judge adjudicated the issue of the lawfulness of the respondent's status and found that it had been fraudulently obtained. He therefore found that the respondent was never a lawful permanent resident and thus could be treated as an "arriving alien."

The question whether a returning lawful permanent resident can be regarded as an arriving alien and charged under section 212(a) of the Act was not before us in *Matter of Koloamatangi* because the alien, who was suspected of having procured his status by fraud, was charged with deportability under section 237(a) of the Act. He was therefore afforded the due process owed to him as one who "was facially and procedurally in lawful permanent resident status." *Matter of Koloamatangi*, 23 I&N Dec. at 549. His ineligibility for the relief he sought was determined after the Immigration Judge resolved the issue of the unlawfulness of his permanent resident status, not prior to the commencement of proceedings. *See id*.; *see also Matter of Wong*, 14 I&N Dec. 12 (BIA 1972). We therefore conclude that *Matter of Koloamatangi* is not controlling in this case.

Because the respondent is a lawful permanent resident who does not fall within one of the exceptions in section 101(a)(13)(C) of the Act, he should not have been regarded as seeking admission to the United States. Therefore, he cannot be charged under section 212(a) of the Act, notwithstanding any questions regarding the lawfulness of his status. However, the DHS is not precluded from charging an alien such as the respondent under section 237(a) of the Act. The grounds of deportability contain a provision that is clearly applicable to an alien who allegedly obtained his lawful permanent resident status through fraud or misrepresentations. *See* section 237(a)(1)(A) of the Act (providing that "[a]ny alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable"); *see also* section 212(a)(6)(C) of the Act.

…

IV. CONCLUSION

We conclude that the respondent, a lawful permanent resident who does not fall within one of the exceptions in section 101(a)(13)(C) of the Act, cannot be regarded as an arriving alien. Therefore, the charges brought by the DHS under section 212(a) of the Act should not have been sustained. Accordingly, we will sustain the respondent's appeal and remand the record to give the DHS an opportunity to properly charge him under section 237(a) of the Act. If necessary, the Immigration Judge may then determine whether the respondent lawfully obtained his permanent

resident status and allow him to apply for any relief from removal for which he may be eligible.

…

DISSENTING OPINION: ROGER A. PAULEY, Board Member
I believe that the respondent was properly charged under section 212(a) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a) (2012). As an ostensible returning lawful permanent resident, he did not need to be charged under section 237(a) of the Act, 8 U.S.C. § 1227(a) (2012), because the Immigration Judge found at his removal proceeding that he was never lawfully admitted for permanent residence.

…
The majority explains that such a person must be charged under section 237(a) of the Act because he does not fall into any of the six enumerated categories at section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C) (2012), allowing for a returning lawful permanent resident to be charged as an applicant for admission. I disagree.

The majority's position embodies a stark violation of the bedrock principle of statutory construction that a term, in this case "lawfully admitted for permanent residence," appearing in the same statute should be given an identical construction and not be accorded two different meanings.

In that regard, we have consistently held, and the courts of appeals have uniformly endorsed our interpretation, that the phrase "lawfully admitted for permanent residence" means that the alien must have been in substantive compliance with the immigration laws. …

Significantly, Congress chose to use the same term in section 101(a)(13)(C) of the Act, which is applicable to returning lawful permanent residents, demonstrating that Congress intended that only lawful permanent residents with valid status are subject to its regime. It would have been easy for Congress to preface section 101(a)(13)(C) of the Act with language asserting the construction that the majority would engraft on that section, such as that an alien "admitted for lawful permanent residence, *whether or not such status was rightly conferred*," shall not be regarded as seeking admission unless one or more of the six enumerated exceptions applies. However, by using the very term it defined in section 101(a)(20) of the Act (indeed, the same subsection!), Congress clearly expressed its intent that the definition therein applies. …

. . .

Fortunately, not much damage will result from the majority's erroneous decision. As the majority opinion observes, the Department of Homeland Security ("DHS")

> may charge a returning lawful permanent resident who it believes has wrongly obtained his or her status as having been inadmissible at the time of adjustment of status. *See* section 237(a)(1)(A) of the Act. If such charge is upheld, *Matter of Koloamatangi* will apply to render the alien ineligible for relief to the extent relief is sought based on lawful permanent resident status. However, the majority decision does have a modicum of practical import because an alien charged under section 237(a) (as opposed to section 212(a)) may seek a waiver of deportability under section 237(a)(1)(H) of the Act, if he or she is subject to removal as having been inadmissible at the time of admission because of fraud. That section contains more generous provisions allowing for such a waiver than does the comparable provision at section 212(i) of the Act.
>
> To the extent that the majority confers an advantage on the class of lawful permanent residents who wrongly obtained their status—as compared to the class of lawful permanent residents who obtained their status rightfully but are charged as applicants for admission under section 101(a)(13)(C)—I find it an unlikely expression of congressional intent. The former class, which includes the respondent in this case, generally represents a less deserving group inasmuch as they ordinarily will have obtained their status by fraud or other wrongful means. …

[Authors' Note: We further explore the issues of inadmissibility, removability and eligibility for waivers in Chapters 5, 6, and 7.]

Page 132-133 (§ 2.01 Note 2 at the end.) Add the following after the final paragraph of Note 2 on page 133:

Even U.S. citizens have a diminished expectation of privacy at the border. While some courts feel that all searches and seizures at the border of laptops and other electronic devices must adhere to a standard of reasonableness, others disagree and feel that it is within the border patrol officers' rights to search and seize anything at the border. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). See the discussion of expectations at the border below in the materials surrounding Problem 2-6.

Page 140 (§ 2.01[C]): This part of chapter two discusses the power of the DHS to use expedited removal at the border, and includes an excerpt from *Meng Li v. Eddy*, 259 F.3d 1132 (9th Cir. 2001), *vacated as moot*, 324 F.3d 1109 (9th Cir. 2003). In that case, the Ninth Circuit Court affirmed a district court rejection of habeas jurisdiction to challenge an expedited removal order even where the individual alleged the removal was based on an erroneous legal determination. Ms. Li had a valid tourist visa when she sought admission, but the border official thought she was actually entering to accept a temporary position. The case was later vacated as moot because the court believed that Ms. Li was no longer subject to the effects of the expedited removal order because more than five years had passed since her exclusion.

The Ninth Circuit has revisited the issue and held that a limited scope of review of an expedited removal is possible. In *Smith v. CBP*, 741 F.3d 1016 (9th Cir. 2014), the court held that a court may review whether a CBP officer is acting within his or her statutory and regulatory authority.

Robert Pauw, who represented Mr. Smith, brought a habeas challenge to the use of expedited removal where a Canadian sought admission as a tourist. The plaintiff argued that Canadians are not subject to expedited removal under 8 C.F.R. § 235.3(b)(2)(i). While the Ninth Circuit agreed that they could review this issue, the panel concluded that Mr. Smith was not seeking admission as a bona fide tourist because he had professional photographic equipment and other material with him that evidenced an intent to work in the United States. The case is discussed in more depth at 19 Bender's Immigration Bulletin 199 (Feb. 15, 2014).

For an interesting blog post on this issue, see David A. Isaacson, *Can Some Returning Nonimmigrants Challenge an Expedited Removal Order in Court? How Recent Case Law May Provide a Window of Opportunity* (Mar. 5, 2011), *available at* http://www.cyrusmehta.com/news.aspx?SubIdx=ocyrus201135115520.

In contrast, see *Shunaula v. Holder*, 732 F.3d 143 (2d Cir. 2013), in which the court held that it lacked jurisdiction to hear a noncitizen's due process challenge to his 1997 expedited removal order.

In fiscal year 2012, DHS indicated that expedited removal orders accounted for 163,000, or 39 percent, of all removals. DHS, Immigration Enforcement Actions: 2012, http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf.
This document also contains statistics on other enforcement actions, such as the number of detentions and removals. As noted throughout the chapter, after Fiscal Year 2014 the government ceased regular reporting of the number of expedited removals.

The DHS no longer publishes explicit information about the number of expedited removal orders issued at ports of entry or after apprehension in the interior. See discussion below relating to page 177 explaining that 44% of all removals use this expedited process.

Page 148 (§ 2.01[D][3]): An updated link for frequently asked questions about the Visa Waiver Program is at https://www.cbp.gov/travel/international-visitors/frequently-asked-questions-about-visa-waiver-program-vwp-and-electronic-system-travel

Page 149: Before Note 4, add the following:

CBP created a new special electronic registration system for citizens of the People's Republic of China. This system is required even though Chinese citizens are not eligible for the visa waiver program. The new system, called Electronic Visa Update System (EVUS), periodically collects information to help CBP identify "people who may pose a threat or who are otherwise inadmissible." 81 Fed. Reg. 72,481, 72,482 (Oct. 20, 2016). Only PRC passport holders with B1/B2, B1, or B2 visa stamps valid for ten years must use the EVUS system. If enrollment is unsuccessful, the visa is automatically revoked. For more analysis see Gary Chodorow, *Guide to EVUS Enrollment for Chinese, with Ten-year B1/B2 Visas*, 22 Bender's Immigration Bulletin 407 (Apr. 1, 2017).

It is possible that CBP will seek similar electronic registration programs for other nationalities.

Page 152 (§ 2.01): Add the following at the end of Note 2:

Vera was vacated because the parties ultimately found she had not entered on the visa waiver program. Thus the government could not find she had waived her right to hearing.

However, this issue is returning. Danielle ('Dany') Vargas was arrested after protesting the immigration related arrest and detention of her parents who had overstayed after entry on the visa waiver program. Dany, who had been granted a period of Deferred Action for Childhood Arrivals, was then arrested. She had allowed her grant of DACA to expire. Sarah Fowler, *Detained Immigrant Released; Vargas was Taken into Custody After a News Conference in Jackson*, The Clarion-Ledger (Jackson, Mississippi) (Mar. 11, 2017). Dany is represented and was able to gain release because her counsel filed a habeas corpus petition challenging her arrest. As of June 27, 2017, the litigation continued but was transferred to the Fifth Circuit and converted into a petition for review. *Vargas v. United States Dep't of Homeland Sec.*, 2017 U.S. Dist. LEXIS 34747 (W.D. La. Mar. 10, 2017).

Should the government's reliance on the visa waiver terms that waive any removal hearing be time limited? Is the waiver meaningful if completed by a child? Should she be bound by the actions of her parents, as argued in the original court decision in *Vera* cited in the text? At some point, such as after living more than half her life in the United States, has a person like Dany Vargas acquired sufficient ties to the United States to entitle her to an individual removal hearing?

Page 153 [§ 2.01[D][1]): Read the following after the "Expedited Removal Process Under the 1996 Act" Chart:

In two 2014 cases, federal district courts have continued to reject challenges to expedited removal proceedings. In *M.S.P.C. v. U.S. Customs & Border Prot.* 60 F. Supp. 3d 1156 (D.N.M. 2014), the federal district court rejected the argument of a woman who was apprehended within nine miles of the border. The woman, a citizen of El Salvador, objected to the constitutionality of using expedited removal procedures, as she had entered the United States. The district court rejected that argument, holding that Congress had constitutionally limited a newly arriving person to the procedures controlled by the executive branch and that she had insufficient ties to the United States to warrant greater due process protection.

Similarly, in *Rodriguez v. U.S. Customs & Border Prot*., 2014 U.S. Dist. LEXIS 131872 (W.D. La. Sept. 18, 2014), the district court ruled that Mr. Rodriguez could not seek a stay of his removal and a review of his expedited removal order in regular removal proceedings.

Page 154: New Section [4]: Refugee Travel Ban Orders

Introduction:
Shortly after his inauguration, President Trump issued an executive order that sought to suspend all refugee admissions and to bar all admissions from several nations. After courts struck down that executive order, the President issued a second and then a third travel ban order.

In June 2018, the Supreme Court upheld the third travel ban order. A summary of the Supreme Court's decision follows:

Trump v. Hawaii
138 S. Ct. 2392 (June 26, 2018)

Prior History: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Hawaii v. Trump, 878 F.3d 662 (9th Cir. 2017)
Disposition: Reversed and remanded.

In September 2017, the President issued Proclamation No. 9645, seeking to improve vetting procedures for foreign nationals traveling to the United States by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present a security threat. The Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate. Foreign states were selected for inclusion based on a review undertaken pursuant to one of the President's earlier Executive Orders. As part of that review, the Department of Homeland Security (DHS), in consultation with the State Department and intelligence agencies, developed an information and risk assessment "baseline." DHS then collected and evaluated data for all foreign governments, identifying those having deficient information-sharing practices and presenting national security concerns, as well as other countries "at risk" of failing to meet the baseline. After a 50-day period during which the State Department made diplomatic efforts to encourage foreign governments to improve their practices, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient. She recommended entry restrictions for certain nationals from all of those countries but Iraq, which had a close cooperative relationship with the U. S. She also recommended including Somalia, which met the information-sharing component of the baseline standards but had other special risk factors, such as a significant terrorist presence. After consulting with multiple Cabinet members, the President adopted the recommendations and issued the Proclamation. Invoking his authority under 8 U. S. C. §§1182(f) and 1185(a), he determined that certain restrictions were necessary to "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information" and "elicit improved identity-management and information-sharing protocols and practices from foreign governments." The Proclamation imposes a range of entry restrictions that vary based on the "distinct circumstances" in each of the eight countries. It exempts lawful permanent residents and provides case-by-case waivers under certain circumstances. It also directs DHS to assess on a continuing basis whether the restrictions should be modified or continued, and to report to the President every 180 days. At the completion of the first such review period, the President

determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals.

Plaintiffs—the State of Hawaii, three individuals with foreign relatives affected by the entry suspension, and the Muslim Association of Hawaii—argue that the Proclamation violates the Immigration and Nationality Act (INA) and the Establishment Clause. The District Court granted a nationwide preliminary injunction barring enforcement of the restrictions. The Ninth Circuit affirmed, concluding that the Proclamation contravened two provisions of the INA: §1182(f), which authorizes the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States," and §1152(a)(1)(A), which provides that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." The court did not reach the Establishment Clause claim.

Held:

1. This Court assumes without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue. See *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. 155, 113 S. Ct. 2549, 125 L. Ed. 2d 128.

2. The President has lawfully exercised the broad discretion granted to him under §1182(f) to suspend the entry of aliens into the United States.

(a) By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry, whose entry to suspend, for how long, and on what conditions. It thus vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA. *Sale*, 509 U. S., at 187, 113 S. Ct. 2549, 125 L. Ed. 2d 128. The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in §1182(f) is that the President "find[ ]" that the entry of the covered aliens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country's compliance with the information and risk assessment baseline. He then issued a Proclamation with extensive findings about the deficiencies and their impact. Based on that review, he found that restricting entry of aliens who could not be vetted with adequate information was in the national interest.

Even assuming that some form of inquiry into the persuasiveness of the President's findings is appropriate, but see *Webster* v. *Doe*, 486 U. S. 592, 600, 108 S. Ct. 2047, 100 L. Ed. 2d 632, plaintiffs' attacks on the sufficiency of the findings cannot be sustained. The 12-page Proclamation is more detailed than any prior order issued under §1182(f). And such a searching inquiry is inconsistent with the broad

statutory text and the deference traditionally accorded the President in this sphere. See, *e.g., Sale*, 509 U. S., at 187-188, 113 S. Ct. 2549, 125 L. Ed. 2d 128.

The Proclamation comports with the remaining textual limits in §1182(f). While the word "suspend" often connotes a temporary deferral, the President is not required to prescribe in advance a fixed end date for the entry restriction. Like its predecessors, the Proclamation makes clear that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks" within the covered nations. Finally, the Proclamation properly identifies a "class of aliens" whose entry is suspended, and the word "class" comfortably encompasses a group of people linked by nationality.

(b) Plaintiffs have not identified any conflict between the Proclamation and the immigration scheme reflected in the INA that would implicitly bar the President from addressing deficiencies in the Nation's vetting system. The existing grounds of inadmissibility and the narrow Visa Waiver Program do not address the failure of certain high-risk countries to provide a minimum baseline of reliable information. Further, neither the legislative history of §1182(f) nor historical practice justifies departing from the clear text of the statute.

(c) Plaintiffs' argument that the President's entry suspension violates §1152(a)(1)(A) ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA. Section 1182 defines the universe of aliens who are admissible into the United States (and therefore eligible to receive a visa). Once §1182 sets the boundaries of admissibility, §1152(a)(1)(A) prohibits discrimination in the allocation of immigrant visas based on nationality and other traits. Had Congress intended in §1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could have chosen language directed to that end. Common sense and historical practice confirm that §1152(a)(1)(A) does not limit the President's delegated authority under §1182(f). Presidents have repeatedly exercised their authority to suspend entry on the basis of nationality. And on plaintiffs' reading, the President would not be permitted to suspend entry from particular foreign states in response to an epidemic, or even if the United States were on the brink of war.

3. Plaintiffs have not demonstrated a likelihood of success on the merits of their claim that the Proclamation violates the Establishment Clause.

(a) The individual plaintiffs have Article III standing to challenge the exclusion of their relatives under the Establishment Clause. A person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact. Cf., *e.g., Kerry* v. *Din*, 576 U. S. ___, ___, 135 S. Ct. 2128, 192 L. Ed. 2d 183.

(b) Plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national

security were but pretexts for discriminating against Muslims. At the heart of their case is a series of statements by the President and his advisers both during the campaign and since the President assumed office. The issue, however, is not whether to denounce the President's statements, but the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, the Court must consider not only the statements of a particular President, but also the authority of the Presidency itself.

(c) The admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U. S. 787, 792, 97 S. Ct. 1473, 52 L. Ed. 2d 50. Although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen. That review is limited to whether the Executive gives a "facially legitimate and bona fide" reason for its action, *Kleindienst* v. *Mandel*, 408 U. S. 753, 769, 92 S. Ct. 2576, 33 L. Ed. 2d 683, but the Court need not define the precise contours of that narrow inquiry in this case. For today's purposes, the Court assumes that it may look behind the face of the Proclamation to the extent of applying rational basis review, *i.e.,* whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. Plaintiffs' extrinsic evidence may be considered, but the policy will be upheld so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.

(d) On the few occasions where the Court has struck down a policy as illegitimate under rational basis scrutiny, a common thread has been that the laws at issue were "divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests*." Romer* v. *Evans*, 517 U. S. 620, 635, 116 S. Ct. 1620, 134 L. Ed. 2d 855. The Proclamation does not fit that pattern. It is expressly premised on legitimate purposes and says nothing about religion. The entry restrictions on Muslim-majority nations are limited to countries that were previously designated by Congress or prior administrations as posing national security risks. Moreover, the Proclamation reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs challenge the entry suspension based on their perception of its effectiveness and wisdom, but the Court cannot substitute its own assessment for the Executive's predictive judgments on such matters. See *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 33-34, 130 S. Ct. 2705, 177 L. Ed. 2d 355.

Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list. Second, for those countries still subject to entry restrictions, the Proclamation includes numerous exceptions for various categories of foreign nationals. Finally, the Proclamation creates a waiver program

> open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review.
>
> 878 F. 3d 662, reversed and remanded.

Page 155 (§ 2.02): Insert the following after the paragraph starting "While judicial review of the border…"

Recently, people have been acting out against these stops and questioning their constitutionality. The following videos highlight people who are refusing to answer questions or comply with Border Patrol requests: https://www.youtube.com/watch?v=1Ea_VMY0UnA and https://www.youtube.com/watch?v=FFjrPnaWenc.

Page 177 (§ 2.02): New expedited removal percentages:

Expedited removal has grown to represent more than 44% of all of the orders of removal in FY 2013. In 2014, the DHS released this report: https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2014.pdf. During 2014, expedited removals made up 39.1 percent of all removals (Page 7, table 7). This is the most recent report with a listed percentage of expedited removals. Since then the government has not reported the total number of expedited removals. In the last two years of the Obama administration, removals were reported together, including reinstatement of removal, removal after a hearing with an immigration judge, and expedited removal. See Lenni B. Benson, "Immigration Adjudication: The 'Missing Rule of Law', Center for Migration Studies (May 2017), *available a*t http://jmhs.cmsny.org/index.php/jmhs/article/view/87. In this essay, Benson noted that 88% of all removals occur outside the immigration courts.

Page 188 (§ 2.02): Read the following at the end of Note 3, just before Note 4:

In *In re Pena,* 26 I. & N. Dec. 613 (BIA 2015), discussed above in Problem 2-1, a returning lawful permanent resident was inappropriately treated as an "arriving alien" and inappropriate charged with inadmissibility grounds instead of deportation grounds. The BIA primarily relied on statutory interpretation, but the constitutional due process rights of Mr. Pena also factored into the BIA's decision.

Page 189 (§ 2.02): Add the following after Note 5:

6. Judicial Review of Expedited Removal Revisited. As we saw earlier in this chapter, Congress appeared to limit judicial review of expedited removal decisions in INA § 235(b) and § 242. *See* the discussion of the Ninth Circuit's decision in *Meng Li v. Eddy*, at text pages 140-44, where the court rejected a habeas challenge to a CBP refusal of a business woman with a valid business visitor visa stamp. At the end of August 2016, the Third Circuit similarly rejected a habeas challenge brought to the expedited removal process applied to women and their infant children seeking asylum. The excerpt below provides a detailed description of the expedited removal process for people who articulate a fear of return. We discussed that process in examining Problem 2-3 above on pages 149-50, when we looked at the statute and regulations governing an asylum

seeker such as Marta Hapta-Selassie and her children.

Going beyond the statutory and regulatory provisions, the Third Circuit reached the constitutional dimensions of denying additional procedures and judicial review via habeas corpus. The opinion discusses all the cases you have read in this chapter and some from chapter 1, e.g., *Chae Chan Ping* [text at 37]; *Fong Yue Ting* [text at 42]; *Yamataya v. Fisher* [text at 155]; *Knauff* [text at 160]; *Mezei* [text at 165]; and *Landon v. Plasencia* [text at 177]. Now that you have read the leading Supreme Court cases about the rights of individuals at the border, examine this opinion and its assessment of the rights of individuals who seek asylum at the border.

1. What does due process require? The context of large numbers of apprehensions. In the last few years, the CBP has begun to report on the apprehension of unaccompanied minors and families, primarily young women with infants or toddlers. In the summer of 2014, more than 68,000 unaccompanied minors were taken into custody, as were a similar number of families. This chart summarizes similar apprehensions in 2016:

	UAC	Family Members	All
January 2016	3091	3,145	23,759
February 2016	3,095	3,051	26,077
March 2016	4,214	4,451	33,319
April 2016	5,173	5,620	38,088
May 2016	5,617	6,782	40,349
June 2016	4,809	6,633	34,463
July 2016	5,068	7,574	33,737

Source: https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016.

[Authors' Note: For an updated chart comparing apprehension through June of 2018, see the update for Chapter 1 above.]

In 2008 Congress adopted the Trafficking Victims Reauthorization Protection Act (TVPRA), which precludes using expedited removal for unaccompanied children. The TVPRA is codified at 6 U.S.C. § 279(g), available at https://www.law.cornell.edu/uscode/text/6/279.

In the spring of 2018, the Trump Administration announced that it would begin to prosecute parents who entered the United States without inspection. As part of this prosecution effort, the DHS began to forcibly separated immigrant parents and children, claiming that children could not stay with their parents in jails. Within a few months, more than 3,000 children were separated from their parents at the U.S. border. They were usually treated as "unaccompanied minors."

The ACLU challenged the government's family separation policy. *L. v. United States Immigration & Customs Enforcement*, 2018 U.S. Dist. LEXIS 107365 (S.D. Cal. June 26, 2018). The federal

court ordered reunification of the separated children. By the end of July, however, more than 1,000 children had not been reunited with their parents and many had spent months in detention. The litigation continues. Below we provide a case, also litigated by the ACLU, that tried to challenge the quality and fairness of the expedited removal procedures for parents and children held in "family detention."

To what degree is the opinion below concerned with the real-world implications of granting habeas review to asylum applicants who arrive at our borders? Is the expedited removal statute (created in 1996) adequately designed for large numbers of applications?

CASTRO v. DEP'T OF HOMELAND SEC.

835 F.3d 422 (3d Cir. 2016), cert. denied, __U.S. __, 137 S. Ct. 1581 (2017)

Judges: Before: SMITH, HARDIMAN, and SHWARTZ, Circuit Judges. HARDIMAN, Circuit Judge, concurring dubitante.

Opinion by: SMITH

Petitioners are twenty-eight families — twenty-eight women and their minor children — who filed habeas petitions in the United States District Court for the Eastern District of Pennsylvania to prevent, or at least postpone, their expedited removal from this country. They were ordered expeditiously removed by the Department of Homeland Security (DHS) pursuant to its authority under § 235(b)(1) of the Immigration and Nationality Act (INA, 8 U.S.C. § 1225(b)(1). Before DHS could effect their removal, however, each petitioning family indicated a fear of persecution if returned to their native country. Nevertheless, following interviews with an asylum officer and subsequent *de novo* review by an immigration judge (IJ), Petitioners' fear of persecution was found to be not credible, such that their expedited removal orders became administratively final. Each family then filed a habeas petition challenging various issues relating to their removal orders.

In this appeal we must determine, first, whether the District Court has jurisdiction to adjudicate the merits of Petitioners' habeas petitions under § 242 of the INA, 8 U.S.C. § 1252.[1] Because we hold that the District Court does not have jurisdiction under the statute, we must also determine whether the statute violates the Suspension Clause of the United States Constitution. This is a very difficult question that neither this Court nor the Supreme Court has addressed. We hold that, at least as applied to Petitioners and other similarly situated aliens, § 1252 does not violate the Suspension Clause. Consequently, we will affirm the District Court's order dismissing Petitioners' habeas petitions for lack of subject matter jurisdiction.

I. STATUTORY FRAMEWORK

[1] From this point in this opinion, we will refer to provisions of the INA by their location in the United States Code.

The statutory and regulatory provisions of the expedited removal regime are at the heart of this case. We will, therefore, provide an overview of the provisions which form the framework governing expedited removal before further introducing Petitioners and their specific claims. First, we will discuss 8 U.S.C. § 1225(b)(1) and its implementing regulations, which lay out the administrative side of the expedited removal regime. We will then turn to 8 U.S.C. § 1252, which specifies the scope of judicial review of all removal orders, including expedited removal orders.

A. Section 1225(b)(1)

Under 8 U.S.C. § 1225(b)(1) and its companion regulations, two classes of aliens are subject to expedited removal if an immigration officer determines they are inadmissible due to misrepresentation or lack of immigration papers: (1) aliens "arriving in the United States," and (2) aliens "encountered within 14 days of entry without inspection and within 100 air miles of any U.S. international land border."[2] *See* 8 U.S.C. § 1225(b)(1)(A)(i) & (iii); Designating Aliens for Expedited Removal, 69 Fed Reg. 48877-01 (Aug. 11, 2004).[3] [Eds. Note: In text at pages 195-96] If an alien falls into one of these two classes, and she indicates to the immigration officer that she fears persecution or torture if returned to her country, the officer "shall refer the alien for an interview by an asylum officer" to determine if she "has a credible fear of persecution [or torture]." 8 U.S.C. § 1225(b)(1)(A)(ii) & (B)(ii); 8 C.F.R. § 208.30(d). The statute defines the term "credible fear of persecution" as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title." 8 U.S.C. § 1225(b)(1)(B)(v); *see also* 8 C.F.R. § 208.30(e)(3) ("An alien will be found to have a credible fear of torture if the alien shows that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture.").

Should the interviewing asylum officer determine that the alien lacks a credible fear of persecution (i.e., if the officer makes a "negative credible fear determination"),

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[2] Any aliens otherwise falling within these two categories but who are inadmissible for reasons other than misrepresentation or missing immigration papers are referred for regular — i.e., non-expedited — removal proceedings conducted under *8 U.S.C. § 1229a*. *See 8 U.S.C. § 1225(b)(2)(A)*.

[3] The statute actually gives the Attorney General the unfettered authority to expand this second category of aliens to "any or all aliens" that cannot prove that they have been physically present in the United States for at least the two years immediately preceding the date their inadmissibility is determined, regardless of their proximity to the border. *See* 8 U.S.C. § 1225(b)(1)(A)(iii). Although DHS (on behalf of the Attorney General) has opted to apply the expedited removal regime only to the limited subset of aliens described above, it has expressly reserved its authority to exercise at a later time "the full nationwide enforcement authority of [§ 1225(b)(1)(A)(iii)(II)]." *See Designating Aliens for Expedited Removal, 69 Fed Reg. 48877-01 (*Aug. *11, 2004)*.

the officer orders the removal of the alien "without further hearing or review," except by an IJ as discussed below. 8 U.S.C. § 1225(b)(1)(B)(iii)(I). The officer is then required to "prepare a written record" that must include "a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution." *Id.* § 1225(b)(1)(B)(iii)(II). Next, the asylum officer's supervisor reviews and approves the negative credible fear determination, after which the order of removal becomes "final." 8 C.F.R. § 235.3(b)(7); *id.* § 208.30(e)(7). Nevertheless, if the alien so requests, she is entitled to have an IJ conduct a *de novo* review of the officer's negative credible fear determination, and "to be heard and questioned by the [IJ]" as part of this review. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.42(d). Assuming the IJ concurs in the asylum officer's negative credible fear determination, "[t]he [IJ]'s decision is final and may not be appealed," and the alien is referred back to the asylum officer to effect her removal. 8 C.F.R. § 1208.30(g)(2)(iv)(A).[4]

B. Section 1252

Section 1252 of Title 8 defines the scope of judicial review for all orders of removal. This statute narrowly circumscribes judicial review for expedited removal orders issued pursuant to § 1225(b)(1). It provides that "no court shall have jurisdiction to review . . . the application of [§ 1225(b)(1)] to individual aliens, including the [credible fear] determination made under [§ 1225(b)(1)(B)]." 8 U.S.C. § 1252(a)(2)(A)(iii). Moreover, except as provided in § 1252(e), the statute strips courts of jurisdiction to review: (1) "any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an [expedited removal] order"; (2) "a decision by the Attorney General to invoke" the expedited removal regime; and (3) the "procedures and policies adopted by the Attorney General to implement the provisions of [§ 1225(b)(1)]." *Id.* § 1252(a)(2)(A)(i), (ii) & (iv). Thus, the statute makes abundantly clear that whatever jurisdiction courts have to review issues relating to expedited removal orders arises under § 1252(e).

Section 1252(e), for its part, preserves judicial review for only a small subset of issues relating to individual expedited removal orders:

Judicial review of any determination made under [§ 1225(b)(1)] is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

[4] On the other hand, if the interviewing asylum officer, or the IJ upon *de novo* review, concludes that the alien possesses a credible fear of persecution or torture, the alien is referred for non-expedited removal proceedings under 8 U.S.C. § 1229a, "during which time the alien may file an application for asylum and withholding of removal." 8 C.F.R. § 1208.30(g)(2)(iv)(B).

(B) whether the petitioner was ordered removed under [§ 1225(b)(1)], and

(C) whether the petitioner can prove . . . that the petitioner is [a lawful permanent resident], has been admitted as a refugee . . . or has been granted asylum . . . .

Id. § 1252(e)(2). In reviewing a determination under subpart (B) above — i.e., in deciding "whether the petitioner was ordered removed under [§ 1225(b)(1)]" - "the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually admissible or entitled to any relief from removal." Id. § 1252(e)(5).

Section 1252(e) also provides jurisdiction to the district court for the District of Columbia to review "[c]hallenges [to the] validity of the [expedited removal] system." Id. § 1252(e)(3)(A). Such systemic challenges include challenges to the constitutionality of any provision of the expedited removal statute or its implementing regulations, as well as challenges claiming that a given regulation is inconsistent with law. See id. § 1252(e)(3)(A)(i) & (ii). Nevertheless, systemic challenges must be brought within sixty days after implementation of the challenged statute or regulation. Id. § 1252(e)(3)(B); *see also Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 47 (D.D.C. 1998), aff'd, 199 F.3d 1352, 339 U.S. App. D.C. 341 (D.C. Cir. 2000) (holding that "the 60-day requirement is jurisdictional rather than a traditional limitations period").[5]

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioners are natives and citizens of El Salvador, Honduras, and Guatemala who, over a period of several months in late 2015, entered the United States seeking refuge. While their reasons for fleeing their home countries vary somewhat, each petitioner claims to have been, or to fear becoming, the victim of violence at the hands of gangs or former domestic partners. United States Customs and Border Protection (CBP) agents encountered and apprehended each petitioner within close proximity to the border and shortly after their illegal crossing. In fact, the vast majority were apprehended within an hour or less of entering the country, and at distances of less than one mile from the border; in all events, no petitioner appears to have been present in the country for more than about six hours, and none was apprehended more than four miles from the border. And because none of the petitioners presented immigration papers upon their arrest, and none claimed to have been previously admitted to the country, they clearly fall within the class of aliens to whom the expedited removal statute applies. ...

After the CBP agents apprehended them and began the expedited removal process,

[5] In its brief, as it did during oral argument, the government repeatedly argues that many of Petitioners' claims are of a systemic nature and should have been brought in the district court for the District of Colombia under § 1252(e)(3). In making this argument, however, the government conveniently elides the fact that the sixty-day deadline would clearly prevent Petitioners from litigating their systemic claims in that forum, because that deadline passed years ago.

Petitioners each expressed a fear of persecution or torture if returned to their native country. Accordingly, each was referred to an asylum officer for a credible fear interview. As part of the credible fear interview process, the asylum officers filled out and gave to Petitioners a number of forms, including a form memorializing the officers' questions and Petitioners' answers during the interview. Following the interviews — all of which resulted in negative credible fear determinations — Petitioners requested and were granted *de novo* review by an IJ. Because the IJs concurred in the asylum officers' conclusions, Petitioners were referred back to DHS for removal without recourse to any further administrative review. Each petitioning family then submitted a separate habeas petition to the District Court, each claiming that the asylum officer and IJ conducting their credible fear interview and review violated their Fifth Amendment procedural due process rights, as well as their rights under the INA, the Foreign Affairs Reform and Restructuring Act of 1998, the United Nations Convention Against Torture, the Administrative Procedure Act, and the applicable implementing regulations. All the petitions were reassigned to Judge Paul S. Diamond for the limited purpose of determining whether subject matter jurisdiction exists to adjudicate Petitioners' claims.

Petitioners argued before the District Court that § 1252 is ambiguous as to whether the Court could review their challenges to the substantive and procedural soundness of DHS's negative credible fear determinations. As such, they argued that the Court should construe the statute to allow review of their claims in order to avoid "the serious constitutional concerns that would arise" otherwise. JA 19. The District Court roundly rejected this argument, concluding instead that § 1252 unambiguously forecloses judicial review of all of Petitioners' claims, and that to adopt Petitioners' proposed construction would require the Court "to do violence to the English language to create an 'ambiguity' that does not otherwise exist." JA 20.

Turning then to the Suspension Clause issue, the District Court separately analyzed what it termed as Petitioners' "substantive" challenges — those going to the ultimate correctness of the negative credible fear determinations — versus their challenges relating to the procedures DHS followed in making those determinations. Based on the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court derived four "factors in determining the scope of an alien's Suspension Clause rights": "(1) historical precedent; (2) separation-of-powers principles; (3) the gravity of the petitioner's challenged liberty deprivation; and (4) a balancing of the petitioner's interest in more rigorous administrative and habeas procedures against the Government's interest in expedited proceedings." … (citations omitted). Applying these factors, the Court determined that the Suspension Clause did not require that judicial review be available to address any of Petitioners' claims, and therefore that § 1252(e) does not violate the Suspension Clause. Thus, the Court dismissed with prejudice the consolidated petitions for lack of subject matter jurisdiction. Petitioners then filed a timely notice of appeal with this Court.

III. ANALYSIS

Petitioners challenge on appeal the District Court's holding that it lacked subject matter jurisdiction under § 1252(e) to review Petitioners' claims, as well as the Court's conclusion that § 1252(e) does not violate the Suspension Clause. We review *de novo* the District Court's determination that it lacked subject matter jurisdiction. …

A. Statutory Jurisdiction under § 1252(e)

The government contends that § 1252 unambiguously forecloses judicial review of Petitioners' claims, and that nearly every court to address this or similar issues has held that the statute precludes challenges related to the expedited removal regime. Petitioners, on the other hand, argue that the statute can plausibly be construed to provide jurisdiction over their claims, and that, per the doctrine of constitutional avoidance, the statute should therefore be so construed. They also point to precedent purportedly supporting their position.

We review pure legal questions of statutory interpretation *de novo*. …If the statute is unambiguous, we must go no further…. The statute must be enforced according to its plain meaning, even if doing so may lead to harsh results….

As discussed in our overview of the expedited removal regime, ... § 1252 makes abundantly clear that if jurisdiction exists to review any claim related to an expedited removal order, it exists only under subsection (e) of the statute. ...And under subsection (e), unless the petitioner wishes to challenge the "validity of the system" as a whole rather than as applied to her, the district courts' jurisdiction is limited to three narrow issues. ...Petitioners in this case concede that two of those three issues do not apply to them; that is, they concede they are aliens, and that they have not previously been lawfully admitted to the country…. Nevertheless, they argue that their claims fall within the third category of issues that courts are authorized to entertain: "whether [they have been] ordered removed under §1255(b)(1)."...
…
…Petitioners argue that the second sentence of § 1252*(e)(5)* creates a strong inference that courts have jurisdiction to review claims like theirs. This sentence states, "There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal." ...Petitioners argue that because this sentence explicitly prohibits review of only two narrow questions, we should read it to implicitly authorize review of other questions related to the expedited removal order, such as whether the removal order resulted from a procedurally erroneous credible fear proceeding. … Petitioners claim that the statute is at least ambiguous as to whether their claims are reviewable and that we should construe the statute in their favor in order to avoid the "serious constitutional problems" that may ensue if we read it to foreclose habeas review.

Petitioners are attempting to create ambiguity where none exists.[11] Their reading of the second sentence in § 1252(e)(5) may be creative, but it completely ignores other provisions in the statute — including the sentence immediately preceding it — that clearly evince Congress' intent to narrowly circumscribe judicial review of issues relating to expedited removal orders. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(A)(iii) ("[N]o court shall have jurisdiction to review . . . the application of [§ 1225(b)(1)] to individual aliens, including the [credible fear] determination made under [§ 1225(b)(1)(B)].").

…

By reading the INA to foreclose Petitioners' claims, we join the majority of courts that have addressed the scope of judicial review under § 1252 in the expedited removal context. [citing several cases omitted here *Li v. Eddy*, 259 F.3d 1132, 1134-35 (9th Cir. 2001), opinion vacated as moot, 324 F.3d 1109 (9th Cir. 2003) ("With respect to review of expedited removal orders, . . . the statute could not be much clearer in its intent to restrict habeas review.) …

Petitioners claim that the Ninth Circuit and two district courts in other circuits have construed § 1252 to allow judicial review of claims that the aliens in question had been ordered expeditiously removed in violation of the expedited removal statute. In *Smith v. U.S. Customs and Border Protection*, 741 F.3d 1016 (9th Cir. 2014), Smith, a Canadian national, was ordered removed under *§ 1225(b)(1)* when, upon presenting himself for inspection at the United States-Canada border, the CBP agent concluded that he was an intending immigrant without proper work-authorization documents. Smith filed a habeas petition… claiming that Canadians are exempt from the documentation requirements for admission, which meant that the CBP agent exceeded his authority in ordering Smith removed. Therefore (Smith's argument went), he was not "ordered removed under [§ 1225(b)(1)]." … The Ninth Circuit "[a]ccept[ed] [Smith's] theory at face value" only to then reject Smith's argument on the merits. *Id.* ...[T]he court appears merely to have assumed *hypothetical* jurisdiction in order to dispose of the appeal on easier merits grounds. We therefore assign no weight to either *Smith*'s outcome or its reasoning.

In *American-Arab Anti-Discrimination Commission v. Ashcroft*, 272 F. Supp. 2d 650 (E.D. Mich. 2003), several Lebanese aliens were ordered removed under § 1225(b)(1), years after entering the United States using fraudulent documentation. They filed habeas petitions challenging their expedited removal orders, and the district court concluded that it had jurisdiction "under the circumstances here . . . to determine whether the expedited removal statute was *lawfully applied* to petitioners in the first place." *Id. at 663*. To support this conclusion, the court latched onto the language in § 1252(e)(5) limiting the scope of habeas review under § 1252(e)(2)(B)

[11] And because we conclude that the statute is unambiguous, we are unable to employ the canon of constitutional avoidance to reach Petitioners' desired result. ..."[T]he canon of constitutional doubt permits us to avoid [constitutional] questions only where the saving construction is not plainly contrary to the intent of Congress. We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." (internal quotation marks and citations omitted)).

to "whether [the expedited removal order] relates to the petitioner," reasoning that an order "relates to" a person only if it was lawfully applied to the person. *Id.* We find the court's construction of the statute to be not just unsupported, but also flatly contradicted by the plain language of the statute itself. ...

…

For these reasons we agree with the District Court's conclusion that it lacked jurisdiction under § 1252 to review Petitioners' claims, and turn now to the constitutionality of the statute under the Suspension Clause.

B. Suspension Clause Challenge

The Suspension Clause of the United States Constitution states: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The government does not contend that we are in a time of formal suspension. Thus, the question is whether § 1252 operates as an unconstitutional suspension of the writ by stripping courts of habeas jurisdiction over all but a few narrow questions. As the party challenging the constitutionality of a presumptively constitutional statute, Petitioners bear the burden of proof. …

Petitioners argue that the answer to the ultimate question presented on appeal — whether § 1252 violates the Suspension Clause — can be found without too much effort in the Supreme Court's Suspension Clause jurisprudence, especially in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), and *Boumediene v. Bush*, 553 U.S. 723 (2008), as well as in a series of cases from what has been termed the "finality era." The government, on the other hand, largely views these cases as inapposite, and instead focuses our attention on what has been called the "plenary power doctrine" and on the Supreme Court cases that elucidate it. The challenge we face is to discern the manner in which these seemingly disparate, and perhaps even competing, constitutional fields interact. Ultimately, and for the reasons we will explain below, we conclude that Congress may, consonant with the Constitution, deny habeas review in federal court of claims relating to an alien's application for admission to the country, at least as to aliens who have been denied initial entry or who, like Petitioners, were apprehended very near the border and, essentially, immediately after surreptitious entry into the country.

We will begin our discussion with a detailed overview of the Supreme Court's relevant Suspension Clause precedents, followed by a summary of the Court's plenary power cases. We will then explain how we think these two areas coalesce in the context of Petitioners' challenges to their expedited removal orders.

1. Suspension Clause Jurisprudence

The Supreme Court has held that a statute modifying the scope of habeas review is constitutional under the Suspension Clause so long as the modified scope of review — that is, the habeas substitute - "is neither inadequate nor ineffective to

test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381, (1977). The Court has weighed the adequacy and effectiveness of habeas substitutes on only a few occasions, and only once, in *Boumediene*, has it found a substitute wanting. *See Boumediene*, 553 U.S. at 795 (holding that "the [Detainee Treatment Act] review procedures are an inadequate substitute for habeas corpus," and therefore striking down under the Suspension Clause § 7 of the Military Commissions Act, which stripped federal courts of habeas jurisdiction over Guantanamo Bay detainees). Thus, *Boumediene* represents our only "sum certain" when it comes to evaluating the adequacy of a given habeas substitute such as § 1252, and even then the decision "leaves open as many questions as it settles about the operation of the [Suspension] Clause." Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 COLUM. L. REV. 537, 578 (2010).

…

St. Cyr was a lawful permanent resident alien who, in early 1996, pleaded guilty to a crime that qualified him for deportation. ...Under the immigration laws prevailing at the time of his conviction, he was eligible for a waiver of deportation at the Attorney General's discretion. *Id.* Nevertheless, by the time he was ordered removed in 1997, Congress had enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), 110 Stat. 3009-546. Among the myriad other revisions to our immigration laws that these enactments effected, AEDPA and IIRIRA stripped the Attorney General of his discretionary power to waive deportation, and replaced it with the authority to "cancel removal" for a narrow class of aliens that did not include aliens who, like St. Cyr, had been previously "convicted of any aggravated felony." When St. Cyr applied to the Attorney General for waiver of deportation, the Attorney General concluded that AEDPA and IIRIRA stripped him of his waiver authority even as to aliens who pleaded guilty to the deportable offense prior to the statutes' enactment. …St. Cyr filed a habeas petition in federal district court under [28 U.S.C.] § 2241, claiming that the provisions of AEDPA and IIRIRA eliminating the Attorney General's waiver authority did not apply to aliens who pleaded guilty to a deportable offense before their enactment.…

The government contended that AEDPA and IIRIRA stripped the courts of habeas jurisdiction to review the Attorney General's determination that he no longer had the power to waive St. Cyr's deportation. …In the Court's review, the government's proposed construction of the jurisdiction-stripping provisions would have presented "a serious Suspension Clause issue."…

To explain why the Suspension Clause could possibly have been violated by a statute stripping the courts of habeas jurisdiction under § 2241, the Court began with the foundational principle that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" …Looking to the Founding era, the Court found evidence that "the writ of habeas corpus was available to nonenemy aliens as well as to citizens" as a means to challenge the "legality of Executive

detention." …In such cases, habeas review was available to challenge "detentions based on errors of law, including the erroneous application or interpretation of statutes."…

…Indeed, the Court discussed at some length the "historical practice in immigration law," …with special focus on cases from what may be termed the "finality era." ...In order to understand the role that these finality-era cases appear to play in *St. Cyr*'s Suspension Clause analysis, and because Petitioners place significant weight on them in their argument that § 1252 violates the Suspension Clause, we will describe them in some depth.

The finality-era cases came about during an approximately sixty-year period when federal immigration law rendered final (hence, the "finality" era) the Executive's decisions to admit, exclude, or deport aliens. This period began with the passage of the Immigration Act of 1891, ch. 551, 26 Stat. 1084, and concluded when Congress enacted the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, which permitted judicial review of deportation orders through declaratory judgment actions in federal district courts. ...During this period, and despite the statutes' finality provisions appearing to strip courts of all jurisdiction to review the Executive's immigration-related determinations, the Supreme Court consistently recognized the ability of immigrants to challenge the legality of their exclusion or deportation through habeas corpus. Based on this, Petitioners contend that the finality-era cases "establishe[d] a constitutional floor for judicial review," …and that the Suspension Clause was the source of this floor. In making this argument, Petitioners rely especially on *Heikkila v. Barber*, 345 U.S. 229 (1953), in which the Court derived from its finality-era precedents the principle that the statutes' finality provisions "had the effect of precluding judicial intervention in deportation cases *except insofar as it was required by the Constitution"*…. (emphasis added); *see also id. At 235* ("During these years, the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable *to the fullest extent possible under the Constitution*." (emphasis added; citing *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) ("The power to exclude or to expel aliens . . . is vested in the political departments of the government, and is to be regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations so established, except so far the judicial department . . . *is required by the paramount law of the constitution*, to intervene." (emphasis added)))).

… In short, the Court found in the finality-era cases evidence that, as a matter of historical practice, aliens facing removal could challenge "the Executive's legal determinations," [17] including "Executive interpretations of the immigration laws."

[17] As support for this proposition, the Court also cited *Gegiow v. Uhl,* 239 U.S. 3 (1915). *See St. Cyr,* 533 U.S. at 306 & n.28. *Gegiow* involved Russian immigrants whom immigration officers had ordered deported after concluding that the aliens were "likely to become public charges." 239 U.S. at 8 (internal quotation marks omitted). The immigrants sought and obtained habeas review of the

Id. at 306-07.

We turn now to *Boumediene*. In *Boumediene* the Court addressed two main, sequential questions. First, the Court considered whether detainees at the United States Naval Station at Guantanamo Bay, Cuba, "are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status . . . as enemy combatants, or their physical location . . . at Guantanamo Bay." *553 U.S. at 739*. Then, after determining that the detainees were entitled to the protections of the Suspension Clause, the Court addressed the question "whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus." *Id. at 771*.

In answering the first question regarding the detainees' entitlement *vel non* to the protections of the Suspension Clause, the Court primarily looked to its "extraterritoriality" jurisprudence, i.e., its cases addressing where and under what circumstances the Constitution applies outside the United States. From these precedents the Court developed a multi-factor test to determine whether the Guantanamo detainees were covered by the Suspension Clause:

[A]t least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Based on these factors, the Court concluded that the Suspension Clause "has full effect at Guantanamo Bay."[18] *Id.*

The Court next considered the adequacy of the habeas substitute provided to the detainees by Congress. The Detainee Treatment Act (DTA) granted jurisdiction to

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Executive's determination. According to the Supreme Court, the only reason the Executive provided to support its conclusion that the aliens were deportable was that they were not likely to find work in the city of their ultimate destination (Portland, Oregon) due to the poor conditions of the city's labor market. *Id. at 8-9*. In order to avoid the force of earlier Supreme Court precedent holding that "[t]he conclusiveness of the decisions of immigration officers under [the prevailing immigration statute's finality provision] is conclusiveness upon matters of fact," *id. at 9* (citing *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892)), the Court presented the question on review as one of law, rather than one of fact: "whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked." *Id. at 9-10*. And because the Court ultimately concluded that such a consideration was not an appropriate grounds for ordering the aliens deported, it reversed the order. *Id. at 10*.

[18] While the Court obviously analyzed how these factors apply to the Guantanamo detainees in much greater depth than our brief summary might suggest, we refrain from expositing its analysis further. That is because, as we explain in greater detail below, we think this multi-factor test provides little guidance in addressing Petitioners' entitlement to the protections of the Suspension Clause in this case.

the Court of Appeals for the D.C. Circuit "only to assess whether the CSRT [Combat Status Review Tribunal[19]] complied with the 'standards and procedures specified by the Secretary of Defense' and whether those standards and procedures are lawful." *Id*.... Under the DTA, the D.C. Circuit lacked jurisdiction "to inquire into the legality of the detention generally." *Id.*

In assessing the adequacy of the DTA as a habeas substitute, the Court acknowledged the lack of case law addressing "standards defining suspension of the writ or [the] circumstances under which suspension has occurred."… It also made clear that it was not "offer[ing] a comprehensive summary of the requisites for an adequate substitute for habeas corpus." … Having pronounced these caveats, the Court then began its discussion of what features the habeas substitute needed to include to avoid violating the Suspension Clause. To begin, the Court recognized what it considered to be two "easily identified attributes of any constitutionally adequate habeas corpus proceeding," *id.*: first, the Court "consider[ed] it uncontroversial [] that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law," *id*....; and second, "the habeas court must have the power to order the conditional release of an individual unlawfully detained," *id.*

In addition to these two seemingly irreducible attributes of a constitutionally adequate habeas substitute, the Court identified a few others that, "depending on the circumstances, [] *may* be required." *Id.* (emphasis added). These additional features include: the ability of the prisoner to "controvert facts in the jailer's return," …; "some authority to assess the sufficiency of the Government's evidence against the detainee,";… and the ability "to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner,".... To determine whether the circumstances in a given case are such that the habeas substitute must also encompass these additional features, the Court discussed a number of considerations, all of which related to the "rigor of any earlier proceedings." …In short, the Court established a sort of sliding scale whose focus was "the sum total of procedural protections afforded to the detainee at all stages, direct and collateral."...

Applying these principles, the Court ultimately concluded that the DTA did not provide the detainees an adequate habeas substitute. The Court believed the DTA could be construed to provide *most* of the attributes necessary to make it a "constitutionally adequate substitute" for habeas — including the detainees' ability to challenge the CSRT's legal and factual determinations, as well as authority for the court to order the release of the detainees if it concluded that detention was not justified. *Id.* Nevertheless, the DTA did not afford detainees "an opportunity . . . to

[19] CSRTs are the military tribunals established by the Department of Defense to determine if the Guantanamo detainees are "enemy combatants" who are therefore subject to indefinite detention without trial pending the duration of the war in Afghanistan….

present relevant exculpatory evidence that was not made part of the record in the earlier proceedings."… This latter deficiency doomed the DTA as a habeas substitute. Because of this, the Court held that the Military Commissions Act, which stripped federal courts of their ...habeas jurisdiction with respect to the CSRT enemy combatant determinations, "effects an unconstitutional suspension of the writ." *Id.*

2. Plenary Power Jurisprudence

Against the backdrop of the Court's most relevant Suspension Clause precedents, we direct our attention to the plenary power doctrine. Because the course of this doctrine's development in the Supreme Court sheds useful light on the current state of the law, a brief historical overview is first in order.

The Supreme Court has "long recognized [that] the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787 (1977)…. "[T]he Court's general reaffirmations of this principle have been legion." *Kleindienst v. Mandel*, 408 U.S. 753, 765-766 (1972)... The doctrine first emerged in the late nineteenth century in the context of the Chinese Exclusion Act, one of the first federal statutes to regulate immigration.

The case that first recognized the political branches' plenary authority to exclude aliens, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), involved a Chinese lawful permanent resident who, prior to departing the United States for a trip abroad, had obtained a certificate entitling him to reenter the country upon his return…. While he was away, however, Congress passed an amendment to the Chinese Exclusion Act that rendered such certificates null and void. … Thus, after immigration authorities refused him entrance upon his return, the alien brought a habeas petition to challenge the lawfulness of his exclusion, arguing that the amendment nullifying his reentry certificate was invalid. *Id.* The Court upheld the validity of the amendment, reasoning that "[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution," and therefore that "the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one."... (concluding that questions regarding the political soundness of the amendment "are not questions for judicial determination").

In subsequent decisions from the same period, the Court upheld and even extended its reasoning in *Chae Chan Ping*. For instance, in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), another exclusion (as opposed to deportation) case, a Japanese immigrant was denied entry to the United States because immigration authorities determined that she was "likely to become a public charge." …. The Court concluded that the statute authorizing exclusion on such grounds was valid under the sovereign authority of Congress and the Executive to control immigration. *Id.*

at 659 (stating that the power over admission and exclusion "belongs to the political department[s] of the government"). In a statement that perfectly encapsulates the meaning of the plenary power doctrine, the Court declared:

It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.

Id. at 660.[20]

The following year, in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), the Court extended the plenary power doctrine to deportation cases as well. *Fong Yue Ting* involved several Chinese immigrants who were ordered deported pursuant to the Chinese Exclusion Act because they lacked certificates of residence and could not show by the testimony of "at least one credible white witness" that they were lawful residents…. The aliens sought to challenge their deportation orders, claiming, *inter alia*, that the Exclusion Act violated the equal protection clause of the Fourteenth Amendment. *See id.* at 724-25 (*citing Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). As it had done in *Chae Chan Ping* and *Nishimura Ekiu*, the Court declined to intervene or review the validity of the immigration legislation:

The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by congress in the exercise of the powers confided to it by the constitution over this subject.

... "The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon

[20] While the Court recognized Nishimura Ekiu's "entitle[ment] to a writ of *habeas corpus* to ascertain whether the restraint [of her liberty] is lawful," … the scope of the Court's habeas review was limited to inquiring whether the immigration officer ordering the exclusion "was duly appointed" under the statute and whether the officer's decision to exclude her "was within the authority conferred upon him by [the Immigration Act of 1891]."... Thus, *Nishimura Ekiu* cannot help Petitioners because, as we noted above, they have conceded that they fall within the class of aliens for whom Congress has authorized expedited removal, and that the immigration officials ordering their removal are duly appointed to do so. *See* 8 U.S.C. § 1225(b)(1)(A)(iii). That said, it would be a different matter were the Executive to attempt to expeditiously remove an alien that Congress has *not* authorized for expeditious removal — for example, an alien who claims to have been continuously present in the United States for over two years prior to her detention. Such a situation might very well implicate the Suspension Clause in a way that Petitioners' expedited removal does not.

the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

Thus, the Court's earliest plenary power decisions established a rule leaving essentially no room for judicial intervention in immigration matters, a rule that applied equally in exclusion as well as deportation cases.

Yet not long after these initial decisions, the Court began to walk back the plenary power doctrine in significant ways. In *Yamataya v. Fisher*, 189 U.S. 86 (1903), a Japanese immigrant was initially allowed to enter the country after presenting herself for inspection at a port of entry. *Id.* at 87. Nevertheless, just a few days later, an immigration officer sought her deportation because he had concluded, after some investigation, that she "was a pauper and a person likely to become a public charge." *Id.* About a week later, the Secretary of the Treasury ordered her deported without notice or hearing. *Id.* Yamataya then filed a habeas petition in federal district court to challenge her deportation, claiming that the failure to provide her notice and a hearing violated due process. *Id.* The Court acknowledged its plenary power precedents, including *Nishimura Ekiu* and *Fong Yue Ting, ...* but clarified that these precedents did not recognize the authority of immigration officials to "disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution." …According to these "fundamental principles," the Court held, no immigration official has the power arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.

Id. at 101.[21]

Thus, *Yamataya* proved to be a "turning point" in the Court's plenary power jurisprudence. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1390 n.85 (1953). Indeed, as Professor Hart explains, it was at this point that the Court "began to see that the premise [of the plenary power doctrine] needed to be qualified — that a power to lay down general rules, even if it were plenary, did not necessarily include a power to be arbitrary or to authorize administrative officials to be arbitrary." *Id.* at 1390; *see also* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 947-48 & n.62 (1995) (discussing *Yamataya*'s significance to the development of the plenary power doctrine). *Yamataya*, then, essentially gave

[21] Although the Court recognized the due process rights of recent entrants to the country — even entrants who are subsequently determined "to be illegally here" — it explicitly declined to address whether very recent *clandestine* entrants like Petitioners enjoy such rights. *See Yamataya*, 189 U.S. at 100. For obvious reasons, and as we explain below, we consider this carve-out in the Court's holding to be of particular importance in resolving this appeal.

way to the finality-era cases upon which Petitioners and *amici* place such considerable weight. Hart, *supra*, at 1391 & n.86 (noting the "[t]housands" of habeas cases challenging exclusion and deportation orders "whose presence in the courts cannot be explained on any other basis" than on the reasoning of *Yamataya*).

Nevertheless, *Yamataya* did not mark the only "turning point" in the development of the plenary power doctrine. Nearly fifty years after *Yamataya*, the Court issued two opinions — *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) and *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 (1953) — that essentially undid the effects of *Yamataya*, at least for aliens "on the threshold of initial entry," as well as for those "assimilated to that status for constitutional purposes." *Mezei*, 345 U.S. at 212, 214 (internal quotation marks and alterations omitted); *see also* Hart, *supra*, at 1391-92 (explaining the significance of *Knauff* and *Mezei* for the Court's plenary power jurisprudence, noting specifically that by these decisions the Court "either ignores or renders obsolete every habeas corpus case in the books involving an exclusion proceeding").

In *Knauff*, the German wife of a United States citizen sought admission to the country pursuant to the War Brides Act…. She was detained immediately upon her arrival at Ellis Island, and the Attorney General eventually ordered her excluded, without a hearing, because "her admission would be prejudicial to the interests of the United States." *Id.* at 539-40. The Court upheld the Attorney General's decision largely on the basis of pre-*Yamataya* plenary power principles and precedents:

[T]he decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien. . . . Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.

Id. at 543-44 (citing, inter alia, *Nishimura Ekiu*, 142 U.S. at 659-60 and *Fong Yue Ting*, 149 U.S. at 713-14). Thus, with its holding in *Knauff*, the Court effectively "reinvigorated the judicial deference prong of the plenary power doctrine." Weisselberg, *supra*, at 956.

Similar to *Knauff, Mezei* involved an alien detained on Ellis Island who was denied entry for undisclosed national security reasons. Unlike Knauff, however, Mezei had previously lived in the United States for many years before leaving the country for a period of approximately nineteen months, "apparently to visit his dying mother in Rumania [*sic*]."... And unlike Knauff, Mezei had no choice but to remain in custody indefinitely on Ellis Island, as no other country would admit him either. …In these conditions, Mezei brought a habeas petition to challenge his exclusion

(and attendant indefinite detention). …Nevertheless, the Court again upheld the Executive's decision, essentially for the same reasons articulated in *Knauff*. "It is true," the Court explained, "that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Id.* ....In contrast, aliens "on the threshold of initial entry stan[d] on different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'"[22] *Id.* (*quoting* Knauff, 338 U.S. at 544).

Thus, *Knauff* and *Mezei* essentially restored the political branches' plenary power over aliens at the border seeking initial admission. And since these decisions, the Court has continued to signal its commitment to the full breadth of the plenary power doctrine, at least as to aliens at the border seeking initial admission to the country.[23] *See Fiallo*, 430 U.S. at 792 ("This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." (internal quotation marks and citations omitted)); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." (*citing Knauff*, 338 U.S. at 542; *Nishimura Ekiu*, 142 U.S. at 659-60)).

3. Application to Petitioners and the Expedited Removal Regime

Having introduced the prevailing understandings of the Suspension Clause and of the political branches' plenary power over immigration, we now consider the relationship between these two areas of legal doctrine and how they apply to

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[22] Although Mezei (like Knauff) was indisputably on United States soil when he was ordered excluded and when he filed his habeas petition, the Court "assimilated" Mezei's status "for constitutional purposes" to that of an alien stopped at the border…. This analytical maneuver is often referred to as the "entry fiction" or the "entry doctrine." *See, e.g., Jean v. Nelson*, 727 F.2d 957, 969 (11th Cir. 1984) (en banc), *aff'd* , 472 U.S. 846 (1985). As explained below, the entry fiction plays an important, albeit indirect, role in our analysis of Petitioners' Suspension Clause challenge.

[23] The Court has departed from its reasoning in *Knauff* and *Mezei* in other respects, including for lawful permanent residents seeking reentry at the border, *see Landon v. Plasencia*, 459 U.S. 21 (1982) (holding that such aliens are entitled to protections of Due Process Clause in exclusion proceedings), as well as for resident aliens facing indefinite detention incident to an order of deportation following conviction of a deportable offense, *compare Zadvydas v. Davis*, 533 U.S. 678, 692-95 (2001) (concluding that resident aliens ordered deported have liberty interest under Fifth Amendment in avoiding indefinite detention incident to deportation, and distinguishing *Mezei* on grounds that petitioners had already entered U.S. before ordered deported), *with id.* at 702-05(Scalia, J., dissenting) (arguing that *Mezei* controlled question whether aliens ordered deported had liberty interest to remain in United States such that they are entitled to due process in decision to hold them indefinitely, and stating that such aliens have no right to release into the United States).

Petitioners' claim that the jurisdiction-stripping provisions of § 1252 violate the Suspension Clause.

Petitioners argue that under the Supreme Court's Suspension Clause jurisprudence — especially *St. Cyr* and the finality-era cases — courts must, at a minimum, be able to review the legal conclusions underlying the Executive's negative credible fear determinations, including the Executive's interpretation and application of a statute to undisputed facts.[24] And because § 1252(e)(2) does not provide for at least this level of review, Petitioners claim that it constitutes an inadequate substitute for habeas, in violation of the Suspension Clause.

The government, on the other hand, claims that the plenary power doctrine operates to foreclose Petitioners' Suspension Clause challenge. In the government's view, Petitioners should be treated no differently from aliens "on the threshold of initial entry" who clearly lack constitutional due process protections concerning their application for admission. *Mezei*, 345 U.S. 212. And because Petitioners "have no underlying procedural due process rights to vindicate in habeas," Respondents' Br. 49, the government argues that "the scope of habeas review is [] irrelevant." *Id.*

> Petitioners raise three principal arguments in response to the government's contentions above. First, they claim that to deny them due process rights despite their having indisputably entered the country prior to being apprehended would run contrary to numerous Supreme Court precedents recognizing the constitutional rights of all "persons" within the territorial jurisdiction of the United States. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (explaining that the Fifth Amendment applies to all aliens "within the jurisdiction of the United States," including those "whose presence in this country is unlawful, involuntary, or transitory"). Second, they argue that even if the Constitution does not impose any independent procedural minimums that the Executive must satisfy before removing Petitioners, the Executive must at least fairly administer those procedures that Congress has actually prescribed in the expedited removal statute. *Cf. Dia v. Ashcroft*, 353 F.3d 228, 238-39 (3d Cir. 2003) (en banc) (holding that *Fifth Amendment* entitles aliens to due process in deportation proceedings, and

[24] Petitioners at times claim that they should also be entitled to raise *factual* challenges due to the "truncated" nature of the credible fear determination process. Notwithstanding *Boumediene*'s holding that habeas review of factual findings may be required in some circumstances, we think Petitioners' argument is readily disposed of based solely on some of the very cases they cite to argue that § 1252 violates the Suspension Clause. *See, e.g., St. Cyr*, 533 U.S. 306 (noting that in finality-era habeas challenges to deportation orders "the courts generally did not review factual determinations made by the Executive"); *Heikkila*, 345 U.S. 236 (noting that "the scope of inquiry on habeas corpus" "has always been limited to the enforcement of due process requirements," and not to reviewing the record to determine "whether there is substantial evidence to support administrative findings of fact"); *Gegiow*, 239 U.S. 9 ("The conclusiveness of the decisions of immigration officers under [the finality provision of the Immigration Act of 1907] is conclusiveness upon matters of fact.").

> explaining that these rights "ste[m] from those statutory rights granted by Congress and the principle that '[m]inimum due process rights attach to statutory rights.'" (quoting *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996))). Third, Petitioners claim that, regardless of the extent of their constitutional or statutory due process rights, habeas corpus stands as a constitutional check against illegal detention by the Executive that is separate and apart from the protections afforded by the *Due Process Clause*.

We agree with the government that Petitioners' Suspension Clause challenge to § 1252 must fail, though we do so for reasons that are somewhat different than those urged by the government. As explained in Part III.B.1 above, *Boumediene* contemplates a two-step inquiry whereby courts must first determine whether a given habeas petitioner is prohibited from invoking the Suspension Clause due to some attribute of the petitioner or to the circumstances surrounding his arrest or detention. *Cf. Boumediene*, 553 U.S. at 739. Only after confirming that the petitioner is not so prohibited may courts then turn to the question whether the substitute for habeas is adequate and effective to test the legality of the petitioner's detention (or removal). As we explain below, we conclude that Petitioners cannot clear *Boumediene's* first hurdle — that of proving their entitlement *vel non* to the protections of the Suspension Clause.[25]

The reason Petitioners' Suspension Clause claim falls at step one is because the Supreme Court has unequivocally concluded that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon*, 459 U.S. at 32. Petitioners were each apprehended within hours of surreptitiously entering the United States, so we think it appropriate to treat them as "alien[s] seeking initial admission to the United States." *Id.* And since the issues that Petitioners seek to challenge all stem from the Executive's decision to remove them from the country, they cannot invoke the Constitution, including the Suspension Clause, in an effort to force judicial review beyond what Congress has already granted them. As such, we need not reach the second question under the *Boumediene* framework, i.e., whether the limited scope of review of expedited removal orders under § 1252 is an adequate substitute for traditional habeas review.[26]

Petitioners claim that *St. Cyr* and the finality-era cases firmly establish their right

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[25] In evaluating Petitioners' rights under the Suspension Clause, we find *Boumediene*'s multi-factor test, referenced earlier in this opinion, to provide little guidance. As we explain above, the Court derived the factors from its extraterritoriality jurisprudence in order to assess the reach of the Suspension Clause to a territory where the United States is not sovereign. *See* 553 U.S. at 766. In our case, of course, there is no question that Petitioners were apprehended within the sovereign territory of the United States; thus, the *Boumediene* factors are of limited utility in determining Petitioners' entitlement to the protections of the Suspension Clause.

[26] And because we hold that Petitioners cannot even invoke the Suspension Clause to challenge issues related to their admission or removal from the country, we have no occasion to consider what constitutional or statutory due process rights, if any, Petitioners may have.

to invoke the Suspension Clause to challenge their removal orders.[27] For two main reasons we think Petitioners' reliance on these cases is flawed. First, *St. Cyr* involved a lawful permanent resident, a category of aliens (unlike recent clandestine entrants) whose entitlement to broad constitutional protections is undisputed. … Second, as stated earlier, *St. Cyr* discussed the Suspension Clause (and therefore the finality-era cases) only to explain what the Clause "might possibly protect," …, not what the Clause most certainly protects — and even in this hypothetical posture the opinion was non-committal when discussing the significance of the finality-era cases to the Suspension Clause analysis. ...Indeed, the Court had good reason to tread carefully when it came to the meaning of the finality-era cases; after all, none of them even mentions the Suspension Clause, let alone identifies it as the constitutional provision establishing the minimum measure of judicial review required in removal cases.[28] We therefore conclude that *St. Cyr* and the finality-era cases are not controlling here.

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[27] Petitioners also rely on this Court's decision in *Sandoval v. Reno, 166 F.*3d *225 (*3d Cir. *1999)*, which is factually and analytically very similar to *St. Cyr*. Because *St. Cyr* essentially subsumes *Sandoval*, however, our reasons for rejecting *St. Cyr*'s significance in our case apply equally to *Sandoval*.

[28] It was largely for this reason that the District Court below declined to assign much weight to the finality-era cases in its analysis of Petitioners' Suspension Clause argument. Petitioners and *amici* contend that the Suspension Clause was the only "logical" constitutional provision that the Court in *Heikkila* could have relied upon when explaining that "the Constitution" required a certain level of judicial review of immigration decisions. *See* Brief for Scholars of Habeas Corpus Law, Federal Courts, and Constitutional Law as *Amicus Curiae* 12. Given the tentative and hypothetical nature of the Court's Suspension Clause analysis in *St. Cyr*, we too are hesitant to extract too much Suspension Clause-related guidance from a series of cases whose precise relationship (if any) to the Suspension Clause is far from clear. This is especially so in light of Justice Scalia's dissent in *St. Cyr* in which he forcefully critiqued the majority's reliance on the finality-era cases generally and *Heikkila* specifically:

> The Court cites many cases which it says establish that it is a "serious and difficult constitutional issue" whether the Suspension Clause prohibits the elimination of habeas jurisdiction effected by IIRIRA. Every one of those cases, however, pertains not to the meaning of the Suspension Clause, but to the content of the habeas corpus provision of the United States Code, which is quite a different matter. The closest the Court can come is a statement in one of those cases to the effect that the Immigration Act of 1917 "had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution," *Heikkila, 345 U.S., at 234-35*. That statement (1) was pure dictum, since the Court went on to hold that the judicial review of petitioner's deportation order was unavailable; (2) does not specify to what extent judicial review was "required by the Constitution," which could (as far as the Court's holding was concerned) be zero; and, most important of all, (3) does not refer to the Suspension Clause, so could well have had in mind the due process limitations upon the procedures for determining deportability that our later cases establish.
>
> *533 U.S. at 339* (Scalia, J., dissenting) (some citations omitted).

Nevertheless, we need not resolve this issue in our case, for even if *St. Cyr* definitively established the import of the finality-era cases to the Suspension Clause, we still think the distinction between a lawful permanent resident and a very recent surreptitious entrant makes all the difference in this case. More on this below.

Another potential criticism of our position — and particularly of our decision to treat Petitioners as "alien[s] seeking initial admission to the United States" who are prohibited from invoking the Suspension Clause — is that it appears to ignore the Supreme Court's precedents suggesting that an alien's physical presence in the country alone flips the switch on constitutional protections that are otherwise dormant as to aliens outside our borders. *See Mathews*, 426 U.S. at 77 ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to th[e] constitutional protection [of the Due Process Clause]."); *Zadvydas*, 533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." (citations omitted)); *see also Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Yamataya*, 189 U.S. at 100-01; *Mezei*, 345 U.S. at 212; *Leng May Ma v. Barber*, 357 US. 185 (1958); *Plyler v. Doe*, 457 U.S. 202 (1982). Again, this criticism is misplaced for two principal reasons.

First, and perhaps most fundamentally, most of the cases cited above did not involve aliens who were seeking initial entry to the country or who were apprehended immediately after entry. *See, e.g., Yick Wo*, 118 U.S. at 358 (long-time resident alien); *Mathews*, 426 U.S. at 69 (lawfully admitted resident aliens); *Plyler*, 457 U.S. at 206 (undocumented resident aliens); *Zadvydas*, 533 U.S. at 684-85 (long-time resident aliens). And as for the cases that *did* involve arriving aliens, the Court rejected the aliens' efforts to invoke additional protections based merely on their presence in the territorial jurisdiction of the United States.29[5] *See Mezei*, 345 U.S. at 207 (former resident alien held on Ellis Island seeking readmission after extended absence); *Leng May Ma*, 357 U.S. at 186 (arriving alien allowed into the country on parole pending admission determination). Thus, Petitioners can draw little support from these latter cases.

Second, the Supreme Court has suggested in several other opinions that recent clandestine entrants like Petitioners do not qualify for constitutional protections based merely on their physical presence alone. *See Yamataya*, 189 U.S. at 100-01 (withholding judgment on question "whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part

[29] Petitioners make much of the fact that the Court extended constitutional due process protections to the alien in *Yamataya* despite her short stint in the United States. *See 189 U.S. at 87, 100-01*. Petitioners' reliance on this case ignores other language in the opinion clearly distinguishing Yamataya — an alien who was initially admitted to the country and who "ha[d] become . . . a part of its population" before being ordered deported, *id. at 101* — from very recent clandestine entrants like Petitioners, *see id. at 100*. Thus, while *Yamataya* might apply in some future case where the alien ordered removed has been in the country for a period of time sufficient "to have become, in [some] real sense, a part of our population," *id.*, that simply is not this case.

of our population, before his right to remain is disputed"); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950) ("It was under compulsion of the Constitution that this Court long ago held [in *Yamataya*] that an antecedent deportation statute must provide a hearing *at least for aliens who had not entered clandestinely and who had been here some time even if illegally*." (emphasis added)); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien *lawfully enters and resides in this country* he becomes invested with the rights guaranteed by the Constitution to all people within our borders." (emphasis added)); *Landon*, 459 U.S. at 32 (1982) ("[O]nce an alien gains admission to our country *and begins to develop the ties that go with permanent residence* his constitutional status changes accordingly." (emphasis added)); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (stating in dicta that "aliens receive constitutional protections when they have come within the territory of the United States *and developed substantial connections with this country*" (emphasis added)). At a minimum, we conclude that all of these cases call into serious question the proposition that even the slightest entrance into this country triggers constitutional protections that are otherwise unavailable to the alien outside its borders. Such a proposition is further weakened by the Court's adoption of the "entry fiction" to deny due process rights to aliens even though they are unquestionably within the territorial jurisdiction of the United States. In other words, if entitlement to constitutional protections turned entirely on an alien's position relative to such a rigid conception as a line on a map, then the Court's entry-fiction cases such as *Mezei* would run just as contrary to this principle as our holding in this case does.[30]

We thus conclude that, as recent surreptitious entrants deemed to be "alien[s] seeking initial admission to the United States," Petitioners are unable to invoke the Suspension Clause, despite their having effected a brief entrance into the country prior to being apprehended for removal.[31]

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[30] This is not to say that an alien's location relative to the border is *irrelevant* to a determination of his rights under the Constitution. Indeed, we think physical presence is a factor courts should consider; we simply leave it to courts in the future to evaluate the Suspension Clause rights of an alien whose presence in the United States goes meaningfully beyond that of Petitioners here.

[31] In addition to the above, it is worth noting that when the Court in *Landon* stated that certain aliens lack constitutional rights regarding their application for admission, it did not categorize aliens based on whether they have *entered* the country or not; rather, the Court focused (as IIRIRA and the expedited removal regime focus) on whether the aliens are "seeking initial *admission* to the United States." *Landon, 459 U.S. at 32* (emphasis added); *see also, e.g.*, *8 U.S.C. § 1225(b)(1)* (conditioning aliens' eligibility for expedited removal, in part, on inadmissibility, even if aliens are physically present in the United States). Arguably, this suggests that, at least in some circumstances, an alien's mere physical presence in the country is of little constitutional significance unless that alien has previously applied for and been granted admission. *See* David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 Va. J. Int'l L. 673, 689 n.55 (2000) (arguing that "by emphasizing admission over entry, [*Landon*] may give more weight to" the constitutional significance of IIRIRA's focus on aliens' admissibility rather than physical location). Then again, *Landon* relied on *Knauff* to support its statement that "an alien seeking initial admission . . . has no

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Our holding rejecting Petitioners' Suspension Clause claims is true to the arc traced by the Supreme Court's plenary power cases in recent decades. It is also consistent with the Court's analytical framework for evaluating Suspension Clause challenges. Even if Petitioners would be entitled to constitutional habeas under the finality-era cases, those cases, as explained above, no longer represent the prevailing view of the plenary power doctrine, at least when it comes to aliens seeking initial admission. Instead, we must look to *Knauff*, *Mezei*, and other cases reaffirming those sea-changing precedents, all of which point to the conclusion that aliens seeking initial admission to the country — as well as those rightfully assimilated to that status on account of their very recent surreptitious entry — are prohibited from invoking the protections of the Suspension Clause in order to challenge issues relating to their application for admission. [32]

IV. CONCLUSION

We are sympathetic to the plight of Petitioners and other aliens who have come to this country seeking protection and repose from dangers that they sincerely believe

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constitutional rights regarding his application." *See* Landon, 459 U.S. at 32 (citing, inter alia, Knauff, 338 U.S. at 542). And since *Knauff* focused on whether the alien had "entered" the country, "initial admission" in *Landon* may simply be synonymous with "initial entry." At all events, our opinion should not be read to place tremendous weight on this possible distinction.

[32] Of course, as we recognized above, this is not to say that the political branches' power over immigration is limitless in all respects. We doubt, for example, that Congress could authorize, or that the Executive could engage in, the indefinite, hearingless detention of an alien simply because the alien was apprehended shortly after clandestine entrance. *Cf. Zadvydas*, 533 U.S. at 695 (noting that the question before the Court — "whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States" — does not implicate questions regarding "the political branches' authority to control entry into the United States"). And we are certain that this "plenary power" does not mean Congress or the Executive can subject recent clandestine entrants or other arriving aliens to inhumane treatment. *Cf. Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (noting that "[n]o limits can be put by the courts upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein," but distinguishing such valid exercises of power from a law allowing the Executive to subject deportable aliens to hard labor without a jury trial); *Zadvydas*, 533 U.S. at 704 (Scalia, J., dissenting) (noting the difference between the rights of aliens not to be tortured or "subjected to the punishment of hard labor without a judicial trial" and the right to remain in the country after being deemed deportable); *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987) ("The 'entry fiction' that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States determines the aliens' rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within United States territory to humane treatment." (footnote omitted)). But to say that the political branches' power over immigration is subject to important limits in some contexts by no means requires that the exercise of that power must be subject to judicial review in all contexts.

their own governments are unable or unwilling to address. Nevertheless, Congress has unambiguously limited the scope of judicial review, and in so doing has foreclosed review of Petitioners' claims. And in light of the undisputed facts surrounding Petitioners' surreptitious entry into this country, and considering Congress' and the Executive's plenary power over decisions regarding the admission or exclusion of aliens, we cannot say that this limited scope of review is unconstitutional under the Suspension Clause, at least as to Petitioners and other aliens similarly situated. We will therefore affirm the District Court's order dismissing Petitioners' habeas petitions for lack of subject matter jurisdiction.

HARDIMAN, *Circuit Judge*, concurring *dubitante*.

I join Judge Smith's excellent opinion in full, but I write separately to express my doubt that the expression of the plenary power doctrine in *Landon v. Plasencia* completely resolves step one of the Suspension Clause analysis under *Boumediene*. Although *Landon* appears to preclude "alien[s] seeking initial admission to the United States" from invoking any constitutional protections "regarding [their] application[s]," the question of what constitutional rights such aliens are afforded was not squarely before the Supreme Court in that case because the petitioner was a returning permanent resident. 459 U.S. 21, 23, 32 (1982). Nor did the Court in *Landon* purport to resolve a jurisdictional question raising the possibility of an unconstitutional suspension of the writ of habeas corpus.[1]

Despite my uncertainty about *Landon*'s dispositive application here, I am convinced that we would reach the same result under step two of *Boumediene*'s framework. Unlike the petitioners in *Boumediene*—who sought their release in the face of indefinite detention—Petitioners here seek to alter their status in the United States in the hope of *avoiding* release to their homelands. That prayer for relief, in my view, dooms the merits of their Suspension Clause argument that 8 U.S.C. § 1252(e) provides an "inadequate or ineffective" habeas substitute. …

Additional Notes and Questions:

[1] *Landon* may also be at odds with the proposition that "the Suspension Clause protects the writ 'as it existed in 1789.'" *INS v. St. Cyr, 533 U.S. 289, 301, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)* (quoting *Felker v. Turpin, 518 U.S. 651, 663-64, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996)*; *see also Boumediene v. Bush, 553 U.S. 723, 746, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008)*. *See generally* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Context, and American Implications*, *94 Va. L. Rev. 575, 675-76 (2008)* ("A sample of newspapers from the 1780s provides four instances of the use of the writ by slaves in Connecticut, New Jersey, Pennsylvania, and Maryland. These suggest that the use of the writ was not confined to native-born British-American citizens of European ancestry, and that American usage was paralleling that in England and its colonies. Indeed, it is difficult to imagine that Americans were not aware of reports of the decision in Somerset's Case of 1772, in which Chief Justice Mansfield ruled that a slave in England could not be held in custody.").

1. Is There No Habeas Even for a Detained Asylum Seeker? Many of the plaintiffs in the *Castro* case began hunger strikes in late August and early September 2016 to challenge their continued detention. http://www.nytimes.com/2016/09/03/nyregion/22-migrant-women-held-in-pennsylvania-start-a-hunger-strike-to-protest-detention.html?_r=0.

Lead counsel for the plaintiffs sought rehearing or en banc review and a petition for certiorari before the Supreme Court. Both were denied.

2. Later Developments for Some of the Children in *Castro*. For some of the children held at Berks, attorneys stepped forward and began to pursue state juvenile court procedures to have the children declared "special immigrant juveniles." This is a unique path to status for children who have been abused, neglected, abandoned by one or both parents. For several of these children, the required state court findings were made and their petitions for permanent residence were pending before the USCIS. A renewed habeas request for these children succeeded before a different panel of Third Circuit judges. *Osorio-Martinez v. AG United States,* 893 F.3d 153 (3d Cir. 2018). That panel found that to deny these children a fair procedure might indeed evoke a due process claim because they now had a significant stake in the United States by virtue of their pending classification as "special immigrants."

Special Immigration Juvenile Status is discussed in Chapter 4 and in Chapter 7. The relevant statute is INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

The approach used in this case may help others who can demonstrate eligibility or filing for an immigrant status and therefore may have an ability to challenge the fairness of the expedited removal procedures.

3. What Does Habeas Provide? If the plaintiffs in *Castro* had succeeded in obtaining habeas jurisdiction and sought judicial review of the denial of the credible fear or asylum claims, what types of challenges might they raise? Are they testing the expedited removal process or the merits of the decisions in their individual asylum claims? Or both?

4.Would a Grant of Jurisdiction Dismantle Expedited Removal? Does providing for judicial review of CBP decisions necessarily mean that the process cannot be "expedited?" Can you envision a system that would allow judicial review but not undermine congressional goals of rapid process? Most of the plaintiffs in the *Castro* case have been held for more than one year, but adjudications in the individual cases were complete in most cases within a matter of weeks.

5. Problems with Detention. Later in this Chapter we discuss detention of people seeking admission. See *Clark v. Martinez,* text at page 212. The Berks detention center is also currently in litigation because the facility lost its certification as a detention facility for juveniles. The state obtained a stay of an order forcing removal of the children while the case is appealed.

6. The Detention of Children. For over twenty years, the federal government has been under a consent decree requiring special protections for immigrant children in detention. The settlement was part of the *Reno v. Flores* litigation. In the summer of 2016, the Ninth Circuit ruled that children, even those held with their parent, must not be detained longer than necessary and can

only be held in appropriate facilities. *Flores v. Lynch,* 828 F.3d 898 (9th Cir. 2016). The Ninth Circuit upheld the settlement agreement again in 2017. *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017).

As of this writing, the children continue to be held with their mothers in two facilities: Berks in Pennsylvania and a 2400+ bed facility in Dilley, Texas. On June 27, 2017, after a hearing on the enforcement action, the District Court again found the government had violated the settlement agreement by holding children in detention centers that are not licensed facilities. Order of Judge Gee, Central District of California in *Flores v. Sessions*, CV 85-4544 DMG (AGRx) (June 27, 2017). Among other things the District Court ordered the appointment of a special juvenile monitor.

On July 26, 2018, in a renewed enforcement action under *Flores,* Judge Gee again ordered special monitoring of the conditions of confinement for minors. The counsel in *Flores* brought additional claims and concerns about the arrest of minors within the United States but also the forced medication and poor conditions of juvenile detention. *See* https://www.cnn.com/2018/07/27/us/federal-judge-independent-monitor-migrant-children/index.html.

Insert to page 202 (§ 2.03): Add the following before the Yale-Loehr and O'Neill article:

See Lenni B. Benson, *Immigration Adjudication: The 'Missing Rule of Law'*, Center for Migration Studies (May 2017), *available at* http://jmhs.cmsny.org/index.php/jmhs/article/view/87. In this essay, Benson noted that 88% of all removals occur outside the immigration courts.

Page 202 (§ 2.03): New Note: Further Expansion of Expedited Removal

In a policy memorandum issued on February 20, 2017, DHS Secretary John Kelly directed the component division of DHS to consider ways to implement President Trump's order on border security. The memorandum is at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

Of particular interest to our discussion of expedited removal is the memorandum's exploration of expanding expedited removal to all persons found within the territory of the United States who have both not been here more than two years and are subject to INA §§ 212(a)(6) or 212(a)(7). As of June 2017, DHS has not implemented this expansion. The new possible expansion of expedited removal into the interior raises serious constitutional concerns.

One report estimates that over 328,000 people currently residing in the United States might be subject to the expansion of expedited removal if it occurs. Immigrant Legal Resource Center, *Fair Treatment Denied: The Trump Administration's Troubling Attempt to Expand "Fast Track" Deportations*, at https://www.ilrc.org/report-expedited-removal-expansion.

Page 209 (§ 2.04): The link at the end of Note 1 no longer works.

Pages 210-34 (§ 2.04): This section discusses how far into the territorial United States Border Patrol officers can act. For a recent case on this issue, see *Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668 (6th Cir. 2013). In that case a group of individuals alleged that they were illegally stopped, searched, and/or detained by Border Patrol officers in Ohio based upon their Hispanic appearance, race, and ethnicity. The court of appeals rejected the government's sovereign immunity claim and allowed the case to go forward.

Page 211 (§ 2.04): Replace the link for the Miami Herald article. Working link: http://www.latinamericanstudies.org/mariel/triumph.htm

Page 231 (§ 2.04): Replace the link for the Administrative Conference report in Note 2 with the following link: https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf.

Page 232 (§ 2.04[A]): Note 4 discusses the detention of children. This issue has become even more pressing as the number of unaccompanied children crossing the U.S-Mexico border from Central America has rapidly increased. See the update to Chapter one for a chart on the nearly 250,000 unaccompanied children who entered the United States between 2013 and 2018.

Between October 2013 and June 2014, over 50,000 unaccompanied children have been apprehended on the U.S.-Mexican border. Fernanda Santos, *Border Centers Struggle to Handle Onslaught of Young Migrants*, N.Y. Times, June 18, 2014, http://www.nytimes.com/2014/06/19/us/border-centers-struggle-to-handle-onslaught-of-children-crossers.html. A June 20, 2014 White House fact sheet on the U.S. government's response to the crisis is at http://www.whitehouse.gov/the-press-office/2014/06/20/fact-sheet-unaccompanied-children-central-america. Among other things the administration announced that it is opening additional detention facilities. For a critique of this approach, see http://www.humanrightsfirst.org/press-release/response-surge-unaccompanied-minors-and-families-us-mexican-border-must-reflect.

The CBP reported that in fiscal year 2014, the agency apprehended 66,000 unaccompanied minors, primarily from Central America, and nearly 67,000 adults with very young children. Children are not subject to regular expedited removal under INA § 235(b); 8 U.S.C. § 1225(b), but instead are taken into custody and turned over to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services for detention. Adults traveling with their children can be subjected to expedited removal, but only after an opportunity to make a claim for protection and to request a credible fear interview. The federal government opened several "family detention centers" to detain the parents and young children as a part of the inspection process. *See, e.g.*, Julia Preston, *Hope and Despair as Families Languish in Texas Immigration Centers*, N.Y. Times, June 14, 2015, http://www.nytimes.com/2015/06/15/us/texas-detention-center-takes-toll-on-immigrants-languishing-there.html

Stephen Manning has produced a detailed and illustrated narrative reporting on the experiences of lawyers and students who volunteered to provide legal assistance to detain women and children. *See* https://innovationlawlab.org/the-artesia-report/the-artesia-report/.

Attorneys who volunteer at the detention centers have found that one of their first challenges is trying to establish the scope and role of attorneys in the context of expedited removal adjudication and the narrow scope of inquiry in immigration proceedings to review a credible fear determination.

On July 7, 2016, the Ninth Circuit reaffirmed the twenty-year-old settlement in *Reno v. Flores*, finding that the federal government may not detain children except as required under the conditions of the settlement. The ruling applies to children who might have been arrested with a parent. The Ninth Circuit did not order the wholesale release of the parents, however, creating a difficult challenge for DHS to secure the safe release of children if they are unwilling to release a parent. *Flores v. Lynch,* 828 F.3d 898 (9th Cir. 2016), now renamed *Flores v. Sessions* in the on-going enforcement litigation. See above for a discussion of the June 27, 2017 enforcement order appointing a monitor over the conditions of detention.

In Chapter 6, we discuss some of the special immigration procedures initiated in response to the influx of children and the release of thousands of adults with children who were admitted into the United States but placed in regular removal proceedings under INA§ 240; 8 U.S.C. § 1229a. In Chapter 7 we visit some of the forms of relief available to children, in particular, a path to permanent residence called "special immigrant juvenile status." In Chapter 8 we explore asylum and other humanitarian protections.

Page 232 (§ 2.04[A]): Add a new note 5:

5. When is Mandatory Detention Limited? As we have seen, Congress appeared to mandate detention for several classes of noncitizens in INA § 236; 8 U.S.C. § 1226(c). On its face, the statute appears to deprive immigrant detainees of a right to a bond hearing. Litigants chipped away at the statutory rigidity and have found successful arguments that ensure a right to a bond hearing before an immigration judge.

In 2015, the Ninth Circuit interpreted the mandatory detention statute to include a right to a bond hearing after six months of detention. *Rodriguez v Robbins*, 804 F.3d 1060 (9th Cir. 2015). The Ninth Circuit relied on the doctrine of constitutional avoidance. The Ninth Circuit cited statistics to note that approximately 429,000 noncitizens a year are detained and that roughly 33,000 individuals are in immigration detention on any given day. *Id*. at 1065 (9th Cir. 2015).

In February 2018, the Supreme Court reversed and remanded the Ninth Circuit's decision. 583 U.S. ___, 138 S. Ct. 830 (2018). The majority disagreed that the canon of constitutional avoidance required the insertion of a bond hearing, finding that Congress clearly intended to prevent any bond during certain forms of detention, including, people detained as part of the expedited removal process. We excerpt the Supreme Court decision below in Chapter 6.

6. When is Parole a Possibility? As you have seen in reading the expedited removal statute and regulations, DHS can detain all people denied entry while in the expedited removal process. But for those people who are seeking asylum and are then placed into regular removal proceedings, the DHS began to also use continued detention. In 2018, nine people who had passed a credible fear interview but who continued to be detained without a right to bond sued, alleging that the

failure to exercise discretion to release from detention violated the agency's own guidance documents, thereby violating the Administrative Procedure Act and due process. The federal district court agreed and issued an injunction. *Damus v. Nielsen*, 2018 U.S. Dist. LEXIS 109843 (D.D.C. July 2, 2018).

Page 235 (§ 2.04): The link in Note 3 to the Customs and Border Protection website does not seem to work properly. Possible alternate link: https://www.cbp.gov/travel/us-citizens for citizens and https://www.cbp.gov/travel/international-visitors for noncitizens.

Page 236 New Note 5. Privacy and Rights at the Border
A case in the District Court of Massachusetts challenged the search and seizure of the electronics and personal data of David House, a computer programmer who was legally associated with the Bradley Manning Support Network. In 2013, the government settled, and said that they would destroy the remaining copies of House's data. It also released all documents pertaining to the investigation of House by DHS and the Army CID. Information about the case is at https://www.aclu.org/cases/house-v-napolitano.

For further information about the ACLU and its views on privacy at the border, visit their website at https://www.aclu.org/issues/privacy-technology/privacy-borders-and-checkpoints/electronic-device-searches.

In *United States v. Saboonchi*, 990 F. Supp. 2d 536 (D. Md. 2014). the court found that a CBP officer had reasonable suspicion of criminal activity that authorized a search and seizure of a computer hard drive. The court denied a motion to suppress. Mr. Saboonchi had previously been investigated for export violations, and lied about where equipment he had purchased would be used.

However, in *United States v. Linarez-Delgado*, 2007 U.S. App. LEXIS 29485 (3d Cir. Dec. 19, 2007), the Third Circuit did not believe that reasonable suspicion of criminal activity was necessary to authorize a search. The court held that since Mr. Linarez-Delgado was already detained, "[s]uch searches fell within the broad authority granted to customs officers." Id. at *3.

In *Cruz-Ramos v. Holder*, 2014 U.S. App. LEXIS 9287 (2d Cir. May 20, 2014), an appeal to the Second Circuit was successful. While the petitioner did not provide an affidavit that described sufficiently egregious conduct by the government, the Second Circuit remanded to the agency to allow Cruz-Ramos an opportunity to challenge the circumstances surrounding his arrest and search. The court found that the immigration judge had improperly placed the burden on the Cruz-Ramos

In *United State v. Djibo*, 151 F. Supp. 3d 297 (E.D.N.Y. 2015), the court found that the search of Djibo's phone at the border violated Djibo's Fourth amendment rights. The court ruled that the defendant was "deemed to be in custody" when his phone was seized at the airport. In this case, the court found the phone was not part of the ordinary border search that was originally focused on importing currency. Accordingly, the court found the defendant's *Miranda* rights were violated. The government tried to argue that the phone search as a natural progression and therefore lawful

as an expansion of the warrantless search of currency at the border. The district court rejected this argument.

In contrast, see *United States v. Tajah*, 2016 U.S. Dist. LEXIS 89776 (W.D.N.Y. July 11, 2016). In this case, the primary issue presented was at what point does a border inspection become a criminal investigation? Mr. Tajah and Ms. Notice (Tajah's wife, also a permanent resident) were taking a bus from Canada to New York. They crossed the border and then entered the bus terminal to be inspected. Ms. Notice presented her passport and green card and completed inspection. The CBP agent examined the passport Tajah presented and began to ask additional questions. Dissatisfied, the CBP agent told Mr. Tajah he would need to be questioned in secondary inspection. In separate interrogations both Mr. Tajah and Ms. Notice confessed that Mr. Tajah had used a false passport, and revealed his true name and identity. The government subsequently accused Mr. Tajah of illegal reentry of an alien removed for an aggravated felony, misuse of another person's passport, a false claim of U.S. citizenship, false statements to federal law enforcement agents, and aggravated identity theft. The government accused Ms. Notice of misuse of another person's passport, encouraging and inducing illegal reentry, false statements to federal law enforcement agents, and aggravated identity theft. Ms. Notice sought to suppress statements she made to CBP officers at the U.S./Canadian border. Her counsel argued that she was entitled to *Miranda* rights before the CBP posed any questions to her. The district court denied her motion to suppress her statements, and found that the CBP had read her the *Miranda* rights when they took her into secondary inspection. The court concluded her statements were voluntary and could be used in against her.

Chapter 3: Nonimmigrant Visas and Maintaining Status in the United States

General Note: The U.S. Department of State (DOS) has created a new electronic version of the Foreign Affairs Manual (FAM). The new FAM is available at https://fam.state.gov/. We have not updated FAM citations in Chapter 3. Please use the search tool on the FAM website to find the current version of an old citation.

Page 245 (§ 3.01[A][2]) The Department of State 30/60 Day Rule

Change the first paragraph in section [2] to read:

On September 1, 2017, the Department of State (DOS) updated the Foreign Affairs Manual (FAM) with new guidance concerning the timing and sequence of events that a consular or U.S. immigration officer should consider to determine whether a foreign national has violated INA § 212(a)(6)(C). Previously, the DOS used a rule commonly referred to as the "30/60 Day Rule" to determine the foreign national's intent and whether a misrepresentation may have been made to the consular officer when the foreign national applied for a visa or to the U.S. immigration officer when the foreign national applied for admission at a port of entry. See the excerpt below:

In the middle of the page, at subsection *a.*, change the following:

"… relatives, etc. and the violates such status by:"

To read instead:

"… relatives, etc. and then violates such status by:"

At the end of the excerpt on page 246, replace:

"The USCIS follows the State Department's guidelines in their adjudication process."

With the following:

The DOS has eliminated the 30/60 Day Rule and added new sections regarding status violations or "inconsistent conduct" within 90 days of entry. Under the new 90-Day Rule, a presumption of willful misrepresentation applies to the foreign national who violates his nonimmigrant status or engages in conduct inconsistent with his status within 90 days of admission. 9 FAM 302.9(B)(3)(g), (h) [new]. "Inconsistent conduct" that triggers the new rule includes:

- Engaging in unauthorized employment;
- Enrolling in a course of academic study, if such study is not authorized for that nonimmigrant classification (e.g. B status);
- A nonimmigrant in B or F status, or any other status prohibiting immigrant intent, marrying a United States citizen or lawful permanent resident and taking up residence in the United States; or

- Undertaking any other activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment.

9 FAM 302.9(B)(3)(g)(2), (3)

Page 246 (§ 3.01[A][3]): Changed Circumstances

Change paragraph [3] to read as follows:

Under the new 90-Day Rule, a presumption of willful misrepresentation applies to a foreign national who violates his status or engages in conduct inconsistent with his status, as described above, within 90 days of admission. Under the old rule, the foreign national could argue changed circumstances following admission to overcome the 30/60 Day Rule. Can he argue changed circumstances under the new rule as well?

Previously, violations that occurred more than 60 days after entry in the United States were not considered a basis for inadmissibility under INA § 212(a)(6)(C)(i). Under the new rule, what happens to the foreign national whose "inconsistent conduct" occurs more than 90 days after admission? Now, a presumption of willful misrepresentation does not arise if the foreign national violates his status or engages in activities inconsistent with his status more than 90 days after admission. However, if the facts of the case give rise to a "reasonable belief" that the foreign national misrepresented the purpose or intent of his travel to the United States when he applied for his visa or for admission, the consular officer must request an Advisory Opinion from the DOS visa office. 9 FAM 302.9(B)(3).

Page 250 (§ 3.01[A][5]): Change the following in the first full paragraph:

See 8 C.F.R. §§ 214.2(h)(16), (e)(4), (l)(16), (o)(13), (p)(15) ; 22 C.F.R. § 214.15.

To read instead:

See 8 C.F.R. §§ 214.2(h)(16), (e)(5), (l)(16), (o)(13), (p)(15).

Page 250 (§ 3.01[A][5]): Change the following in the middle of the page, at paragraph (F)(i):

"…who is a bona fide student qualified to pursue a full courts of stayed and who week to enter …"

To read instead:

"…who is a bona fide student qualified to pursue a full course of study and seeks to enter …"

Page 252 (§ 3.01[B]): Change the following in the middle of the page, in the paragraph beginning "A noncitizen in transit …":

"With very few exceptions, a nonimmigrant will receive a new I-94 form every time he or she enters the country."

To read instead:

"Although the CBP now maintains all I-94 forms online, a nonimmigrant will still almost always receive a new I-94 form every time he or she enters the country by land. It is the foreign national's responsibility to check the CBP website at http://www.cbp.gov/ to obtain a copy of that document."

At the end of this paragraph add this additional citation:

" ; *see also* U.S. Customs and Border Protection, *Arrival/Departure Forms: I-94 and I-94W*, https://www.cbp.gov/I94/ (last updated Jan. 5, 2018)."

Page 256 (§ 3.02[A][1]): At the top of the page, replace the paragraph starting "Noncitizens from certain countries…" with the following:

Under the Visa Waiver Program (VWP), a noncitizen from an approved participating nation may travel to the United States to engage in B-2 or B-1 activities for up to 90 days without a visa. For a current list of participating countries and additional information about the VWP, see Bureau of Consular Affairs, U.S. Dep't of State, *Visa Waiver Program*, https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html (last visited July 13, 2018).

Any person seeking to use the VWP to travel to the United States must first apply for authorization through the Electronic System for Travel Authorization (ESTA). ESTA is an automated web-based system used by the Department of Homeland Security to determine an individual's eligibility to travel to the United States without a visa for tourism or business. ESTA approval authorizes a traveler to board a carrier for travel to the United States under the VWP. ESTA is not a visa. Individuals traveling on a valid visa are not required to apply for ESTA. Approved ESTA applications are valid for two years or until the traveler's passport expires, whichever comes first. ESTA became mandatory on January 12, 2009. For more information, see U.S. Customs and Border Protection, *Official ESTA Application*, https://esta.cbp.dhs.gov/esta/ (last visited July 13, 2018).

Page 257 (§ 3.02[B]): Replace the third paragraph beginning "Admission for duration…" with the following:

Admission for duration of status allows a foreign national to remain in the United States as long as he or she maintains status. Generally, maintenance of status means that he or she remains a student in good standing and enrolled in a degree-granting program. Recently, however, maintaining status has become more complicated for foreign students and exchange visitors (F and J nonimmigrants who were admitted to the United States for duration of status (D/S)). In January 2017, President Trump issued Executive Order 13768, Enhancing Public Safety in the Interior of the United States. 82 Fed. Reg. 8799 (Jan. 30, 2017). On May 11, 2018, USCIS issued a policy memo changing how the agency will calculate unlawful presence for students and exchange visitors in F, J and M who fail to maintain their status in the United States. USCIS Policy Memorandum on Accrual of Unlawful Presence and F, J, and M Nonimmigrants, PM-602-1060

(May 10, 2018). This policy memorandum, effective August 9, 2018, identifies when a student can start to accrue unlawful presence due to his or her failure to maintain status. A more detailed discussion on this topic can be found in Chapter 5 in the discussions on unlawful presence as a ground of inadmissibility. Foreign national students who maintain their status can seek approval from their student advisor and USCIS to extend their stay to include a period of Optional Practical Training (OPT). The length of the OPT will depend on the nature of the student's field of study. Most students are limited to a total of 12 months of postgraduate training. In May 2016, a revised STEM optional practical training program took effect. Under the new regulations, F-1 students with qualifying STEM degrees may hold OPT status for up to 36 months (i.e., an initial period of 12 months plus 24 months of STEM OPT). The Student and Exchange Visitor Program maintains a list of fields of study that DHS considers to be science, technology, engineering, or mathematics (STEM) fields for purposes of the 24-month STEM OPT extension described at 8 C.F.R. § 214.2(f). For more information, see Dep't of Homeland Sec., *Study in the States: STEM OPT*, https://studyinthestates.dhs.gov/stem-opt-hub (last visited July 13, 2018). The DHS regulations grant all foreign students a 30- to 60-day grace period that follows the completion of any OPT. *See* 8 C.F.R. §§ 214.2(f)(5), 214.2(f)(10)(ii). The foreign student can use this 30- to 60-day grace period to wind up his or her affairs in the United States as he or she prepares to return abroad, transfer to another school, or apply for a change of status to another nonimmigrant visa classification.

Page 258 (§ 3.02[B][1]): Add the following to the end of the introductory first paragraph about F-1 students, before the first full paragraph on that page:

According to U.S. Immigration and Customs Enforcement (ICE), in March 2018, the total number of active nonimmigrant students in the United States on F-1 and M-1 visas and their dependents exceeded 1.20 million. This figure represents a 0.5% decrease in admissions since March 2017. STUDENT & EXCHANGE VISITOR PROGRAM, SEVIS BY THE NUMBERS: BIANNUAL REPORT ON INTERNATIONAL STUDENT TRENDS (April 2018), https://www.ice.gov/doclib/sevis/pdf/byTheNumbersApr2018.pdf.

Page 258 (§ 3.02[B][1]):

In the paragraph near the bottom of the page beginning "F-1 students who…", change "an additional 17 months of OPT" to "an additinal 24 months of OPT."

Page 259 (§ 3.02[B][1]): Add the following to the end of the list of STEM fields at the top of the page:

This list can also be found at Dep't of Homeland Sec., *Study in the States: Eligible CIP Codes for the STEM OPT Extension*, https://studyinthestates.dhs.gov/eligible-cip-codes-for-the-stem-opt-extension (last visited July 13, 2018).

Page 259 (§ 3.02[B][1]). Add the following additional citation to the end of the first full paragraph:

; Dep't of Homeland Sec., *Study in the States: STEM OPT*, https://studyinthestates.dhs.gov/stem-opt-hub (last visited July 13, 2018).

Page 259 (§ 3.02[B][1]). Add the following to the end of the second full paragraph, beginning "In addition to…":

Further, tudents granted OPT can lose it if they transfer to another school or begin study at another educational level (e.g. beginning a master's program after completing a bachelor's degree). Transferring will terminate their OPT as well as their corresponding employment authorization document (EAD). It is important to note that although their OPT will end when they transfer to another school, their F-1 status is not affected provided they comply with all requirements necessary to maintain their status (i.e., not working after their OPT has terminated and their EAD invalidated). *See* USCIS, *Automatic Termination of Optional Practical Training for F-1 Students If They Transfer to a Different School or Begin Study at Another Educational Level*, https://www.uscis.gov/news/alerts/automatic-termination-optional-practical-training-f-1-students-if-they-transfer-different-school-or-begin-study-another-educational-level (last updated May 18, 2018).. Remaining in the United States in violation of status can result in the accrual of unlawful presence. See discussion in Chapter 5.

Page 261 (§ 3.02[C]): Add the following immediately after the section title, before the paragraph beginning "The H-3 category…":

This subsection contains information about various nonimmigrant visa categories that allow foreign nationals to work in the United States (i.e., H-1B, L-1, TN, etc.). As you read about these categories, consider how the number of foreign national students in the United States may affect H-1B demand and the hiring practices of U.S. employers seeking qualified candidates to fill positions that may be in short supply in the local U.S. work force. Consider as well what impact the recent Executive Orders of the Trump administration have on the prospective employee candidate pool and business interests of U.S. employers.

Page 261 (§ 3.02[C][1]): Add the following new paragraph at the bottom of the page, after the end of the last paragraph about H-1B workers:

All spouses and accompanying children of H-1B holders hold H-4 designations. Effective May 26, 2015, certain H-4 spouses may apply for employment authorization. 80 Fed. Reg. 10,284 (Feb. 25, 2015). Accompanying children are not allowed to work with this status. *See* 8 C.F.R. §§ 274a.12(c)(26), 214.2(h)(9)(iv).

Page 262 (§ 3.02[C][2]): At the end of the paragraph about H-2A and H-2B workers, add:

See also La. Forestry Ass'n v. Sec'y U.S. Dep't of Labor, 745 F.3d 653 (3d Cir. 2014).

Page 270 (§ 3.02[H][2]): Change the sentence in the middle of the U-1 section that currently reads:

"Foreign nationals who have been the victim of such crimes as sexual assault, torture, domestic violence, prostitution, involuntary servitude, or kidnapping may apply for U visas …"

To read instead:

"Foreign nationals who have been the victims of such crimes in the United States as sexual assault, torture may apply for U visas…"

And add the following to the end of this paragraph:

Because the number of U visa applications filed every year has increased, it now takes 2.5 to 3 years for an immigration officer to fully review and adjudicate an application. If the beneficiary is deemed eligible for U status, and visa numbers are available, a full four-year visa is issued to the beneficiary. The USCIS estimates approximately four years for an applicant to become eligible to receive the visa. The U visa recipient becomes eligible for deferred action and can apply for an employment authorization document (EAD) while waiting to apply for permanent resident status.

For additional information about U visas, see EUNICE HYUNHYE CHO, NATIONAL EMPLOYMENT LAW PROJECT, U VISAS FOR VICTIMS OF CRIME IN THE WORKPLACE: A PRACTICE MANUAL (2014), https://www.nelp.org/wp-content/uploads/2015/03/U-Visas-for-Victims-of-Workplace-Crime-Practice-Manual-NELP.pdf.

Page 270 (§ 3.02[H][3]): Replace the following two sentences at the start of the T-1 section:

"In addition to the U visa, VTCPA created the T visa classification. The T visa was created to prevent the exploitation of women and children in the sex trade."

To read instead:

"In addition to the U visa, VTVPA created the T visa classification. Congress created this visa classification to protect foreign nationals from severe forms of trafficking, including commercial sex trafficking or labor or services that result in the victim's involuntary servitude, peonage, debt bondage, or slavery. INA § 101(a)(15)(T); 8 USC §1101(a)(15)(T).

Page 285 (§ 3.03[B][2]): After Problem 3-1, Notes and Questions 1 and 2, add the following question:

3. Parole for Entrepreneurs. On January 17, 2017, DHS published a new rule designed to expand the authority of DHS (USCIS, ICE and CBP) to grant parole status on a case-by-case basis to foreign nationals who are founders of promising start-up companies. The rule was scheduled to take effect July 17, 2017, but the Trump administration published a final rule to delay the implementation date to March 14, 2018. On May 25, 2018, DHS proposed a rule to end the program. 83 Fed. Reg. 24,415 (May 29, 2018).

If the new parole rule ever takes effect, it is designed to facilitate the ability of certain entrepreneurs and business innovators to start growing their companies within the United States, thereby helping to improve the U.S. economy by increased capital spending and job creation. Dep't of Homeland Sec., Memorandum on Policies Supporting U.S. High-Skilled Businesses and Workers (Nov. 20,

2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_business_actions.pdf.

Under the new rule, parole would be extended to up to three entrepreneurs per start-up company, as well as to their spouses and children. Foreign nationals granted parole would be eligible to work for the start-up company only. Their spouses could apply for work authorization in the United States. However, their children would not be eligible for work authorization.

To be considered for parole under the new rule, entrepreneurs would have to show that they meet the following criteria:

1. They possess a substantial ownership interest in a start-up that was created in the United States within the last five years, and which has substantial potential for rapid growth and job creation;
2. They have an active and central role in the start-up company, such that they are positioned to assist substantially with the growth and success of the business; and
3. They can prove that their stay in the United States will provide a significant public benefit to the United States based on the foreign national's role as an entrepreneur of the start-up company by showing that the start-up company:
    a. Has received a significant investment of capital from qualified U.S. investors with records of successful investments;
    b. Has received significant awards or grants for economic development, research and development, or job creation from federal, state, or local government entities; or
    c. Partially meets one or both of the criteria above and provides additional reliable and compelling evidence of the company's substantial potential for rapid growth and job creation.

USCIS, Press Release, USCIS Proposes Rule to Welcome International Entrepreneurs (Aug. 26, 2016), https://www.uscis.gov/news/news-releases/uscis-proposes-rule-to-welcome-international-entrepreneurs; 82 Fed. Reg. 5238 (Jan. 17, 2017) (final rule).

If the new rule takes effect, can Manuel take advantage of it for his upcoming trip to the United States? What other information do you need about this new parole program before you can recommend it to Manuel?

Page 286 (§ 3.03[B][3]): At the top of the page, delete the paragraph beginning "The countries that participate in the VWP as of the fall of 2012 include: …" and replace with the following paragraph:

The countries that participate in the VWP include: Andorra, Australia, Austria, Belgium, Brunei, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lichtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan, and the United Kingdom (England, Scotland, Wales, Northern Ireland, the Channel Islands, and the Isle of Man). Bureau of Consular Affairs, U.S. Dep't of State,

Visa Waiver Program, https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html (last visited July 13, 2018).

Page 286 (§ 3.03[B][3]): After the paragraph that starts "Read 8 C.F.R. § 217.2(a) for definitions …", insert the following new paragraph:

In December 2015, Congress signed into law the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 as part of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242. This law establishes new eligibility requirements for VWP travel, including travel restrictions. Among other requirements, all VWP travelers had to have an electronic passport to travel to the United States by April 1, 2016. In addition, travelers who have been to Iran, Iraq, Libya, Somalia, Sudan, Syria, or Yemen on or after March 1, 2011 (with limited exceptions) or who are nationals of these countries are no longer eligible for VWP travel to the United States. The new law exempts travelers preforming military service in the armed forces of a VWP country or performing official duties in a full-time capacity in the employment of a VWP country government. DHS may also waive exclusion from the VWP program if it would be in the national security or law enforcement interests of the United States. *See generally* Dep't of Homeland Sec., Press Release, DHS Announces Further Travel Restrictions for the Visa Waiver Program (Feb. 18, 2016), https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program.

Page 289 (§ 3.03[B][4]): After the section on domestic or household servants, before § 3.03[C] begins, add the following:

SAME SEX COUPLES

On June 26, 2013, the U.S. Supreme Court overturned Section 3 of the Defense of Marriage Act. United States v. Windsor, 570 U.S. 744 (2013). The Court held that restricting the interpretation of "marriage" and "spouse" to apply only to heterosexual couples violated the Equal Protection Clause of the Fourteenth Amendment. After *Windsor*, the Obama administration quickly took steps to implement federal government benefits for same-sex couples. For example, same-sex couples are now treated the same as heterosexual couples when applying for immigration benefits.

Same-sex spouses and their children are now eligible for nonimmigrant visa derivative status such as H-4 and L-2 status. Similarly, a U.S. citizen or lawful permanent resident in a same-sex marriage may file a Form I-130 immigrant petition for alien relative on behalf of their same-sex spouse. See Chapter 4 for further discussion.

The Supreme Court took *Windsor* one step further when it decided *Obergefell v. Hodges*, 135 S. Ct. 2584, on June 26, 2015. In *Obergefell*, the Court essentially nullified any ban on same-sex marriage in the United States.

Consider what this change means for Manuel's partner, Carlos, in Problem 3-1 on page 274.

Page 291 (§ 3.03[C]): After Problem 3-2, Notes and Questions 1 and 2, add the following new notes:

3. **H-1B Computer-Related Positions**. On March 31, 2017, the USCIS issued a new policy memo rescinding the December 22, 2000 memo titled "Guidance memo on H1B computer related positions" issued by Nebraska Service Center Director Terry Way. USCIS, Policy Memorandum on Rescission of the December 22, 2000 "Guidance memo on H1B computer related positions", PM-602-0142 (Mar. 31, 2017), https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf. Director Way's memo referred to computer programmers and programmer/analysts as examples of positions in transition. Citing *Matter of Caron International, Inc.*, 19 I. & N. Dec. 791 (Comm'r 1988), the 2000 memo stated that "… employers may be able to establish a position is professional in nature by demonstrating that the higher standard of a specific baccalaureate-level degree has been consistently required for more complex positions within their organizations." The 2000 memo stated that one of the standards for a position to qualify as a specialty occupation is that the employer normally requires a degree or its equivalent for the position, which is typically associated with a consulting firm. Such a position with an employer whose business is not computer related may require closer scrutiny. A lower level positions may also be filled by a beneficiary with a 2-year degree and not qualify as a specialty occupation. The 2017 memo (PM-602-0142) acknowledges that the tech industry has evolved significantly. The memo also clearly states the standard that is to be applied to qualify for H-1B: the employer must show that the position requires the theoretical and practical application of a body of highly specialized knowledge, which requires the attainment of a bachelor's degree or higher in a related field. The memo also states that a position cannot be identified as entry level on the industry salary range, yet require a skill set and consist of job duties that are more senior, complex or specialized in nature.

In Problem 3-2, would Edgar qualify for H-1B under the Way memo? If he and his employer were coming to you now as new clients, what factors would you consider to determine Edgar's eligibility for H-1B status under the new memo?

4. Executive Order 13788 of April 18, 2017: Buy American and Hire American. In Executive Order 13788, President Trump proposed to create higher wages and employment rates for American workers by requiring the executive branch "to rigorously enforce and administer the laws governing entry to the United States of workers from abroad." 82 Fed. Reg. 18,837 (Apr. 21, 2017). His executive order requires the Departments of State, Justice, Labor, and Homeland Security to propose new rules and issue new guidelines to supersede or revise previous rules and guidance if appropriate, to protect the interests of U.S. workers in the administration of our immigration system "as soon as practicable, and consistent with [current] laws." *Id.* at § 5(a). In particular, the President's Executive Order seeks to reform the H-1B program to "ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries." *Id.* at § 5(b).

Is Edgar taking a job away from a U.S. worker or filling a gap in an industry that cannot find enough qualified U.S. workers for the jobs that are available? Does his employment in H-1B pose a threat to the economic interests of U.S. workers? How would you change the H-1B program?

(Note: The H-1B program cannot be changed by Executive Order; congressional action is required.)

Page 303 (§ 3.03[C]): Add the following after the question posed at the end of the Notes and Questions section at the bottom of page 303:

Does the foreign national have at least a U.S. baccalaureate degree or the equivalent in a field related to the job being offered? If the beneficiary has not yet matriculated, can he still claim to have at least a U.S. baccalaureate degree? What if the beneficiary claims to hold a Master's degree to qualify for H-1B cap exempt status?

In *Matter of O-A-, Inc.*, 2017 Immig. Rptr. LEXIS 23225 (A.A.O. 2017), the USCIS AAO clarified that a case-specific analysis must be conducted to determine whether, when a provisional certificate has been issued, the beneficiary has completed all substantive requirements necessary to earn the degree and the granting university or college has approved the degree. *See also* USCIS Policy Memorandum on *Matter of O-A-, Inc.*, PM-602-0144 (Apr. 17, 2017), https://www.uscis.gov/sites/default/files/files/nativedocuments/2017-4-17_PM-602-0144_Matter_of_O-A-Inc-_AAO_Adopted_Decision_2017-03.pdf. In another recent decision, *Matter of A-T- Inc*, 2017 Immig. Rptr. LEXIS 23226 (A.A.O. 2017), the USCIS clarified that to qualify for an H-1B numerical cap exemption based on a master's or higher degree, the conferring institution must have qualified as a "United States institution of higher education" at the time the beneficiary earned his or her degree. *See also* USCIS Policy Memorandum on *Matter of A-T- Inc*, PM-602-0145 (May 23, 2017), https://www.uscis.gov/sites/default/files/files/nativedocuments/APPROVED_PM-602-0145_Matter_of_A-T-_Inc_Adopted_Decision.pdf.

What if the beneficiary does not have a degree from a U.S. university or college, but completed his post-secondary education outside the United States? Continue reading the following cases to see how the USCIS and AAO consider beneficiaries who have foreign degrees, or who are claiming experience in lieu of academic credentials.

Page 313 (§ 3.03[C]): In Notes and Questions, make the following correction to the first paragraph of Note 4:

Change: "Labor Condition Application (Form ETA 9089)" to "Labor Condition Application (Form ETA 9035)"

Page 318 (§ 3.03[C]): Renumber subsection "[2] Deemed Export Compliance" as "[4] Deemed Export Compliance" and add the following two notes just before it:

[2] Moving to a New Job Site and the LCA Requirement

On April 9, 2015, the USCIS AAO issued a precedent decision: *In re Simeio Solutions, LLC*, 26 I. & N. Dec. 542 (A.A.O. 2015). The USCIS followed this decision with a policy memo concerning job site changes for H-1B visa holders. USCIS, Policy Memorandum, USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC*,

PM-602-0120 (July 21, 2015), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf. According to *Simeio*, an employer must now file an amended H-1B petition with the USCIS when a new LCA is required due to a change in the H-1B employee's worksite. The decision stated:

1) When H-1B employees change their place of employment to a worksite location that requires employers to certify a new LCA, this change may affect the employee's eligibility for H-1B; it is therefore a material change for purposes of 8 C.F.R. §§ 214.2(h)(2)(i)(E) and (11)(i)(A) (2014).

2) When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H-1B petition with the corresponding LCA.

An amended petition would not be required if the H-1B employee was moving to a new location within the same metropolitan statistical area (MSA) or "area of intended employment" defined at 20 C.F.R. § 655.715, and the previously certified LCA was posted at the new work location.

This decision and the subsequent policy memo represent a change in USCIS position. Before *Simeio*, an H-1B employee could change job sites without filing an amended H-1B petition as long as a new LCA was obtained before the employee changed worksites and as long as the change in worksite was the only change to the previously approved employment.

Why would a change to only the worksite be considered a material change in the terms and conditions of employment sufficient to require an amended petition? What about "roving employees" or temporary assignment? See 8 C.F.R. §§ 655.715 and 655.735 for references to short-term placement and non-worksite location requirements.

What happens to the foreign national's status in the United States if he or she moves to a new work site before a new LCA and amended petition can be filed with the USCIS? Or without ever notifying the USCIS of the move?

[3] Third Party Placement. Edgar Smith, the foreign national in Problem 3-2, has been working in the United States as an IT Consultant. Consultants are often required to work at third-party sites. These assignments can vary in duration from a few days to several months. Assignments can also occur at short notice. How would such an H-1B petition differ from a petition filed by a U.S. employer for a foreign national employed at a single location?

On February 22, 2018, USCIS issued a policy memo (PM-602-0157) clarifying existing requirements relating to H-1B petitions filed for foreign nationals who will be employed at one or more third-party worksites. This policy memo seeks to consolidate previous guidance and to align the H-1B program with President Trump's Buy American and Hire American Executive Order and the directive to protect the interests of U.S. workers. It requires U.S. employers to include contracts, work orders and itineraries for employees who will be working at third-party locations. Itineraries must include the dates and locations of the services to be provided. The U.S. employer must also be able to show "by a preponderance of the evidence" that the foreign national will be

employed in a specific and non-speculative qualifying assignment in a specialty occupation for the entire time requested on the H-1B petition. Copies of actual work assignments, including technical documentation, detailed work orders, milestone tables, marketing analysis and the like may be submitted to or requested by the USCIS. Letters signed by an authorized official of each ultimate end-client may be required as well. The employer must also be able to show that an employer-employee relationship will be maintained throughout the period requested, and that the petition will be properly supported by an LCA that corresponds to the actual work to be performed by the foreign national. While an H-1B petition can be approved for up to three years, USCIS retains the discretion to limit employment to the period of time the employer is able to demonstrate that it meets these requirements. Petitioners seeking to extend the foreign national's H-1B stay should establish that these requirements were met for the entire prior approval period as well. USCIS, Policy Memorandum, Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites, PM-602-0157 (Feb. 22, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf.

Page 321 (§ 3.03[D][1]): Portability: When Can Ed Start Work?

Change the following item at the bottom of the page:

"… the new petition was not filed before the beneficiary's authorized stay expired …"

To read:

"…the new petition was filed before the beneficiary's authorized stay expired …"

Page 322 (§ 3.03[D][2]): Change the following in the last paragraph:

"… U.S. employers can file their petitions with the USCIS during the first two weeks of April …"

To read:

"U.S. employers can file their petitions with the USCIS during the first five business days of April …"

Additionally, change:

"…the USCIS randomly selects and notifies …"

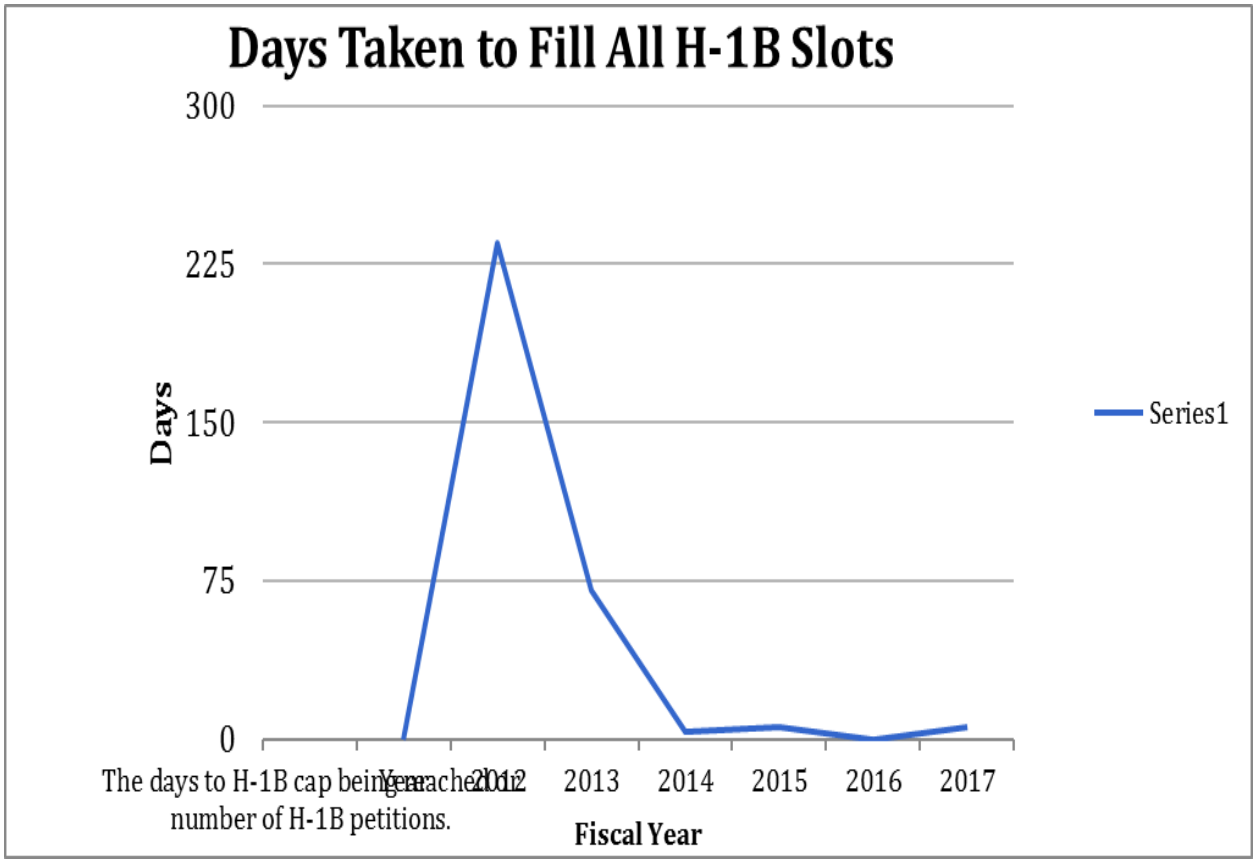
To read:

"… the USCIS conducts a computer-generated random lottery to select the petitions that will be processed and notifies …"

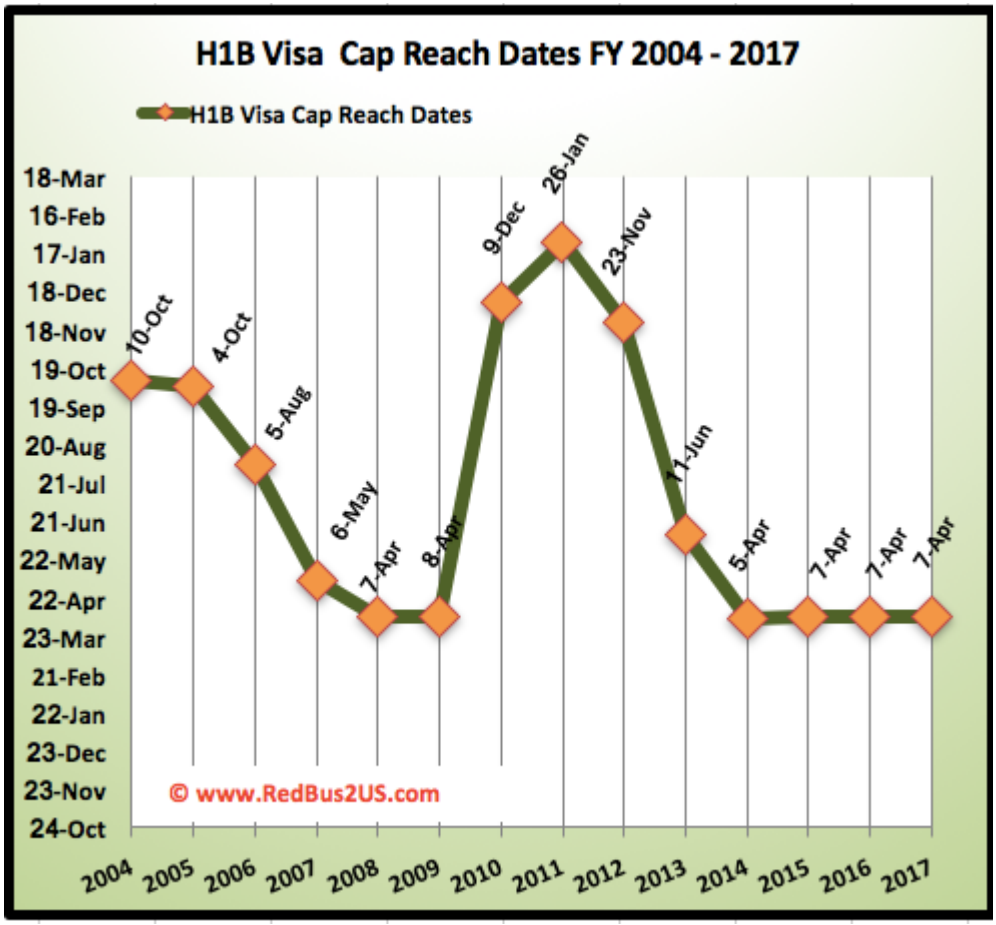
Page 323 (§ 3.03[D][2]): Add the following to the end of the paragraph that starts "What do …":

"What kind of action can an employee or new hire take when a lottery is announced?"

Page 324 (§ 3.03[D][2]): Replace Chart 1 at the top of page 324 with the following chart and text:



The days to H-1B cap being reached in each year number of H-1B petitions.



https://redbus2us.com/wp-content/uploads/2010/01/H1B-Visa-Cap-reach-dates-by-Year-from-2000-to-2018.png

2012: On June 12, 2012, the USCIS announced that all available H-1B cap numbers for fiscal year 2013 had been distributed.

2013: For the first time since 2008, the USCIS reached the statutory limit of 65,000 H-1B cap petitions for fiscal year 2014 within the first week of the filing period (April 1–6, 2013). The advanced degree exemption (i.e., H-1B cap cases filed for U.S. advanced-degree holders) was also reached during this period. On April 7, 2013, the USCIS used a computer-generated random selection process (a/k/a "lottery") to select the petitions that would be adjudicated. Petitions not selected during the lottery process were returned. The final tally of petitions received was approximately 124,000.

Since 2013, USCIS has reached the statutory limit of 85,000 petitions within the first week of April. A lottery selection process to determine which petitions filed would be adjudicated has been held every year since 2013 as well.

2014: The filing window for fiscal year 2015 opened on April 1, 2014. On April 7, 2014, the USCIS announced that sufficient H-1B cap petitions had been received during the preceding week

to meet the statutory limit of 65,000 for standard cap cases and 20,000 for advanced degree exemption cases. Due to the number of petitions received, it took the USCIS longer than anticipated to complete the data entry required to conduct the "lottery." The lottery was conducted on April 10, 2014. As of June 27, 2014, the USCIS was still returning petitions to U.S. employers that had not been selected for adjudication through the lottery process. This year, the USCIS estimated that approximately 172,000 petitions had been received during the first four days of April.

2015: In anticipation of another lottery, the USCIS announced that premium processing would be suspended for all H-1B cap subject cases so the necessary data entry could be completed for the computer-generated lottery process. When the filing window closed on April 7, 2015, the USCIS had received 266,000 petitions from U.S. employers.

2016: Similar to the preceding year, the USCIS announced that premium processing would be suspended for all H-1B cap cases so that necessary data entry could be completed for the computer-generated lottery process. When the filing window closed on April 7, 2016, the USCIS has received nearly 233,000 H-1B petitions, including petitions filed for the advanced degree exemption. On July 8, 2016, the USCIS announced that it had returned all non-selected petitions to U.S. employers. *USCIS Returns Unselected Fiscal Year 2017 H-1B Cap-Subject Petitions*, USCIS, https://www.uscis.gov/news/alerts/uscis-returns-unselected-fiscal-year-2017-h-1b-cap-subject-petitions (last updated July 8, 2016).

2017: USCIS began accepting H-1B petitions subject to the fiscal year 2018 cap on April 3, 2017. In anticipation of the filing window opening for fiscal year 2018, USCIS suspended premium processing for all H-1B petitions for six months. According to USCIS, premium processing was suspended to help it reduce overall processing times. USCIS announced that the cap had been reached on April 7, 2017, reporting that 199,000 petitions were received.

2018: USCIS began accepting H-1B petitions subject to the fiscal year 2019 cap on April 2, 2018. Similar to preceding years, USCIS suspended premium processing for all H-1B petitions during the filing period. On April 6, 2018, USCIS announced that the cap had been reached, reporting that 190,098 H-1B petitions had been filed, including advanced degree exemption petitions. The computer-generated random selection process was conducted on April 11, 2018 and petitioners were notified thereafter.

For a useful chart listing the number of H-1B petitions filed each year, see U.S. CHAMBER OF COMMERCE, *H-1B Petition Data FY1992–Present*, https://web.archive.org/web/20160222174414/http://immigration.uschamber.com/uploads/sites/400/USCC-USCIS-H1B-petition-data-and-cap-dates-FY92-FY16_2.pdf (last visited July 15, 2018).

Why do you think the number of H-1B petitions filed in 2017 and 2018 decreased?

What is the difference? The H-1B nonimmigrant visa is not the only category subject to a numerical cap. The H-2B category is limited to 66,000 a year, distributed semi-annually in

October and April. *See* INA §§ 214(g)(1)(B), 214(g)(10), 8 U.S.C. §§ 1184(g)(1)(B), 1184(g)(10) (2018).

The H-2B category is limited to foreign nationals coming to the United States to perform nonprofessional temporary services or labor. INA § 101(a)(15)(H)(ii)(b). The employer's need for such services or labor must be a one-time occurrence, a seasonal need, a peak-load need, or an intermittent need and one that does not exceed one year. 8 C.F.R. § 214.2(h)(6)(ii)(B) (2018). Nonimmigrant intent restrictions apply. DHS regulations further provide that an H-2B petition for temporary employment in the United States must be accompanied by an approved temporary labor certification (TLC) from the Department of Labor (DOL). 8 C.F.R. §§ 214.2(h)(6)(iii)(A), (C)–(E), (iv)(A) (2018); *see also* INA § 103(a)(6), 8 U.S.C. § 1103(a)(6) (2018).

On March 23, 2018, President Trump signed the FY2018 Omnibus spending bill, which contains a provision (section 205 of Division M, hereinafter ''Section 205'') permitting the Secretary of Homeland Security, under certain circumstances and after consultation with the Secretary of Labor, to increase the number of H-2B visas available to U.S. employers, notwithstanding the otherwise established statutory numerical limitation. Exercise of Time-Limited Authority to Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program, 83 Fed. Reg. 24,905 (May 31, 2018). These additional visas are available to U.S. employers who can attest that, among other things, they will likely suffer irreparable harm without the ability to employ all the H-2B workers requested in their petition.

A similar one-time increase was authorized for FY2017. Exercise of Time-Limited Authority to Increase the Fiscal Year 2017 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program, 82 Fed. Reg. 32,987 (July 19, 2017).

Why not allow a similar temporary rule to increase the visa numbers currently available for the H-1B program?

Page 331 (§ 3.03[G]): Add the following just before the paragraph that starts "As you start the next problem…"

What if Ed held E-3 classification instead of H-1B? Would Sherry be eligible to work in the United States as his accompanying spouse? What nonimmigrant visa classification would she hold in the United States?

Page 331 (§ 3.03[G]): Add the following new Notes 3 and 4 just before subsection H:

3. H-4 Work Authorization. In May 2014, the Department of Homeland Security proposed to extend work authorization to certain H-4 spouses of H-1B principal nonimmigrant visa holders. Employment Authorization for Certain H-4 Dependent Spouses, 79 Fed. Reg. 26,886 (proposed May 12, 2014). Work authorization would be limited to H-4 spouses of H-1B nonimmigrants whose employers have started the permanent-resident process for them. For example, an H-4 spouse would be eligible for work authorization if the H-1B principal nonimmigrant was the beneficiary of an approved Immigrant Petition for Alien Worker (Form I-140) or had been granted an extension of his or her authorized period of H-1B stay in the United States under the American

Competitiveness in the Twenty-First Century Act of 2000 (AC21), as amended by the 21st Century Department of Justice Appropriations Authorization Act. The new regulations were published on February 25, 2015. Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015). The USCIS received the first applications on May 26, 2015.

How would this change affect Sherry Kit, Ed's fiancée from Sydney?

4. Rewriting the H-1B program. In April 2018, USCIS Director L. Francis Cissna wrote a letter to Senator Charles Grassley describing a number of forthcoming policy changes designed to restrict the H-1B program. The changes would include:

- Rewriting the definition of "Specialty Occupation". USCIS has proposed rewriting the definition of "Specialty Occupation". Under the current definition, U.S. employers decided who to hire (and who gets to work in the U.S). The USCIS proposal will create more regulations and provide USCIS adjudicators with more discretion.

- Denying spouses from working in the United States by eliminating the H-4 EAD (employment authorization) category.

- Requiring additional evidence from U.S. employers seeking to place H-1B employees at third-party worksites.

Letter from L. Francis Cissna, Director, USCIS, to the Hon. Charles E. Grassley, Chairman, Comm. on the Judiciary (Apr. 4, 2018) (available from Am. Immigr. Laws. Ass'n as AILA Doc. No. 18042332) (discussing USCIS review of existing regulations, policies and programs to allow for operational changes to implement the "Buy American and Hire American" Executive Order 13788 of April 18, 2017).

Page 332: Problem 3-3: Essential Materials

Change the citations listed to read as follows:

8 C.F.R. § 214.2(l)(2)(ii)(G) should read 8 C.F.R. § 214.2(*l*)(1)(ii)(G)
8 C.F.R. § 214.2(l)(ii)(B) should read 8 C.F.R. § 214.2(*l*)(1)(ii)(B)
8 C.F.R. § 214.2(l)(ii)(C) should read 8 C.F.R. § 214.2(*l*)(1)(ii)(C)
8 C.F.R. § 214.2(l)(ii)(D) should read 8 C.F.R. § 214.2(*l*)(1)(ii)(D)

Page 334 (§ 3.03[H]): Notes and Questions, Add the following new Note 3 near the top of the page, before "In re ____":

> **"Buy American and Hire American" (BAHA) Continued**. A stated purpose of President Trump's Executive Order 13788 is to protect the economic interests of U.S. workers by "rigorously enforc[ing] and administer[ing] the laws governing [the] entry of [foreign workers]." Generally, Executive Order 13788 has resulted in nonimmigrant visa applications and petitions becoming subject to new policy guidance and higher levels of scrutiny. A new policy memo on the L-1 visa classification was issued on November 8, 2017. USCIS, Policy Memorandum, *Matter of G- Inc.*, PM-602-0148 (Nov. 8, 2017), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/APPROVED_PM-602-

0148_Matter_of_G-_Inc._Adopted_AAO_Decision.pdf (designating *Matter of G- Inc*. as an Adopted Decision, 2017-05 (AAO Nov. 8, 2017). *Matter of G- Inc.* clarifies that to establish that a beneficiary will be employed in a managerial capacity as a "function manager," the petitioner must demonstrate that: (1) the function is a clearly defined activity; (2) the function is "essential," i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations. *Matter of G- Inc.*, Adopted Decision 2017-05, at 4 (AAO Nov. 8, 2017).

Pursuant to *Matter of G- Inc.* and the November 8, 2017 policy memorandum on L-1A "function managers," does Alejandra qualify for L-1A status? What information do you need from Manzana to determine Alejandra's eligibility for this classification?

Page 343 (§ 3.03[H]): Delete section header "NOTES AND QUESTIONS" and renumber Note 1 as follows:

4. What Constitutes "Specialized Knowledge"?

Page 345 (§ 3.03[H]): Renumber Note 2 as follows:

5. Blanket L-1 Petitions.

Page 345 (§ 3.03[H]): Add the following at the end of what is new Note 5 concerning blanket L-1 petitions:

In November 2014, President Obama issued several employment-based executive actions. Implementation of the H-4 EAD discussed earlier was among them. Also included was a call for guidance on the specialized knowledge standard. The USCIS issued a new L-1B guidance memo on March 24, 2015. Public comments were accepted through May 8, 2015, with the memo to take effect August 31, 2015. USCIS, Policy Memorandum, L-1B Adjudications Policy, PM-602-0111 (Aug. 17, 2015), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/L-1B_Memorandum_8_14_15_draft_for_FINAL_4pmAPPROVED.pdf.

Chapter 4: Immigrants and Paths to Permanent Resident Status

General Note: The U.S. Department of State (DOS) has created a new electronic version of the Foreign Affairs Manual (FAM). The new FAM is available at https://fam.state.gov/. We have not updated FAM citations in Chapter 4. Please use the search tool on the FAM website to find the current version of an old citation.

Page 401 (§ 4.02[B]): Add the following at the bottom of the page, right before subsection [1]:

On June 26, 2013, the U.S. Supreme Court overturned Section 3 of the Defense of Marriage Act. United States v. Windsor, 570 U.S. 744 (2013). The Court held that restricting the interpretation of "marriage" and "spouse" to apply only to heterosexual couples violated the Equal Protection Clause. After *Windsor*, the Obama administration quickly took steps to ensure that federal government benefits were implemented for same-sex couples. For example, same-sex couples are now treated the same as heterosexual couples when applying for immigration benefits. A U.S. citizen or lawful permanent resident in a same-sex marriage may now file a Form I-130 immigrant petition for alien relative on behalf of their same-sex spouse. *See generally* USCIS, *Same-Sex Marriages FAQ*, http://www.uscis.gov/family/same-sex-marriages (last updated April 3, 2014); U.S. Dep't of State, *U.S. Visas for Same-Sex Spouses FAQ*, http://travel.state.gov/content/dam/visas/DOMA/DOMA%20FAQs.pdf (last visited July 19, 2018).

On June 26, 2015, the U.S. Supreme Court issued *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which takes *Windsor* one step further by clarifying that states cannot ban same-sex marriages and must recognize same-sex marriages performed in other states.

What other family-based immigrant preference categories are affected by this change in law?

Page 418 (§ 4.02[B][2]): Add the following to Note 2, at the end of the first paragraph on this page, after "… definition of orphan":

The Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, § 7083, 128 Stat. 5, 568, changed the definition of "orphan" in INA § 101(b)(1)(F), 8 U.S.C. § 1101(b)(1)(F). When adopting from a non-Hague Convention country, it is not required that both parents travel to or during the adoption. Only one parent must have seen and observed the child before or during adoption proceedings. Also, the child will now receive a certificate of citizenship rather than lawful permanent resident status following admission.

Page 419 (§ 4.02[B][2]): Add the following as Note 3, just before *In re Li*:

3. USCIS Policy Memorandum on Hague Convention Adoptions. On December 23, 2013, USCIS issued a policy memorandum outlining the criteria for determining habitual residence in the United States for children from Hague Convention countries. The memo (PM 602-0095) is at

http://www.uscis.gov/sites/default/files/USCIS/Outreach/Interim%20Guidance%20for%20Comment/Habitual-Residence-PM-Interim.pdf.

The policy memo provides guidance to meet the habitual residence requirement when it is not possible to obtain the habitual residence certificate from the child's country of origin. Providing a certificate of habitual residence for a child from a country that is a party to the Hague Convention (other than the United States) has become an issue in adoption proceedings and immigrant petitions even when the child is physically in the United States and was not paroled in. Petitioners submitting an I-130 immigrant visa petition to USCIS on behalf of their children pursuant to INA § 101(b)(1)(E), 8 U.S.C. § 1101(b)(1)(E) must provide the certificate of habitual residence or satisfy requirements showing attempts to obtain it if the child's country of origin is a signatory to the Hague Convention.

The petitioning adoptive parent must have two years of legal and physical custody of the child before submitting the I-130. Some families have faced lengthy separations while one parent remains with the child abroad and the other works and lives in the United States.

The USCIS policy memo also added a new section to the Adjudicator's Field Manual (AFM), Chapter 21.4(d)(5)(G). The AFM section provides guidance to officers when the country of origin does not issue certificates of habitual residence. The adoptive parent(s) may show that they meet the intent, actual residence, and notice criteria as described in the policy memo.

Pages 441–42 (§ 4.02[D][1], [2]):

Through this section, "CLPR" should be read as "Conditional Lawful Permanent Resident." Similarly, "CLPR Spouse" should be read as "Conditional Lawful Permanent Resident Spouse" or "Conditional LPR Spouse."

Page 446 (§ 4.02[D][5]):

"CLPR Children" should be read as "Conditional Lawful Permanent Resident Children" or "Conditional LPR Children."

Page 448 (§ 4.02[D]): Insert the following subheading just before Problem 4-3:

[7] Violence Against Women Act (VAWA)

Page 450 (§ 4.02[D]) Delete the following text at the top of page 450:

Self-Petitioning — Under VAWA, certain spouses and children of abusive U.S citizens and LPRs may self-petition for immigrant classification. These self-petitioners may now seek classification as immediate relatives or FB preference immigrants without the abuser's knowledge.

> The self-petitioner must be legally married to the abuser when the petition is filed, but need not be living with the U.S. citizen or permanent resident. The legal termination of the

marriage (due to divorce, death, or annulment) after the petition has been filed will not be the basis for denial or revocation of the petition.

The self-petitioner must also show good moral character and that deportation from the United States would result in extreme hardship to her or her dependents**.**

Evidence for Wavier of Joint Petition…

Insert the following instead:

Self-Petitioning — Under VAWA, certain spouses and children of abusive U.S citizens and LPRs may self-petition for immigrant classification. These self-petitioners may now seek classification as immediate relatives or family-based preference immigrants without the abuser's knowledge.

Noncitizen spouse self-petitioners must show that their marriage to the U.S. citizen or permanent resident spouse was entered into in good faith. However, the noncitizen spouse remains eligible to file a self-petition even if one of the following has occurred:

- the spouses are no longer living together, and the marriage is no longer viable;
- the marriage was terminated within the past two years, and the self-petitioner can demonstrate a "connection" between the termination of the marriage and the domestic violence;
- the marriage, which the applicant believed was a legal marriage, was never legitimate solely because of the bigamy of the abuser;
- the abuser died within the past two years (U.S. citizen abusers only);
- the abuser lost or renounced citizenship or permanent resident status within the past two years "related" or "due" to an incident of domestic violence; or
- the abuser obtained legal permanent residence status after separation from the self-petitioner but before divorce.

The self-petitioner must also show good moral character. *See generally* Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, Immigration Law and Procedure § 41.05 (rev. ed. 2013).

Evidence for Waiver of Joint Petition …

Page 452 (§ 4.02[D]): Add the following as new subsections [8] and [9], just before subsection [E]:

[8] The Adam Walsh Act

The Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act or AWA), Pub. L. No. 109-248, amended INA § 204(a)(1), 8 U.S.C. § 1154(a)(1) and INA § 101(a)(15)(K); 8 U.S.C. § 1101(a)(15)(K) to bar a U.S. citizen or lawful permanent resident convicted of a "specified offense against a minor" from filing an I-130, I-600, or I-129F petition for his or her family member unless "no risk" would be posed by the U.S. citizen or permanent resident to his or her family member. See AWA § 111 for the definition of "specified offense against a minor." Further developments in this area include three BIA cases published in May 2014: *In re Aceijas-Quiroz*, 26 I. & N. Dec. 294 (BIA 2014) (BIA has no jurisdiction to review "no risk" determinations made by USCIS); *In re Introcaso*, 26 I. & N. Dec. 304 (BIA 2014) (the petitioner bears the burden of proving whether or not the offense was a "specified offense against a minor"); and *In re Jackson and Erandio*, 26 I. & N. Dec. 314 (BIA 2014) (the AWA applies to all convictions of a U.S. citizen at any time, even if the convictions occurred before enactment of the AWA).

[9] Special Immigrant Juvenile Status

Special Immigrant Juvenile Status (SIJS or SIJ) refers to certain noncitizen children in the United States who may have been abused, abandoned, or neglected by one or both parents in their home country, and for whom it has been determined that return to the home country would not be in the child's best interest. A child who qualifies for this status can later apply for lawful permanent resident status.. Section 7.01[M] discusses this classification in more detail.

Page 454 (§ 4.02[E][1]): Insert the following after the end of the paragraph that begins "The *Visa Bulletin* has a deceptively simple appearance."

Page 454 includes selections from the *Visa Bulletin* for October 2016. October is the start of the fiscal year for the U.S. government. The *Visa Bulletin* is published monthly by the U.S. Department of State. For copies of the most recently published *Visa Bulletin*, and access to past *Visa Bulletins*, go to https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html.

In October 2015, the DOS and USCIS revised the *Visa Bulletin* and the procedure for determining: (1) when the beneficiary of an approved immigrant visa petition can proceed with the final step of the immigrant visa application process by filing his application to adjust status (Form I-485) with the USCIS or by submitting his immigrant visa application (DS-260) with the DOS National Visa Center; and (2) how long it may take the foreign national to receive his visa and permanent resident status (i.e., "green card") after his application has been received and reviewed by USCIS or the DOS consular post. White House, Press Release, Presidential Memorandum — Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century (Nov. 21, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/21/presidential-memorandum-modernizing-and-streamlining-us-immigrant-visa-s.

Previously, the *Visa Bulletin* consisted of one chart. The top half of the chart referred to family-based immigrant visa preference categories. The bottom half of the chart referred to employment-based preference categories.

The revised *Visa Bulletin* now consists of two charts:

(1) Application Final Action Dates (dates when immigrant visas and/or "green cards" may be issued); and
(2) Dates for Filing Applications (dates when foreign nationals may file their I-485 applications with the USCIS).

The *Visa Bulletin*, now including these two charts, continues to be published by the DOS each month. The USCIS now monitors the number of qualified immigrant visa applicants reported by DOS; the number of I-485 applications pending with the USCIS; and historical data concerning application denial rates, rates of abandonment, and rates of withdrawals. One to two weeks after the DOS has issued the *Visa Bulletin*, the USCIS instructs the public which chart to use (i.e., Application Final Action Dates or Dates of Filing Applications) to determine whether foreign nationals who are beneficiaries of an immigrant visa petition waiting to proceed with the final step of the immigrant visa application process can file their I-485 applications with the USCIS.

Selections from the Visa Bulletin

August 2018

FINAL ACTION DATES FOR FAMILY-SPONSORED PREFERENCE CASES

Family-Sponsored	**All Chargeability Areas Except Those Listed**	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
F1	08MAY11	08MAY11	08MAY11	01AUG97	01AUG06
F2A	22JUL16	22JUL16	22JUL16	01JUL16	22JUL16
F2B	22OCT11	22OCT11	22OCT11	01APR97	15FEB07
F3	15JUN06	15JUN06	15JUN06	01DEC95	01MAY95
F4	22DEC04	22DEC04	22MAR04	15JAN98	22APR95

DATES FOR FILING FAMILY-SPONSORED VISA APPLICATIONS

Family-Sponsored	**All Chargeability Areas Except Those Listed**	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
F1	08MAR12	08MAR12	08MAR12	01SEP98	15FEB08
F2A	01DEC17	01DEC17	01DEC17	01DEC17	01DEC17

F2B	08JAN12	08JAN12	08JAN12	08JUN97	15DEC07
F3	22SEP06	22SEP06	22SEP06	08OCT98	01AUG95
F4	01MAY05	01MAY05	01JAN05	01JUN98	01DEC95

Following the publication of the October 2017 DOS *Visa Bulletin*, the USCIS posted instructions on its website that beneficiaries of family-based petitions (e.g., I-130 forms) should use the "DATES FOR FILING FAMILY SPONSORED VISA APPLICATIONS" to determine whether they could file their I-485 applications with the USCIS. *When to File Your Adjustment of Status Application*, USCIS, https://www.uscis.gov/visabulletin-oct-17 (last updated Sept. 15, 2017).

FINAL ACTION DATES FOR EMPLOYMENT-BASED PREFERENCE CATEGORIES

"C" means current, meaning that numbers are authorized for issuance to all qualified applicants; "U" means that numbers are not authorized for issuance at all. (Note: Numbers are authorized only for applicants whose priority date is earlier than the final action date listed below. The applicant's "priority date" is the date his or her immigrant visa petition was properly received by the USCIS.)

Employment-based	**All Chargeability Areas Except Those Listed**	**CHINA - mainland born**	**EL SALVADOR GUATEMALA HONDURAS**	**INDIA**	**MEXICO**	**PHILIPPINES**	**VIETNAM**
1st	01MAY16	01JAN12	01MAY16	01JAN12	01MAY16	01MAY16	01MAY16
2nd	C	01MAR15	C	15MAR09	C	C	C
3rd	C	01JUL14	C	01JAN09	C	01JUN17	C
Other Workers	C	01MAY07	C	01JAN09	C	01JUN17	C
4th	C	C	08FEB16	08FEB16	08FEB16	C	C
Certain Religious Workers	C	C	08FEB16	08FEB16	08FEB16	C	C
5th Non-Regional Center (C5 and T5)	C	01AUG14	C	C	C	C	01AUG14

5th Regional C enter (I5 and R5)	C	01AUG 14	C	C	C	C	01AUG1 4

DATES FOR FILING OF EMPLOYMENT-BASED VISA APPLICATIONS

Employment-based	**All Chargeability Areas Except Those Listed**	**CHINA-mainland born**	**EL SALVADOR GUATEMALA HONDURAS**	**INDIA**	**MEXICO**	**PHILIPPINES**
1st	C	C	C	C	C	C
2nd	C	01APR15	C	22MAY09	C	C
3rd	C	01JAN16	C	01MAY09	C	01JUL17
Other Workers	C	01JUN08	C	01MAY09	C	01JUL17
4th	C	C	01MAY16	C	C	C
Certain Religious Workers	C	C	01MAY16	C	C	C
5th Non-Regional Center (C5 and T5)	C	01OCT14	C	C	C	C
5th Regional Center (I5 and R5)	C	01OCT14	C	C	C	C

Following the publication of the October 2017 *Visa Bulletin* by the DOS, the USCIS instructed beneficiaries of employment-based petitions, such as I-140, I-360 and I-526 forms, to use the 'DATE FOR FILING OF EMPLOYMENT BASED VISA APPLICATIONS" chart to determine whether they were eligible to file their I-485 applications with the USCIS. *Id.*

Page 455 (**§ 4.02[E][1]**): Delete the paragraph that starts "For example, in the June 2012 *Visa Bulletin* …" and replace it with the following:

Based on the preceding charts, what difference would it have made if the USCIS had instructed foreign nationals born in Mainland China who were beneficiaries of I-140 petitions for EB-1 classification to use the "FINAL ACTION DATE" chart to determine if they were eligible to file

their I-485 applications with the USCIS, instead of the "DATE FOR FILING" chart? What if these foreign nationals were the beneficiaries of I-140 petitions for EB-2? EB-3?

Page 456 (**§ 4.02[E][1]):** Replace paragraphs 3 and 4 with the following:

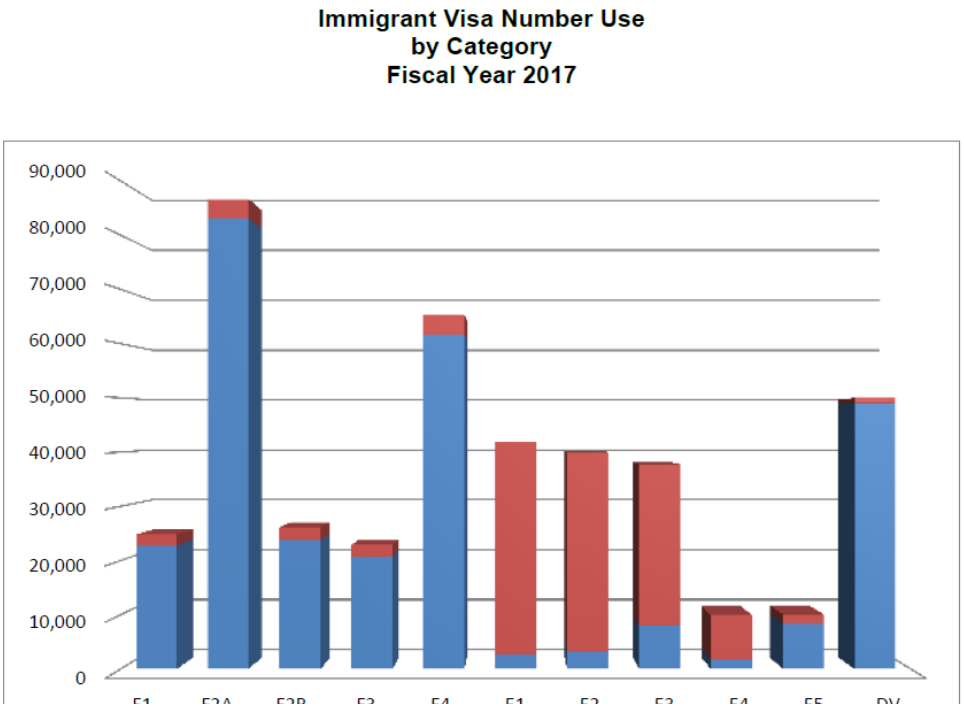
To help you understand the visa allocation process better, visit the DOS website at https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html.

Print a copy of the three most recent *Visa Bulletins*. As you print each copy, follow the link to the USCIS website for the instructions posted by the Service for that month, identifying which chart should be used to determine whether the foreign national can file his I-485 application. For example, after printing the *Visa Bulletin* for September 2018, follow the link from travel.state.gov to http://www.uscis.gov/visabulletininfo for the USCIS instructions for September 2018 and whether the "FINAL ACTION DATE" or "DATE FOR FILING" chart should be used to determine if the visa applicant can file her I-485 application with the USCIS.

As you review these charts and the USCIS instructions, consider the following: Do application dates always move forward? If so, do they move forward at the same rate? What do you think may account for some of the differences

Review the chart below and total numbers of visas issued for fiscal year (FY) 2017:

Immigrant Visa Number Use
By Category
Fiscal Year 2017



Category	Visa Issuances at Offices Abroad	USCIS Adjustments
F1 (Family First)	22,807	2,009
F2A (Family Second[1])	83,080	3,545
F2B (Family Second[2])	23,819	2,342
F3 (Family Third)	20,716	2,146
F4 (Family Fourth)	61,733	3,522
E1 (Employment First)	2,529	39,299
E2 (Employment Second)	3,223	36,738
E3 (Employment Third)	7,893	29,877
E4 (Employment Fourth)	1,755	8,200
E5 (Employment Fifth)	8,414	1,676
DV (Diversity Visa)	49,067	909

[1]Family Second – Spouses and Children of Permanent Residents
[2]Family Second – Unmarried Sons and Daughters (21 years of age or older) of Permanent Residents

A review of only the total numbers may be deceptive. To see how application dates move, and why application dates do not always move forward, we need to look at a single category over a period of time. The chart and numbers below look at the EB-4 category for Special Immigrant Juveniles (unaccompanied minors in the United States who have been abused, abandoned or neglected) for the period 2010–16:

Period FY – Total	Petitions Received	Petitions Approved	Petitions Denied	Pending
2010	1,646	1,590	97	35
2011	2,226	1,869	84	47
2012	2,968	2,726	119	220
2013	3,994	3,431	190	702
2014	5,776	4,606	247	1,826
2015	11,500	8,739	412	4,357
2016	19,475	15,101	594	8,533
2017	20,914	11,335	890	18,878
Fiscal Year 2018 By Quarter				
Q1 (Oct – Dec)	5,892	1,922	217	22,695

Source: Department of Homeland Security, USCIS, C# Consolidated via Standard Management Analysis and Reporting Tool (SMART), December 2016. AILA Doc. No. 14032450 (Posted Dec. 31, 2017).

This category of immigrant visa is limited to 5000 visas per fiscal year, referred to as a "quota". Until FY2013, fewer than 5000 visa petitions (USCIS Form I-360) were being filed with the USCIS, or approved by the Service. How would this data be reflected on the *Visa Bulletin*?

In FY2013, the *Visa Bulletin* would have consisted of only one chart. The top half of the chart would have referred to Family-Based preference categories. The bottom half of the chart would

have referred to Employment-Based preference categories. The EB-4 category would have looked like this:

Employment-Based	All Charge-ability Areas Except Those Listed	China – Mainland born	India	Mexico	Philippines
4th	C	C	C	C	C

"C" means that the priority date for this category is "current" and that there is no quota backlog. The foreign national can proceed with the filing of his I-485 application to adjust status at any time.

During FY2014, there was a "surge" in applications for the EB-4 category. The number of I-360 petitions filed increased from 3,994 to 5,766. In FY2015, the USCIS received 11,500 petitions. In FY2017, this number increased to 20,914. What factors do you think contributed to this rapid increase in numbers? How do you think the increase in filings affected the availability of visa numbers for this category?

Compare the *Visa Bulletins* for October 2014, 2015, 2016 and 2017 below:

October 2014

Employment Based	All Charge-ability Areas	China – Mainland born	India	Mexico	Philippines
4th	C	C	C	C	C

October 2015

Employment Based	All Charge-ability Areas	China – Mainland born	India	Mexico	Philippines
4th	C	C	C	C	C

October 2016

Employment Based	All Charge-ability Areas	China – Mainland born	El Salvador, Honduras, Guatemala	India	Mexico	Philippines
4th	C	C	15JUN15	C	C	C

October 2017 (Start of FY2018)

Employment Based	All Charge-ability Areas	China – Mainland born	El Salvador, Honduras, Guatemala	India	Mexico	Philippines
4th	C	C	01NOV 15	C	01MAR16	C

What do you notice about the charts for October 2015 and October 2016? What do you think accounts for the addition of the separate column for El Salvador, Honduras and Guatemala? Why was a cut-off date added to Mexico in 2017?

When a cut-off date is added to the *Visa Bulletin*, it means that the quota for that preference category has been reached and visa numbers have "retrogressed." Before the foreign national can proceed to the next step (i.e., either file their I-485 application or complete consular processing overseas), visa numbers must advance again until the applicant's priority date becomes "current" once more.

If you were working with an unaccompanied minor born in India, and you filed an I-360 petition for her today, when would she be able to file her I-485 application with the USCIS? If she had been born in El Salvador or Honduras? If visa numbers retrogressed after the minor filed her I-485 application, what would happen to her I-485 application?

(1) If your sister was born in the Philippines and you filed an I-130 petition for her today, when do you think she would be able to apply for an immigrant visa to come to the United States? Which chart are you reviewing to make this determination?

(2) If you were born in India, and your employer started the green card process for you today, seeking EB-3 classification on your behalf, how long would it take before you might be able to file your I-485 application? If you were in Canada?

(3) If you are able to file your I-485 application when a visa number becomes available and the USCIS determines that you can proceed, what happens if your priority date retrogresses after application has been filed? What happens if your priority date becomes "unavailable"?

Page 457 **(§ 4.02[E][2]):** Replace the first paragraph of this section with the following:

The State Department issues *Visa Bulletins* every month. Before October 2016, the DOS issued only one chart each month. The DOS now issues two charts each month, and the USCIS decides later which chart may be used by foreign nationals waiting to file their I-485 applications. If you are not waiting to file an I-485 application, but are trying to determine how long it may take to get a "green card" and which classification of prospective immigrant you may want to pursue, which chart would you consider? Generally, we would refer to the FINAL ACTION DATES (Chart A) for this information, whether we were considering family- or employment-based preference categories.

By comparing the dates for a specific classification over a period of months (and sometimes years), we can roughly measure the time it may take a foreign national to get his green card by comparing the time between the foreign national's "priority date" and the *Visa Bulletin* date identified by the DOS. Generally, a foreign national who has a priority date that falls before the date identified for the classification listed on the *Visa Bulletin* may apply for an immigrant visa.

Page 458 (§ 4.02[E][2]): Add the following note beneath Table Three for the Philippines:

Chart 4: Comparing *Visa Bulletin* Movement, Tables One, Two and Three have been revised and can be found in the Course Materials folder at the Cornell Blackboard site for Chapter 4.

Page 459 (§ 4.02[E][3]): Add questions (5) and (6) after (4):

(5) Xie, a national of the People's Republic of China, is the beneficiary of an approved I-140 for EB-2 classification. In September 2013, the priority date for China EB-3 advanced ahead of the priority date for China EB-2. If Xie had been classified under EB-3, he would have been able to file an application to adjust status. Can Xie take advantage of this situation? Can he convert his EB-2 petition to EB-3 and file an adjustment application? What if the priority date for EB-2 then moves ahead of the priority date for EB-3? What happens to Xie's application**?**

(6) Marta was born in El Salvador. She is the beneficiary of an approved I-360 petition for EB-4 classification as a Special Immigrant Juvenile. Her I-360 petition and I-485 application were filed concurrently with the USCIS in October 2015. However, before the USCIS could complete the adjudication of her I-485 application, the priority date for EB-4 retrogressed for foreign nationals born in El Salvador. What happened to Marta's I-485 application? Marta was a minor when she filed her application. She is now twenty-one years old. She has come to you because she wants to marry her boyfriend. She also wants to work. What do you tell Marta?

Note: The authors have created a *Visa Bulletin*/Category game. Course materials and instructions can be found in the Course Materials folder at the Cornell Blackboard site for Chapter 4.

Page 467 (§ 4.02[E][3]): I in first full paragraph, change "[Authors' not: now USCIS]" to "[Authors' note: now USCIS]".

Page 479 (§ 4.02[F]): Add the following paragraph to the end of Problem 4-4, Note 1:

Pages 466–78 excerpt a law review article that summarizes how businesses and employees navigate the labor certification and visa petition strategies. It is not unusual for an employee to push her employer for minimum requirements that include an advanced degree or a bachelor's degree plus five years of related experience so that classification as a second preference employment-based immigrant may be sought at the I-140 stage of the permanent resident process. In the excerpt that appears in the text, the employee is a national of the People's Republic of China. She believes that the second preference classification (i.e., "EB-2") will be an advantage to her; it will reduce the time that she will be required to wait between the filing of the PERM or alien labor certification and the filing of her Form I-485 application to adjust status. Historically, the second preference immigrant visa category has advanced more quickly than the third preference category of employment based immigrant visas (i.e., EB-3). However, this is not always the case. For example, during the first several months of FY2015, the EB-3 category advanced to October 1, 2012, approximately 30 months ahead of EB-2, which languished in early 2009 for several months until the EB-3 category retrogressed in June 2014 to October 1, 2006.

Before EB-3 retrogressed, many employers filed new I-140 petitions with the USCIS asking for workers to be reclassified from EB-2 to EB-3, so these employees could file I-485 applications to adjust status. The priority date for EB-3 then retrogressed, and these new I-485 applicants then had to wait for a longer period of time before their I-485 applications could be adjudicated.

As immigration counsel to Az-Tech, working on an application for permanent resident status for an employee who is a Chinese national, what advice would you have given to the company? What advice would you give to the foreign national? Does your advice depend on whether you are talking to the employer or to the employee? Or on whether you are representing the employer or the employee?

Page 490 (§ 4.03): When Can Labor Certification Be Waived?

Change "A. Nation Interest Waivers" to read "A. National Interest Waivers"

Page 491 (§ 4.03[A]): Replace the paragraph on page 491 that begins "NYSDOT remains the leading case in this area" … with the following:

Until December 2016, *NYSDOT* was the leading case in this area. *NYSDOT* established a three-prong test, which, if met, allowed a waiver of the labor certification requirement. Under *NYSDOT*, a national interest waiver was available to an applicant only if he worked in an area of "substantial intrinsic merit," provided a benefit that was national in scope, and served the national interest to a substantially greater degree than other U.S. workers with the same level of education, training and experience. *Id.*

On December 27, 2016, *Matter of Dhanasar*, 26 I. & N. Dec. 884 (AAO 2016), was designated as a precedent decision, vacating *NYSDOT*. *Dhanasar* establishes a new analytical framework, designed "to provide greater clarity, apply more flexibility to circumstances of both petitioning employers and self-petitioning individuals, and better advance the purpose of the broad

discretionary waiver provision to benefit the Unites States." *Id.* at 889. This decision is expected to broaden the availability of national interest waivers (NIWs) to foreign nationals.

Under *Dhanasar*, the USCIS may grant a national interest waiver if the petitioner or applicant can demonstrate that:

(1) The foreign national's proposed endeavor has both substantial merit and national importance;
(2) He or she is well positioned to advance the proposed endeavor; and
(3) On balance, it would be beneficial to the United States to waive the requirement of a job offer and this labor certification.

Id.

The applicant must warrant a favorable exercise of discretion, and qualify as a member of a profession holding an advanced degree or as an individual of exceptional ability in the sciences, arts or business. *Id.* at 893.

The decision is excerpted below.

Matter of DHANASAR
26 I. & N. Dec. 884 (AAO 2016)

> In this decision, we have occasion to revisit the analytical framework for assessing eligibility for "national interest waivers" under section 203(b)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(B)(i) (2012). The self-petitioner, a researcher and educator in the field of aerospace engineering, filed an immigrant visa petition seeking classification under section 203(b)(2) of the Act as a member of the professions holding an advanced degree. The petitioner also sought a "national interest waiver" of the job offer otherwise required by section 203(b)(2)(A).
>
> The Director of the Texas Service Center denied the petition under the existing analytical framework, concluding that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that a waiver of the job offer requirement would not be in the national interest of the United States. Upon de novo review, and based on the revised national interest standard adopted herein, we will sustain the appeal and approve the petition.
>
> . . .
>
> II. NEW ANALYTICAL FRAMEWORK
>
> . . . Today, we vacate *NYSDOT* and adopt a new framework for adjudicating national interest waiver petitions, one that will provide greater clarity, apply more flexibly to circumstances of both petitioning employers and self-petitioning individuals, and better advance the purpose of the broad discretionary waiver

provision to benefit the United States.[6]

Under the new framework, and after eligibility for EB-2 classification has been established, USCIS may grant a national interest waiver if the petitioner demonstrates by a preponderance of the evidence:[7] (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.[8]

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. Evidence that the endeavor has the potential to create a significant economic impact may be favorable but is not required, as an endeavor's merit may be established without immediate or quantifiable economic impact. For example, endeavors related to research, pure science, and the furtherance of human knowledge may qualify, whether or not the potential accomplishments in those fields are likely to translate into economic benefits for the United States.

In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. An undertaking may have national importance for example, because it has national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances. But we do not evaluate prospective impact solely in geographic terms. Instead, we look for broader implications. Even ventures and undertakings that have as their focus one geographic area of the United States may properly be considered to have national importance. In modifying this prong to assess "national importance" rather than "national in scope," as used in *NYSDOT*, we seek to avoid overemphasis on the geographic breadth of the endeavor. An endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance.

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[6] Going forward, we will use "petitioners" to include both employers who have filed petitions on behalf of employees and individuals who have filed petitions on their own behalf (namely, self-petitioners).

[7] Under the "preponderance of the evidence" standard, a petitioner must establish that he or she more likely than not satisfies the qualifying elements. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). We will consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.*

[8] Because the national interest waiver is "purely discretionary," *Schneider v. Chertoff*, 450 F.3d 944, 948 (9th Cir. 2006), the petitioner also must show that the foreign national otherwise merits a favorable exercise of discretion. *See Zhu v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005); *cf. Matter of Jean*, 23 I&N Dec. 373, 383 (A.G. 2002).

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

We recognize that forecasting feasibility or future success may present challenges to petitioners and USCIS officers, and that many innovations and entrepreneurial endeavors may ultimately fail, in whole or in part, despite an intelligent plan and competent execution. We do not, therefore, require petitioners to demonstrate that their endeavors are more likely than not to ultimately succeed. But notwithstanding this inherent uncertainty, in order to merit a national interest waiver, petitioners must establish, by a preponderance of the evidence, that they are well positioned to advance the proposed endeavor.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. On the one hand, Congress clearly sought to further the national interest by requiring job offers and labor certifications to protect the domestic labor supply. On the other hand, by creating the national interest waiver, Congress recognized that in certain cases the benefits inherent in the labor certification process can be outweighed by other factors that are also deemed to be in the national interest. Congress entrusted the Secretary to balance these interests within the context of individual national interest waiver adjudications.

In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification;[9] whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. We emphasize that, in each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

We note that this new prong, unlike the third prong of *NYSDOT*, does not require a showing of harm to the national interest or a comparison against U.S. workers in

[9] For example, the labor certification process may prevent a petitioning employer from hiring a foreign national with unique knowledge or skills that are not easily articulated in a labor certification. *See generally* 20 C.F.R. § 656.17(i). Likewise, because of the nature of the proposed endeavor, it may be impractical for an entrepreneur or self-employed inventor, when advancing an endeavor on his or her own, to secure a job offer from a U.S. employer.

the petitioner's field. As stated previously, *NYSDOT*'s third prong was especially problematic for certain petitioners, such as entrepreneurs and self-employed individuals. This more flexible test, which can be met in a range of ways as described above, is meant to apply to a greater variety of individuals.

III. ANALYSIS

The director found the petitioner to be qualified for the classification sought by virtue of his advanced degrees. We agree that he holds advanced degrees and therefore qualifies under section 203(b)(2)(A). The remaining issue before us is whether the petitioner has established, by a preponderance of the evidence, that he is eligible for and merits a national interest waiver.

The petitioner proposes to engage in research and development relating to air and space propulsion systems, as well as to teach aerospace engineering, at North Carolina Agricultural and Technical State University ("North Carolina A&T"). The petitioner holds two master of science degrees, in mechanical engineering and in applied physics, as well as a Ph.D. in engineering, from North Carolina A&T. At the time of filing the instant petition, he also worked as a postdoctoral research associate at the university. The record reflects that the petitioner's graduate and postgraduate research has focused on hypersonic propulsion systems (systems involving propulsion at speeds of Mach 5 and above) and on computational fluid dynamics. He has developed a validated computational model of a high-speed air-breathing propulsion engine, as well as a novel numerical method for accurately calculating hypersonic air flow. The petitioner intends to continue his research at the university.

The extensive record includes: reliable evidence of the petitioner's credentials; copies of his publications and other published materials that cite his work; evidence of his membership in professional associations; and documentation regarding his research and teaching activities. The petitioner also submitted several letters from individuals who establish their own expertise in aerospace, describe the petitioner's research in detail and attest to his expertise in the field of hypersonic propulsion systems.

We determine that the petitioner is eligible for a national interest waiver under the new framework. First, we conclude that the petitioner has established both the substantial merit and national importance of his proposed endeavor. The petitioner demonstrated that he intends to continue research into the design and development of propulsion systems for potential use in military and civilian technologies such as nano-satellites, rocket-propelled ballistic missiles, and single-stage-to-orbit vehicles. In letters supporting the petition, he describes how research in this area enhances our national security and defense by allowing the United States to maintain its advantage over other nations in the field of hypersonic flight. We find that this proposed research has substantial merit because it aims to advance scientific knowledge and further national security interests and U.S.

competitiveness in the civil space sector.

The record further demonstrates that the petitioner's proposed endeavor is of national importance. The petitioner submitted probative expert letters from individuals holding senior positions in academia, government, and industry that describe the importance of hypersonic propulsion research as it relates to U.S. strategic interests. He also provided media articles and other evidence documenting the interest of the House Committee on Armed Services in the development of hypersonic technologies and discussing the potential significance of U.S. advances in this area of research and development. The letters and the media articles discuss efforts and advances that other countries are currently making in the area of hypersonic propulsion systems and the strategic importance of U.S. advancement in researching and developing these technologies for use in missiles, satellites, and aircraft.

Second, we find that the record establishes that the petitioner is well positioned to advance the proposed endeavor. Beyond his multiple graduate degrees in relevant fields, the petitioner has experience conducting research and developing computational models that support the mission of the United States Department of Defense ("DOD") to develop air superiority and protection capabilities of U.S. military forces, and that assist in the development of platforms for Earth observation and interplanetary exploration. The petitioner submitted detailed expert letters describing U.S. Government interest and investment in his research, and the record includes documentation that the petitioner played a significant role in projects funded by grants from the National Aeronautics and Space Administration ("NASA") and the Air Force Research Laboratories ("AFRL") within DOD.[10] Thus, the significance of the petitioner's research in his field is corroborated by evidence of peer and government interest in his research, as well as by consistent government funding of the petitioner's research projects. The petitioner's education, experience, and expertise in his field, the significance of his role in research projects, as well as the sustained interest of and funding from government entities such as NASA and AFRL, position him well to continue to advance his proposed endeavor of hypersonic technology research.

Third and finally, we conclude that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. As noted above, the petitioner holds three graduate degrees in fields tied to the proposed endeavor, and the record demonstrates that he possesses considerable experience and expertise in a highly specialized field. The evidence also shows that research on hypersonic propulsion holds significant implications for U.S. national security and competitiveness. In addition, the repeated funding of research in which

[10] Although the director of North Carolina A&T's Center for Aerospace Research ("CAR") is listed as the lead principal investigator on all grants for CAR research, the record establishes that the petitioner initiated or is the primary award contact on several funded grant proposals and that he is the only listed researcher on many of the grants.

the petitioner played a key role indicates that government agencies, including NASA and the DOD, have found his work on this topic to be promising and useful. Because of his record of successful research in an area that furthers U.S. interests, we find that this petitioner offers contributions of such value that, on balance, they would benefit the United States even assuming that other qualified U.S. workers are available.

In addition to conducting research, the petitioner proposes to support teaching activities in science, technology, engineering, and math ("STEM") disciplines. He submits letters favorably attesting to his teaching abilities at the university level and evidence of his participation in mentorship programs for middle school students. While STEM teaching has substantial merit in relation to U.S. educational interests, the record does not indicate by a preponderance of the evidence that the petitioner would be engaged in activities that would impact the field of STEM education more broadly. Accordingly, as the petitioner has not established by a preponderance of the evidence that his proposed teaching activities meet the "national importance" element of the first prong of the new framework, we do not address the remaining prongs in relation to the petitioner's teaching activities.

IV. CONCLUSION

The record demonstrates by a preponderance of the evidence that: (1) the petitioner's research in aerospace engineering has both substantial merit and national importance; (2) the petitioner is well positioned to advance his research; and (3) on balance, it is beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. We find that the petitioner has established eligibility for and otherwise merits a national interest waiver as a matter of discretion.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361 (2012). The petitioner has met that burden.

ORDER: The appeal is sustained and the petition is approved.

Page 500 (§ 4.03[B]), Problem 4-8, Notes and Questions

Add the following paragraph at the end of Note 1. "Functional Manager?"

As you reconsider Alejandra's eligibility for EB-1 classification as a multinational manager, review *Matter of G- Inc*., Adopted Decision 2017-05 (AAO Nov. 8, 2017) discussed in Chapter 3, Problem 3-3. You will also want to review INA § 203(b)(1)(C), 8 USC § 1153(b)(1)(C) and read USCIS Policy Memorandum PM-602-0158 (March 19, 2018), adopting *Matter of S- P-, Inc*., Adopted Decision 2018-01 (AAO Mar. 19, 2018).

Matter of S- P-, Inc. clarifies that a beneficiary who worked abroad for a qualifying multinational

organization for at least one year but left its employ for a period of more than two years *after* being admitted to the United States as a nonimmigrant does not satisfy the one-in-three foreign employment requirement for immigrant classification as a multinational manager or executive. *See* INA § 203(b)(1)(C), 8 USC § 1153(b)(1)(C). To cure the interruption in employment, the beneficiary would need an additional year of qualifying employment abroad. A post-entry interruption would not be limited to intervening employment with a non-qualifying U.S. employer, as was the case in *Matter of S- P- Inc*., but could include periods of stay in a nonimmigrant status without work authorization." *Matter of S- P-, Inc.*, Adopted Decision 2018-01 (AAO Mar. 19, 2018).

Can Manzana still file an I-140 immigrant visa petition for Alejandra, although she has been in the United States for two years in L-1B Status? What if Alejandra had entered the United States to work for a rival company in TN classification one year ago? Would Manzana be able to file an I-140 petition for her for EB-1 classification?

Page 501 (§ 4.03[B]): Add the following to the end of Note 2 to Problem 4-9:

If Carlos cannot find a teaching position, what options would you recommend to him? Do DOMA and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), change his situation? What about the diversity green card lottery? See page 394 n.1 and discussion regarding the diversity immigrant category. Can Carlos apply for the diversity lottery?

Page 505 (§ 4.03): Problem 4-10: Father Isaiah Nimba. Add the word "priest" to the end of the following sentence:

"The parishioners of the Archdiocese of Charleston have flocked to their new."

The new sentence should read:

"The parishioners of the Archdiocese of Charleston have flocked to their new priest."

Page 520 (§ 4.03[D]): Add the following just after the *In re Ho* excerpt, right before § 4.04:

In addition to *In re Ho,* there are three other EB-5 precedents: *In re Soffici*, 22 I. & N. Dec. 158 (INS Assoc. Comm'r 1998); *In re Izummi*, 22 I. & N. Dec. 169 (INS Assoc. Comm'r 1998); and *In re Hsiung*, 22 I. & N. Dec. 201 (INS Assoc. Comm'r 1998).

Page 524 (§ 4.04[C][3]): Add the following at the end of subsection [3], just before subsection [4]:

See Chapter 5 pages 626–33 (§ 5.05[D][1]) for additional discussion concerning travel with advance parole. *In re Arrabally and Yerrabelly*, 25 I. & N. Dec. 771 (BIA Apr. 17, 2012).

Page 525 (§ 4.04[C]): Add the following as a new paragraph just before Problem 4-12:

Since the 2008 memo issued by Acting Associate Director Neufeld, additional protection has been extended to the beneficiaries of F-2A petitions who subsequently seek to adjust status under the F-2B category. On November 21, 2013, USCIS issued guidance on the handling of certain family-based automatic conversion and priority date retention requests pending the U.S. Supreme Court's ruling on *Mayorkas v Cuella de Osorio*. See USCIS Policy Memorandum on Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Pending a Supreme Court Ruling on *Mayorkas v. Cuellar de Osorio*, PM-602-0094 (Nov. 21, 2013), http://www.uscis.gov/sites/default/files/files/nativedocuments/PM-602-0094_Family-Based_Priority_Date_Retention_Final_Memo.pdf. Referring to *In re Wang*, 25 I&N Dec. 28 (BIA June 16, 2009), this guidance provides that where a petitioner files an F-2B petition on behalf of a former derivative beneficiary of a previously approved F-2A petition, the original priority date may be retained if the requirements of 8 CFR § 204.2(a)(4) or (h)(2) are met. This guidance also allows for the automatic conversion of the beneficiary's classification from F-2A to F-2B, allowing the beneficiary of a previously approved F-2A petition to file an application for adjustment of status under the F-2B category without having to file a second I-130 petition. On June 9, 2014, the Supreme Court reversed and remanded the *Osorio* case to the Ninth Circuit for reconsideration pursuant to the BIA's interpretation of INS § 203(h)(3), 8 U.S.C. § 1153(h) in *In re Wang*. *Scialabba v. De Osorio*, 134 S. Ct. 2191 (2014).

Also of interest concerning adjustment of status for family members is *In re Akram*, 25 I. & N. Dec. 874 (BIA 2012) (holding that a noncitizen admitted to the United States as a K-4 nonimmigrant may not adjust status without demonstrating immigrant visa eligibility and availability as the beneficiary of an I-130 alien relative petition filed by his or her stepparent, the U.S. citizen K petitioner; further holding that a K-4 derivative child of a K-3 nonimmigrant who married the U.S. citizen K petitioner after the K-4 reached the age of 18 is ineligible to adjust status because he or she no longer qualified as the petitioner's "stepchild.").

Page 534 (§ 4.04[C][9]): Add the following three sections after section [9], just before Problem 4-13:

[10] Options to INA § 245

In addition to foreign nationals eligible to adjust status under INA § 245(i), you may encounter foreign nationals eligible to adjust status under other special programs, such as the Cuban Adjustment Act of 1966 (CAA). The CAA allows nationals and citizens of Cuba who were inspected and admitted or paroled into the United States after January 1, 1959 and who have been physically present in the United States for at least one year to adjust status. The spouses or unmarried children of such Cubans may also apply to adjust status, regardless of nationality, if they were inspected and admitted or paroled into the United States after January 1, 1959 and have been physically present in the United States. The abused spouse or child of a CAA-eligible individual is also eligible to adjust status under the CAA. Congress has affirmed the availability of the CAA until there is a democratic government in Cuba. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (enacted as Division C of Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 606(a), 110 Stat. 3009, 3009-695). *See generally* Memorandum from Doris Meissner, Comm'r, INS, to All Reg'l Directors (Apr. 19, 1999), *reprinted in* Memorandum from Tracy Renaud, Chief, Off. of Field Operations, USCIS, to Field

Leadership, USCIS, (Mar. 4, 2008), http://www.uscis.gov/sites/default/files/files/pressrelease/CubanParole_4Mar08.pdf.

Certain Haitian nationals are also able to adjust status under the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA), enacted as title IX of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-538. Although the qualifying period for principal HRIFA applicants ended on March 31, 2000, dependents may still adjust status if they meet eligibility requirements. *See* USCIS, *Green Card for a Haitian Refugee*, http://www.uscis.gov/green-card/other-ways-get-green-card/green-card-haitian-refugee (last visited July 26, 2018).

[11] Can Someone Who Has Received DACA (Deferred Action for Childhood Arrivals) Obtain Permanent Resident Status?

On June 15, 2012, the Department of Homeland Security issued a memorandum announcing that DHS would offer deferred action for two years (subject to renewal) to certain young people who had been brought to the United States as children and met the following criteria:

1) Under the age of 31 as of 6/15/2012;
2) Came to the United States before their 16th birthday;
3) Had continuously resided in the United States since 6/15/2007;
4) Was physically present in the United States on 6/15/2012, and at the time of application to the USCIS;
5) Entered without inspection before 6/15/2012, or lawful immigration status or parole obtained prior to 6/15/2012, expired as of 6/15/2012;
6) Is currently in school, or has graduated or obtained a certificate of completion from high school, has obtained a GED, or is an honorably discharged veteran of the U.S. Coast Guard or the U.S. Armed Forces; and
7) Has not been convicted of a felony, a "significant misdemeanor," three or more other misdemeanors, or does not otherwise pose a threat to national security or public safety.

USCIS, *Consideration of Deferred Action for Childhood Arrivals (DACA)*, https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca#guidelines (last visited July 26, 2018).
DACA can be affirmatively requested from the USCIS by foreign nationals already in removal proceedings, those who have final orders for removal or voluntary departure, and by those foreign nationals who have never been in removal proceedings as long as they are not in detention. A grant of DACA is subject to renewal every two years. Foreign nationals who qualify for deferred action are not placed into removal proceedings or removed from the United States for the duration of the grant. Foreign nationals who have been granted DACA can apply for work authorization. *Id.*

While deferred action allows the foreign national to remain in the United States with work authorization, DACA recipients are not granted lawful immigration status or put on a pathway to citizenship.

What options are available to a DACA recipient who wants to become a permanent resident? If a DACA recipient marries a U.S. citizen, can they apply for adjustment of status as an immediate

relative? If they marry a lawful permanent resident, or otherwise become the beneficiary of an approved I-130 petition? Can an employer sponsor them for permanent resident status? Under what circumstances would they be able to apply for adjustment of status?

During the period of deferred action, DACA recipients do not acquire unlawful presence. They are considered to be in a period of authorized stay by DHS. However, any unlawful presence acquired before or after DACA has been granted is not excused.

In addition to work authorization, DACA recipients could apply for advance parole (i.e., permission to travel abroad and return to the United States to resume their last status). Although USCIS is no longer accepting parole applications, would a DACA recipient who has traveled abroad on advance parole be able to apply for an immigrant visa at a U.S. consular post outside the United States (i.e., complete immigrant visa processing), or apply for adjustment of status following his parole into the United States?

Where is DACA now?

On January 25, 2017, President Trump issued Executive Order No. 13,768, *Enhancing Public Safety in the Interior of the United States*. In that Order, the President directed federal agencies to "[e]nsure the faithful execution of the immigration laws . . . against all removable aliens." 82 Fed. Reg. 8799 (Jan. 30, 2017). On June 29, 2017, Texas and nine other states sent a letter to Attorney General Jeff Sessions stating that legal action would be taken to challenge DACA unless DHS agreed to "phase out" the program by rescinding the 2012 DACA memo and ordering the Executive Branch to stop renewing or issuing any new DACA applications by September 5, 2017. Letter from Ken Paxton, Att'y Gen. of Texas, et al. to Jeff Sessions, U.S. Att'y Gen., DOJ (June 29, 2017), https://www.texasattorneygeneral.gov/files/epress/DACA_letter_6_29_2017.pdf. Sessions responded to this letter by sending one of his own to DHS Acting Secretary Elaine Duke on September 4, 2017. In his letter, Sessions stated that DACA "was an unconstitutional exercise of authority by the Executive Branch" and that the program's "legal and constitutional defects" would "likely" render current legal challenges successful. Letter from Jeff Sessions, U.S. Att'y Gen., DOJ, to Elaine Duke, Acting Sec'y, DHS (undated), https://www.dhs.gov/publication/letter-attorney-general-sessions-acting-secretary-duke-rescission-daca. Citing the likely success of ongoing federal litigation to find the program unlawful and President Trump's Executive Order No. 13,768, DHS rescinded DACA the next day. DHS, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)* (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

In what would become the first of many cases filed across the country against DHS, the University of California filed a complaint on September 8, 2017, challenging the rescission of the DACA program and asking the court to enjoin the implementation of the rescission. On January 9, 2018, the district court issued an order directing the government to partially maintain the DACA program. *Regents of the Univ. of Cal. v. DHS*, 298 F. Supp. 3d 1304 (N.D. Cal. 2018).

On February 13, 2018, the Eastern District of New York issued a nationwide preliminary injunction ordering the government to maintain the DACA program on the same terms and conditions that existed before the September 5, 2017 DACA rescission memo, subject to the same

limitations as the January 9, 2018 injunction issued in *Regents of the University of California*. *Vidal v. Nielsen*, 291 F. Supp. 3d 260 (E.D.N.Y. 2018).

Due to these two federal court orders, USCIS has resumed accepting requests to renew a grant of deferred action under DACA for the time being while the courts and Congress continue to debate the outcome and fate of the DACA recipients. USCIS, *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction (last visited July 26, 2018).

[12] Provisional Waivers of Unlawful Presence for Certain Immediate Relatives: I-601A Waivers

While waivers are reviewed in more detail in Chapter 5, consider whether and when a I-601A waiver may apply within the adjustment context. In *In re Cavazos,* discussed on page 526 of the text, the respondent qualified as an immediate relative and was eligible to adjust status, but for the court's finding of preconceived intent. However, because such intent was the only negative factor cited by the immigration judge and was counterbalanced by the respondent's U.S. citizen wife and child, the order of removal was later vacated. The respondent had also been admitted to the United States. Had the respondent entered without inspection today, he would not have been eligible to adjust status despite his classification as an immediate relative. Generally, to take advantage of INA § 245(i), the applicant must be the beneficiary of a qualifying immigrant visa petition or application for employment certification (a/k/a labor certification) that was filed on or before April 30, 2001. What relief would be available to a foreign national who entered without inspection or overstayed more than 180 days in the United States, but who also qualifies as an immediate relative?

After 2001, immediate relatives of U.S. citizens who were not eligible to adjust status in the United States were required to leave the country to apply for their immigrant visas at a U.S. consular post abroad. Immediate relatives who had acquired more than six months of unlawful presence while in the United States were barred from returning for three to ten years. INA § 212(a)(9)(B)(i); 8 U.S.C. § 1182(a)(9)(B)(i). Immediate relatives could not file a waiver application until after they had appeared for their immigrant visa interview abroad. They then had to wait for the DOS to decide their application. If the DOS approved their application, their visa would be issued and they could return to the United States and their families here.

The immigration agencies amended this procedure in 2013. See *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 78 Fed. Reg. 536, 551 (Jan. 3, 2013). Under the new provisional waiver process, immediate relatives are still required to leave the United States to complete the immigrant visa process, but they can apply for a provisional waiver of inadmissibility before leaving the United States by filing Form I-601A with the DOS National Visa Center. Although this process significantly reduces the amount of time applicants are separated from their U.S. citizen family members, and gives family members confidence that the visa will be issued and that the family member(s) will be allowed to return to the United States, it is limited to the spouses and children of U.S. citizens. DHS, Press Release, *Secretary Napolitano Announces Final Rule to Support Family Unity During Waiver Process* (Jan. 3, 2013),

https://www.uscis.gov/news/secretary-napolitano-announces-final-rule-support-family-unity-during-waiver-process.

In 2014, DHS expanded this program to include all statutorily eligible classes of relatives for whom an immigrant visa is immediately eligible (i.e. the spouses and children of LPRs and the adult children of U.S. citizens and LPRs). Memorandum from Jeh Johnson, Secretary, DHS, to Leon Rodriquez, Director, USCIS (Nov. 20, 2014) (Expansion of the Provisional Waiver Program), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf. To be successful, the applicants must show that their absence from the United States would cause "extreme hardship" to a spouse or parent who is a U.S. citizen or LPR. The applicant must also warrant a favorable exercise of discretion. INA § 212(a)(9)(B)(v) and 8 C.F.R. § 212.7(e).

Why do you think this program was expanded? Does this program help foreign nationals who may be the beneficiaries of I-140 petitions but who do not qualify as immediate relatives?

Chapter 5: Inadmissibility: In Every Context

Page 540 (§ 5.01): Add to the end of § 5.01, just before § 5.02:

The opening scenario in § 5.01 introduces a number of grounds of inadmissibility. Chapter 5 will discuss the points where inadmissibility occurs in the immigration process as well as grounds, exceptions, and waivers. The U.S. Department of State provides annual data for various immigrant and nonimmigrant visa applications. *See, e.g.,*http://travel.state.gov/content/visas/english/law-and-polcy/statistics/annual-reports/report-of-the-visa-office-2014.html. Table XX provides information about immigrant and nonimmigrant visa applications in fiscal year 2014 and findings of inadmissibility by INA section. The chart also shows the number of applicants who were able to overcome the ground of ineligibility and receive a visa.

An individual may be found inadmissible on more than one ground. While most denials per ground of inadmissibility are in the hundreds or even thousands, in fiscal year 2014 more than 1.7 million applicants were denied nonimmigrant visas under INA § 214(b); 8 U.S.C. § 1184(b) based on immigrant intent. *Id*.

In 2017 the State Department determined that more than 3 million nonimmigrants were inadmissible and over 280,000 immigrants subject to a ground of inadmissibility. However, the data shows that many of the immigrants, 204,700, were able to overcome the initial ground barring admission.

To understand this dynamic of first examining the grounds of inadmissibility and then challenging the characterization or overcoming the ground with a waiver application, see Lenni B. Benson, *Inadmissibility Lurking All About: Examining Recent Issues in Immigration Law* (2017), chapter 21 in the IMMIGRATION AND NATURALIZATION INSTITUTE (50TH ANNUAL) (PLI 2017).

One of the most common grounds of inadmissibility is that the applicant smuggled a person into the United States. This may occur if a parent used false information to bring a child to the United States or paid a smuggler to bring a child without documents. See Table XX for INA § 212(a)(6)(E); 8 U.S.C. § 1182(a)(6)(E). There are limited exceptions and waivers.

Page 545 (§ 5.02[B]): Add the following to the end of Note 1:

A lot can turn in these cases on the credibility of the noncitizen's testimony. In *Diaz-Perez v. Holder*, 750 F.3d 961 (8th Cir. 2014), DHS questioned Diaz-Perez about his entry to the United States. Diaz-Perez originally stated he entered the United States on foot without inspection several years before. Later, in immigration proceedings, Diaz-Perez testified he told DHS he entered by car and, as a passenger, was inspected and admitted when a CBP officer asked only the driver (his mother-in-law) if she was a U.S. citizen and then waved the car through. The immigration judge found discrepancies in the testimony of Diaz-Perez as well as his mother-in-law and held that he had not been admitted. The BIA agreed, as did the Eighth Circuit.

In May 2015, the Fifth Circuit held that an individual who was "waved-through" at a port of entry was admitted. *Rubio v. Lynch*, 2015 U.S. App. LEXIS 8449 (5th Cir. May 21, 2015). Ramiro Tula

Rubio, a U.S. lawful permanent resident and a citizen of Mexico, initially was found ineligible for cancellation of removal because he was not "admitted in any status" before his criminal offense. The Fifth Circuit found that Rubio was physically "waved in" by a U.S. immigration officer when he first entered the United States in 1992 as a four-year-old child riding as a passenger in a car. The court cited Areguillin and *Quilantan*, BIA cases in which persons who were "waved in" were found to have been admitted.

Note that Rubio's conviction occurred several years following a grant of permanent residence and he was found inadmissible while attempting to return to the United States following a trip to Mexico after accuring more than ten years as a permanent resident. Hypotheticals in Chapters 6 and 7 discuss the consequences of grounds of inadmissibility to longterm permanent residents.

Courts differ on what constitutes an "admission." For example, in *Medina-Nunez v. Lynch*, 2015 U.S. App. LEXIS 9503 (9th Cir. June 8, 2015), the court held that an individual who had been accepted into the Family Unity program had not been admitted to the United States. For that reason, the person was not eligible for cancellation of removal for lawful permanent residents.

If an individual used false documentation, he or she may be subsequently found removable and require a waiver. Consider INA § 212(i); 8 U.S.C. § 1182(i), a waiver of inadmissibility due to fraud and misrepresentation, and INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (inadmissible at entry). The former is discussed in Chapter 5. The latter is discussed at the end of Chapter 5 and the start of Chapter 6.

Those who enter the United States through a false claim to citizenship will be found to have entered without inspection. Consider defenses available when the false claim was made before or after IIRAIRA. For example, was the person a minor? Did she believe she was a U.S. citizen? Was it possible to retract the statement? The current language in INA § 212(a)(6)(C)(ii)(I); 8 U.S.C. § 1182(a)(6)(C)(ii)(I) applies to all such claims whether made knowingly or not.

Page 568 (§ 5.03[B]): Add the following as a new paragraph after the paragraph ending with "MaterialSupportFS-26Sep07.pdf" and before the paragraph starting with "INA § 212(d)(3)(B)(i) provides that a waiver…"

In *Ramadan*, the State Department initially denied Ramadan's H-1B visa application under the material support bar due to his financial contributions to a charity that provided financial support to a terrorist group. In another case arising in the context of removal proceedings, the Second Circuit held in *Ay v. Holder*, 743 F.3d 317 (2d Cir. 2014), that Ay provided material support to a terrorist organization, but remanded to allow the BIA to "address in a precedential decision" whether an exception to the ground of inadmissibility for duress is implicit in INA § 212(a)(3)(B)(iv)(VI); 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). In the earlier removal proceedings, the immigration judge found that Ay gave food several times and clothing at least one time to members of Kurdish terrorist groups, one of which might have been an organization designated by the U.S. government as a terrorist organization. Ay argued he supplied the food and clothing under duress.

Reinforcing Consular Power

Multiple issues arise under the Supreme Court's decision in *Kerry v. Din*, 2015 U.S. LEXIS 3918 (U.S. June 15, 2015). The *Kerry* case concerns Mr. Kanishka Berashk, a citizen of Afghanistan, who is married to U.S. citizen Fauzia Din. The couple has been apart, waiting for the issuance of Mr. Berashk's immediate relative immigrant visa, since 2006. Mr. Berashk was a clerk in the Afghan Ministry of Education. His visa application was denied based on INA § 212(a)(3)(B); 8 U.S.C. § 1182(a)(3)(B) as a foreign national who engaged in "terrorist activities." The Department of State provided no further explanation regarding the reasons for denying Mr. Berashk's visa. The Ninth Circuit held that the Department of State had to provide a facially legitimate and bona fide basis for denying the visa. *Din v. Kerry*, 718 F.3d 856 (9th Cir. 2013). The government appealed to the Supreme Court.

The Supreme Court upheld the non-reviewability of consular decisions. The Supreme Court held that the U.S. Constitution does not require the U.S. government to provide an explanation for denying the visa application of a spouse of a U.S. citizen. Justices Kennedy and Alito stated that even if a U.S. citizen had a constitutional right to live with his or her spouse, it is enough for the U.S. citizen spouse to be advised of the section of the Immigration and Nationality Act under which the foreign national spouse was excluded.

Justices Scalia, Roberts, and Thomas stated that there is no constitutional interest for U.S. citizens to live in the United States with their spouses. (When you study some of the waivers available for inadmissibility in this chapter, consider how that ruling might affect an argument that a U.S. citizen spouse suffers extreme hardship when his or her foreign national spouse cannot live with them in the United States.)

Also note that Ms. Din, the U.S. citizen spouse of the foreign national denied the visa, brought the case. Compare her claim that her due process liberty interest was violated to the U.S. citizens who sued in *Kleindeinst*.

Page 572 (§ 5.03[D][1]): Add the following to the end of Note 2; just before subsection [2]:

Chapters 2 and 6 discuss enforcement priorities by Immigration and Customs Enforcement. Generally, an overstay in nonimmigrant status (without a criminal offense or other aggravating factors), was not a high priority. Compare the hypotheticals about Sherry Kit, who entered on the visa waiver, to what happened to Sarah Jane McCrohan, an Australian citizen who overstayed less than one day in the United States and was detained by U.S. authorities for three weeks when she tried to leave New York for Ottawa, Canada, headed to the Australian Embassy to sort out her visa situation. Elise Foley, *24-Year-Old Pleads With Immigration Agency to Let Her Fly Back to Australia,* Huffington Post, April 15, 2015, http://www.huffingtonpost.com/2015/04/15/immigration-detention_n_7074032.html.

Page 578 (§ 5.03[E][2]): Add the following to the end of subsection [2], just before subsection [F]:

In Chapter 4, you learned about the requirements of a bona fide marriage when applying for immigration status based on a marital relationship. Persons found to have committed marriage

fraud under INA § 204(c); 8 U.S.C. § 1154(c) are ineligible for an immigration benefit through marriage. In April 2015, in *In re Christo*, 26 I. & N. Dec. 537 (AAO 2015), the USCIS Administrative Appeals Office found that a beneficiary who submitted a false marriage certificate with an I-130 immigrant visa petition did not commit marriage fraud. USCIS was deciding the beneficiary's employment-based green card case and reviewed the previous marriage-based immigration case. The AAO read the plain language of INA § 204(c) and found that by submitted the false marriage certificate, the beneficiary did not "enter into" or "attempt or conspire" to enter into a marriage. The AAO found that the beneficiary might be subject to INA § 212(a)(6)(C)(i); 8 U.S.C. § 1182(a)(6)(C)(i) when applying for adjustment of status.

Pages 587-99 (§ 5.03[G][5] and [6]): Delete the discussion of *In re Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), and *Jean-Louis v. AG of the United States*, 582 F.3d 462 (3d Cir. 2009), and replace with *In re Silva-Trevino*, 26 I. & N. Dec. 550 (A.G. 2015), excerpted in § 5.03[G][7] below.

Page 599 (§ 5.03[G][7]): Add the following at the end of subsection [7], just before subsection [H]:

The Supreme Court decided two cases in 2013 concerning the categorical approach. First, in *Moncrieffe v. Holder*, 2013 U.S. LEXIS 3313 (U.S. Apr. 23, 2013), a long-time permanent resident pleaded guilty under a Georgia state law for possession of marijuana with intent to distribute. The law provided leniency for first time offenders. The amount of marijuana involved was 1.3 grams. However, he was ordered deported pursuant to an aggravated felony (illicit trafficking in a controlled substance). The BIA affirmed removability and the Fifth Circuit rejected Moncrieffe's petition for review.

The Supreme Court found that when using the categorical approach to determine if an offense under state law matches an offense in the INA, a court must determine if the state law fits into the generic definition of the federal offense for immigration purposes. The Georgia statute in *Moncrieffe* included a provision that if an individual shared a small amount of marijuana without remuneration, the offense would be treated as simple possession. The Court found that examining the conviction alone, without other documentation, does not "necessarily" provide facts that would match the offense to one under the federal law requiring removal.

Second, *Descamps v. United States*, 2013 U.S. LEXIS 2276 (U.S. June 20, 2013), used the categorical approach in both the sentencing (the original subject of *Taylor v. United States)* and immigration contexts. Courts use the categorical approach to analyze whether past convictions of an individual in federal court are classified violent felonies, including burglary, arson or extortion, under the Armed Career Criminal Act (ACCA). Three prior convictions for certain violent felonies may increase sentencing for federal defendants under the ACCA. Descamps was convicted of possession of a firearm. The government argued Descamps should receive an enhanced sentence under the ACCA because of his past state convictions.

The categorical approach compares the elements of the past convictions with the elements of the generic crime. Statutes that are the same or narrower than the generic offense qualify under the ACCA. Prior convictions under divisible statutes require that the modified categorical approach be used in the analysis. The Court found that the modified categorical approach does not apply to

statutes that contain indivisible sets of elements. Limiting the categorical approach in the analysis of divisible statutes means the judge would not look to the record of conviction, the actual conduct by the defendant. This may result in a finding that a conviction does not result in removability.

Moncrieffe, *Descamps*, and the categorical and modified categorical approaches generally are all discussed in more depth in Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, Immigration Law and Procedure § 71.05[6].

In April 2015, then-Attorney General Holder vacated former Attorney General Mukasey's opinion in *In re Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), summarized in § 5.03[5] above. Below are relevant excerpts from the 2015 opinion of the Attorney General:

IN RE SILVA-TREVINO

26 I. & N. Dec. 550 (Att'y Gen. 2015)

On November 7, 2008, Attorney General Mukasey issued an opinion in this matter vacating the August 8, 2006, decision of the Board of Immigration Appeals and remanding respondent's case for further proceedings in accordance with his opinion. *See* Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008). On remand, the Immigration Judge, applying Attorney General Mukasey's opinion, issued a new decision finding respondent ineligible for discretionary relief from deportation. The Board affirmed that decision. The respondent then filed a petition for review with the United States Court of Appeals for the Fifth Circuit. On January 30, 2014, the Fifth Circuit rejected Attorney General Mukasey's opinion as contrary to the plain language of the statute, vacated the Board's decision, and remanded this matter to the Board for further proceedings consistent with the court's opinion. *See Silva-Trevino v. Holder*, 742 F.3d 197, 200-06 (5th Cir. 2014). For the reasons stated herein, I have determined that it is appropriate to vacate Attorney General Mukasey's November 7, 2008, opinion in this matter.

The central issue raised by this case is how to determine whether an alien has been convicted of . . . a crime involving moral turpitude″within the meaning of section 212(a)(2) of the Immigration and Nationality Act. The Board initially addressed this issue in its August 8, 2006, decision in this case, determining that respondent's conviction for the criminal offense of ″indecency with a child″ should not be considered a crime of moral turpitude because the Texas statute under which he had been convicted criminalized at least some conduct that did not involve moral turpitude and was thus not categorically a crime involving moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. at 690-92. After that decision had issued, Attorney General Gonzales directed the Board to refer the case to him for further review. *See* Att'y Gen. Order No. 2889-2007 (July 10, 2007); *see also* 8 C.F.R. § 1003.1(h)(1)(i) (2007) (providing that the Attorney General may direct the Board to refer cases to him ″for review of [the Board's] decision″). After review, Attorney

General Gonzales's successor, Attorney General Mukasey, issued an opinion vacating the Board's August 8, 2006, decision and establishing a new three-step framework to be used by Immigration Judges and the Board in determining whether an alien had been convicted of a crime involving moral turpitude. Att'y Gen. Order No. 3016-2008 (Nov. 7, 2008); *Matter of Silva-Trevino*, 24 I&N Dec. at 687-90 & n.1, 704 . . . .

In the first step of the framework, Attorney General Mukasey directed Immigration Judges and the Board to ″engage in a 'categorical inquiry'″ in order to determine ″whether moral turpitude necessarily inheres in all cases that have a realistic probability of being prosecuted″ under a particular criminal provision. *Matter of Silva-Trevino*, 24 I&N Dec. at 696-97 (relying on *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007)). Where this categorical analysis did not resolve the moral turpitude inquiry, the Attorney General instructed adjudicators to proceed to the second step, a ″modified categorical″ inquiry ″pursuant to which adjudicators consider whether the alien's record of conviction evidences a crime that in fact involved moral turpitude. ″ Id. at 698. Recognizing that ″[m]ost courts . . . have limited this second-stage inquiry to the alien's record of conviction, ″ the Attorney General concluded that a third step was necessary because ″when the record of conviction fails to show whether the alien was convicted of a crime involving moral turpitude, immigration judges should be permitted to consider evidence beyond that record if doing so is necessary and appropriate to ensure proper application of the Act's moral turpitude provisions.″ *Id.* at 699. Accordingly, Attorney General Mukasey's opinion directed Immigration Judges and the Board to consider, at the third step in the moral turpitude inquiry, ″any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question″ when ″the record of conviction does not resolve the inquiry.″ *Id*. at 704. The Attorney General then remanded the case to the Board to ″reconsider, consistent with [his] opinion, whether the crime respondent committed involved moral turpitude. ″ *Id*. at 709.

On remand, the Board sent the case back to the Immigration Judge who--applying the third step in Attorney General Mukasey's framework--considered evidence outside of the record of conviction to conclude that respondent's conviction had involved moral turpitude because respondent should have known that the victim of his crime was a minor. Silva-Trevino, 742 F.3d at 198-99. As a result, the Immigration Judge found respondent was inadmissible and thus ineligible for discretionary relief from deportation under section 212(a)(2) of the Act. *Id.* On review, the Board affirmed.

In January of last year, on respondent's petition for review, the Fifth Circuit held that "convicted of" as used in section 212(a)(2) did *not* permit Immigration Judges to inquire into relevant evidence outside of the record of conviction in order to classify a particular conviction as one involving moral turpitude. . . . In so doing, the court rejected the third step of Attorney General Mukasey's framework as

contrary to the unambiguous language of the statute and thus refused to accord the Silva-Trevino opinion deference. . . .

As the Fifth Circuit recognized, in so ruling it became the fifth circuit court of appeals to reject Attorney General Mukasey's construction of the statute. . . .These courts have all agreed that the phrase "convicted of"" as used in the Act forecloses any inquiry into evidence outside of the record of conviction. . . . As a result, Attorney General Mukasey's opinion in this matter has not accomplished its stated goal of "establish[ing] a uniform framework for ensuring that the Act's moral turpitude provisions are fairly and accurately applied." . . .

In addition, in the time since Attorney General Mukasey released his opinion, the Supreme Court has issued several decisions that may bear on administrative determinations of whether an alien has been convicted of a crime involving moral turpitude. In *Carachuri-Rosendo v. Holder*, the Court held that adjudicators could not consider uncharged conduct to determine whether an alien had been ″convicted of″ illicit trafficking, an aggravated felony under the Act. 560 U.S. 563, 581-82 (2010). Applying *Carachuri-Rosendo* 3 years later, the Court in *Moncrieffe v. Holder* reaffirmed that the phrase "convicted of" required a categorical approach, and it rejected the Government's argument that adjudicators could engage in a "circumstance-specific" analysis of a particular drug conviction to determine if the quantity of drugs involved made it an aggravated felony. __U.S. __, 133 S. Ct. 1678, 1690-92(2013); *see also* Kawashima v. Holder, __U.S. __, 132 S. Ct. 1166, 1172 (2012) (applying the categorical approach to determine if an alien had been convicted of an offense involving fraud or deceit). These decisions cast doubt on the continued validity of the third step of the framework set out by Attorney General Mukasey's opinion, which directs Immigration Judges and the Board to go beyond the categorical and modified categorical approaches and inquire into facts outside of the formal record of conviction in order to determine whether a particular conviction involves moral turpitude.

In view of the decisions of five courts of appeals rejecting the framework set out in Attorney General Mukasey's opinion--which have created disagreement among the circuits and disuniformity in the Board's application of immigration law--as well as intervening Supreme Court decisions that cast doubt on the continued validity of the opinion, I conclude that it is appropriate to vacate the November 7, 2008, opinion in its entirety. . . .

In light of this vacatur, the Board may address, in this case and other cases as appropriate, the following issues:

1. How adjudicators are to determine whether a particular criminal offense is a crime involving moral turpitude under the Act;

2. When, and to what extent, adjudicators may use a modified categorical approach and consider a record of conviction in determining whether an alien has been

> "convicted of . . . a crime involving moral turpitude" in applying section 212(a)(2) of the Act and similar provisions;
>
> 3. Whether an alien who seeks a favorable exercise of discretion under the Act after having engaged in criminal acts constituting the sexual abuse of a minor should be required to make a heightened evidentiary showing of hardship or other factors that would warrant a favorable exercise of discretion. . . .

Notes:

1. Is A Crime of Moral Turpitude Unconstitutional Under the Void for Vagueness Doctrine? In a number of recent cases, the federal circuits have continued to uphold as constitutional the ground of inadmissibility based on a conviction for a crime involving moral turpitude. *See, e.g., Martinez-de Ryan v. Sessions*, 2018 U.S. App. LEXIS 19639 (9th Cir. July 17, 2018), *Moreno v. AG of the United States*, 887 F.3d 160, 165-66 (3d Cir. 2018); *Boggala v. Sessions*, 866 F.3d 563, 569-70 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 1296 (2018); *Dominguez-Pulido v. Lynch*, 821 F.3d 837, 842-43 (7th Cir. 2016).

In the update to Chapter 6 we discuss a recent Supreme Court decision striking down a ground of removability (not inadmissibility) for an "aggravated felony" because the only definition was a cross reference to a "crime of violence." *Sessions v. Dimaya*, __U.S. __, 138 S. Ct. 1204 (2018).

2. Federal Courts Allow Limited Review of Consular Determinations of Inadmissibility. In July 2018, the Ninth Circuit clarified the doctrine that limits judicial review of consular decisions. In *Allen v. Milas*, 2018 U.S. App. LEXIS 20523 (9th Cir. July 24, 2018), the panel ruled that while the court had subject matter jurisdiction to consider a U.S. citizen husband's challenge to a consular finding that his wife was inadmissible, the doctrine precluded the court from second guessing or rejecting the consular officer's determination that her past convictions were crimes of moral turpitude or crimes relating to a controlled substance.

Page 602 (§ 5.04[A]): Add the following new Note 5, just before subsection [B]:

5. Combining § 212(d)(3) Waivers with Other Relief. Your study of the § 212(d)(3) waiver showed that combined with certain nonimmigrant classifications, a beneficiary may obtain an extended period of authorized stay within the United States. For example, § 3.05[B] discussed the U nonimmigrant category for victims of crimes. In *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014), L.D.G. applied for a U visa as the victim of a serious crime against her and her family. However, USCIS found her inadmissible due to both an immigrati on violation (entry without inspection) and a controlled substance conviction. USCIS refused to grant her a waiver for the controlled substance conviction under INA § 212(d)(14); 8 U.S.C. § 1182(d)(14). In removal proceedings, L.D.G. asked the immigration judge to grant her a waiver under INA § 212(d)(3). The immigration judge held that only USCIS could issue § 212(d)(3) waivers. The BIA affirmed. The circuit court reversed. Among other things the court noted that USCIS and immigration judges had concurrent jurisdiction. The court also stated that U visas were created before the creation of the Department of Homeland Security.

Similarly, in *Atunnise v. Mukasey*, 523 F.3d 830, 833 (7th Cir. 2008), the court determined that an immigration judge had the ability to grant a 212(d)(3) waiver. The court described her waiver as "forward looking," to be able to remain in the United States in U status. It did not find anything in the plain language of the statute prohibiting the use of a 212(d)(3) waiver to waive the inadmissibility of a U visa applicant. The court also found that permitting an immigration judge to grant a 212(d)(3) waiver when deciding eligibility for relief in proceedings was more efficient than "compartmentalizing waiver decisions," particularly due to the long wait times for immigration relief experienced by noncitizens. The court did not rule on the merits of the waiver application but remanded the case so that the immigration judge could consider the waiver application.

Page 611 (§ 5.04[C]): Add the following new Note 5, just before subsection [D]:

5. Limits on § 212(h) Waivers. In *In re Rivas*, 26 I. & N. Dec. 130 (BIA 2013), the Board held that a noncitizen physically present in the United States and in removal proceedings may not obtain a § 212(h) waiver on a "stand-alone" basis and could not be granted such a waiver nunc pro tunc. A concurrently filed application for adjustment of status is required. The Board found that Rivas was ineligible for a § 212(h) waiver because he was not an arriving alien seeking to waive a ground of inadmissibility and he was not applying for the waiver with an application for adjustment of status. *Rivas* differs from *In re Abosi*, 24 I. & N. Dec. 204 (BIA 2007), in which the noncitizen was outside the United States and therefore an arriving alien requesting readmission to the United States.

In September 2014, the Eleventh Circuit denied Rivas' petition for review and stated that an application for adjustment of status to residence must accompany a § 212(h) waiver when a removable permanent resident attempts to reenter the United States from abroad. *Rivas v. Attorney General,* 765 F.3d 1324 (11th Cir. 2014). *Compare Judalang v. Holder*, 2011 U.S. LEXIS 9018 (U.S. 2011) (discussing the availability of former INA § 212(c) relief and unequal treatment of permanent residents who had left the United States and those who had not traveled internationally).

In May 11, 2015, the Seventh Circuit also held that stand alone nunc pro tunc waivers pursuant to INA § 212(h) are unavailable and must be accompanied by an application for adjustment of status. *Palma-Martinez v. Lynch,* 785 F.3d 1147 (7th Cir. 2015).

In Chapter 6, you will study the deportation ground of aggravated felony (defined in INA § 101(a)(43); 8 U.S.C. § 1101(a)(43)). Generally, there is little relief for those removed based on an aggravated felony. However, there is no aggravated felony bar to admission, so it is possible that a former permanent resident may apply for adjustment of status and an INA § 212(h) waiver concurrently, as discussed above.

In May 2015, the Board of Immigration Appeals held in *In re J-H-J-*, 26 I. & N. Dec. 563 (BIA 2015), that a noncitizen who adjusted status in the United States and who has not entered as a lawful permanent resident is not barred from establishing eligibility for a waiver of inadmissibility under INA § 212(h) as a result of an aggravated felony conviction. Former permanent residents convicted of aggravated felonies may submit a § 212(h) waiver when applying for an immigrant visa at a U.S. consulate based on a new immigrant visa petition.

Page 633 (§ 5.05[D][2]): Add the following at the end of subsection [2]:

One of President Obama's executive actions announced in November 2014 will expand the I-601A provisional waiver program. The provisional waiver shortens the time outside of the United States while eligible individuals apply for immigrant visas at U.S. consulates when the applicable ground of inadmissibility is entry without inspection or accrual of unlawful presence. The provisional waiver does not waive any other grounds of inadmissibility. Currently, only immediate relatives of U.S. citizens are able to utilize the provisional waiver. Through the President's executive action, the provisional unlawful presence waiver will be expanded to include spouses and children of lawful permanent residents and sons and daughters of U.S. citizens.

The executive action regarding provisional waivers also includes a request for the USCIS to provide further guidance on the definition of "extreme hardship," a component of the waiver. The USCIS may define factors leading to a presumption of extreme hardship. As you read about requirements for several waivers that require a showing of extreme hardship to qualifying relatives, consider how a USCIS definition may affect preparation of an application.

No regulations have been issued yet regarding the expansion of provisional waivers. General information is available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf and at http://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers.

In fiscal year 2017, over 37,000 immigrants applied for a waiver to overcome the ten-year bar for overstay found in INA § 212(a)(9)(B); 8 U.S.C. § 1182(a)(9)(B). Of that number, the State Department issued over 35,000 waivers. State Department Report on Grounds of Inadmissibility (Table XX), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXX.pdf. But not everyone can meet the high standards required to grant a waiver. Nor does everyone have a qualifying relative.

As of July 2018, the Trump administration has not changed the provisional waiver procedures.

Chapter 6: Deportability and the Removal Process

Page 636 (§ 6.01[A]):

At https://www.ice.gov/removal-statistics/2017, you will find a report summarizing ICE removal statistics for fiscal year 2017 with charts detailing these efforts and comparing removal figures from 2015 to 2017.

In fiscal year 2017, ICE removed a total of 226,119 immigrants. Due to its continued focus on removing convicted felons and other immigrants that DHS felt were public safety threats, ICE reports that 53 percent of those removed had criminal convictions.

ICE organizes its data in terms of interior removals versus removals that take place near a border. The chart below shows that while total removals have generally decreased in the past three years, the removal of individuals classified as criminal noncitizens has increased.

Chart 1: ICE FY2015-2017 Interior v. Border Removals by Criminality

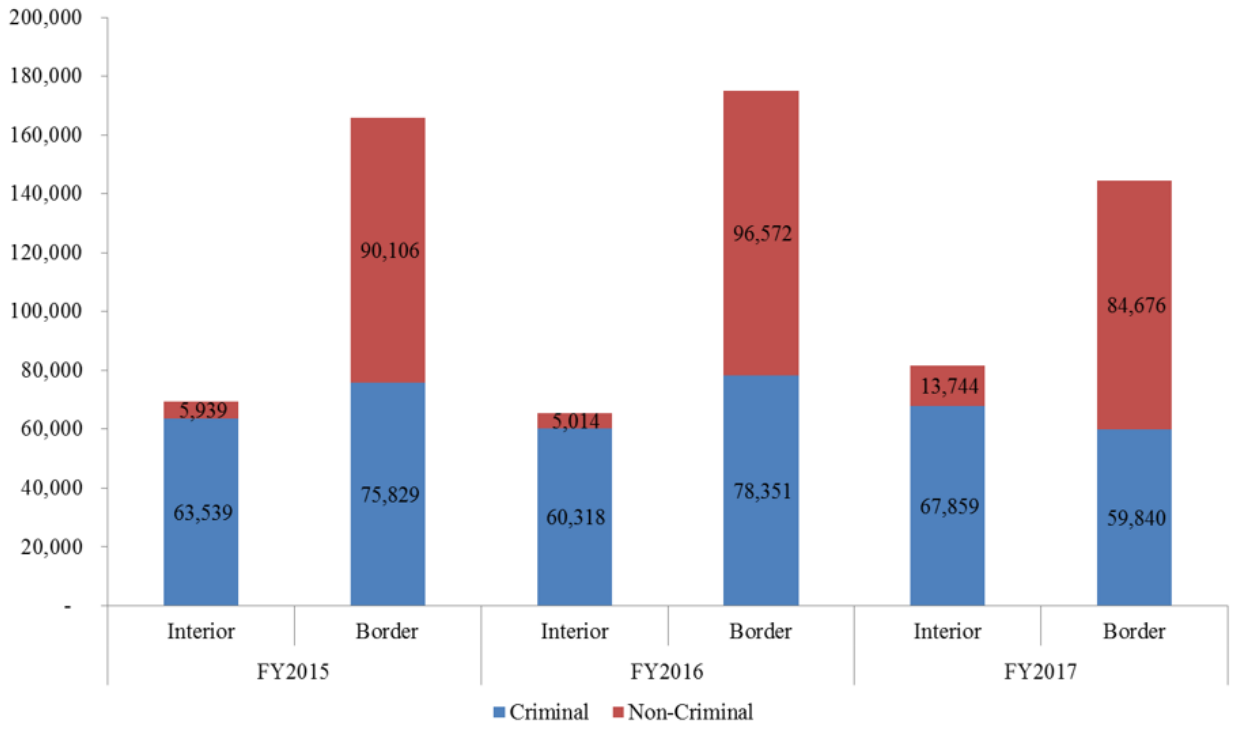


Image Courtesy of ICE.

ICE reported that the majority of immigrants removed in 2017 were from Mexico, Guatemala, Honduras, and El Salvador.

Continuing high levels of removal, enforcement issues at the border, and an over-stretched immigration court system have resulted in many challenges for U.S. immigration agencies. On

April 2014, a Migration Policy Institute report entitled "The Deportation Dilemma: Reconciling Tough and Humane Enforcement" examined the current removal process, developments in apprehensions made at the border and inside the United States, and the possible ways the President can affect immigration policy relating to removal. The report is available at http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement.

In the summer of 2014, the United States experienced an unprecedented surge of unlawful border crossings in the Rio Grande Valley along the southwestern U.S. border. Many of those attempting to enter the United States were unaccompanied children and mothers with children fleeing violence in their home countries. Their countries of origin were primarily the Central American countries of Honduras, Guatemala, and El Salvador. In fiscal year 2014, U.S. Customs and Border Patrol (CBP) apprehended 49,959 unaccompanied minors and 52,326 family units. The large number of apprehensions and the fact that the majority were children resulted in changes in ICE operational policy. See https://www.dhs.gov/archive/unaccompanied-children.

Over the past several years the number of unaccompanied children and families apprehended at the U.S. border has remained high. Numbers for part of FY 2018 show that as of May 31, 2018, CBP apprehended 32,372 unaccompanied minors and 59,113 family units. https://www.cbp.gov/newsroom/stats/sw-border-migration#.

Children are not supposed to be detained pursuant to immigration law, and unaccompanied minors must be transferred to the Department of Health and Human Services within a short amount of time. As discussed in Chapters 6 and 7, unaccompanied minors are not removed upon apprehension, but are scheduled for removal hearings before immigration judges to determine if relief or an immigration benefit exists for them. New facilities to house the children (and also mothers with children) were constructed as a response to the initial waive of children and family groups in 2014. Many of these facilities were in remote locations, making access to legal representation a challenge. The U.S. immigration bar met the challenge with many volunteer attorneys spending weeks at facilities in Artesia, New Mexico and Dilley and Karnes, Texas to conduct intake interviews, represent individuals at credible fear interviews, and assist with special immigrant juvenile and asylum cases. *See* Julia Preston, *In Remote Detention Center, a Battle on Fast Deportation*, N.Y. Times, Sept. 4, 2014, http://www.nytimes.com/2014/09/06/us/ in-remote-detention-center-a-battle-on-fast-deportations.html. Here is a link to an illustrated story about the experience attorneys and paralegals had while volunteering at Artesia: https://insidewitness.files.wordpress.com. It was written and drawn by Steve Sady, former Federal Public Defender for Oregon and his daughter, artist Clio Reese Sady, who served as volunteers at Artesia.

In 2018, the Trump administration instituted a new policy of deterrence in which it separated children from their parents upon entry into the United States. Julie Hirschfeld Davis & Michael D. Shear, *How Trump Came to Enforce a Practice of Separating Migrant Families*, N.Y. Times, June 16, 2018, https://www.nytimes.com/2018/06/16/us/politics/family-separation-trump.html.

The government claims that family separation happened partly as a result of two colliding laws. First, the administration is criminally charging parents with illegal entry and taking them into

custody to await the criminal process. *See* INA § 275; 8 U.S.C. § 1325. The distinction between criminal and civil enforcement was discussed in Chapter 1 in the main text.

For the government's explanation of family separation, see https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry. Once parents are in custody, their children are considered unaccompanied minors and are in need of supervision and care. However, due to years of litigation, the government is required to release children if there is a responsible relative or adult who can serve as a sponsor. The formal settlement agreement can be accessed here: http://www.centerforhumanrights.org/Unaccompanied%20Immigrant%20Minors/Flores%20Case.html.

This hardline separation policy resulted in thousands of children who had just completed a dangerous and traumatic journey to the United States to suffer the further trauma of being taken away from their parents and put into makeshift shelters or flown to foster care facilities in other parts of the country. Julie Hirschfeld Davis, *Separated at The Border From Their Parents: In Six Weeks, 1,995 Children*, N.Y. Times, June 15, 2018, https://www.nytimes.com/2018/06/15/us/politics/trump-immigration-separation-border.html; Jacob Soboroff, Courtney Kube & Julia Ainsley, *Administration will House Kids in Tents in Tornillo, Texas,* NBC News, June 14, 2018, https://www.nbcnews.com/politics/immigration/trump-admin-will-house-migrant-kids-tents-tornillo-texas-n883281. After a public outcry, the administration stopped separating families. The administration and Congress are now trying to determine what the alternative should be, as advocates try to help parents find their children.

In late June, 2018, two federal district courts ordered the federal government to reunite separated families and set time limits on both reunification and future detention. *See generally*, https://www.aclu.org/cases/ms-l-v-ice (this page has all of the pleadings in the first nationwide class action filed to end parent/child separation.) The second suit was filed in New York and can be found at: https://www.nyclu.org/en/press-releases/court-halts-trump-administration-policy-prolonging-detention-hundreds-immigrant. That lawsuit challenges excessive and prolonged detention of children.

Page 637 (§ 6.01[B]):

Full cite to *Padilla v. Kentucky*: 559 U.S. 356, 364 (2010).

Page 638 (§ 6.01[C]):

Updated link to current INA § 287(g) agreements: https://www.ice.gov/factsheets/287g.

Page 639 (§ 6.01[C]): Add the following to the end of section C:

C. Current Removal Enforcement Efforts

During the last years of the Obama administration, the federal government moved away from the Secure Communities program, which had delegated authority for immigration enforcement to state and local governments. While the FBI continued to automatically send fingerprints of arrested individuals to ICE, ICE no longer took enforcement action against those highlighted by the record sharing. Instead, ICE implemented the Priority Enforcement Program (PEP), which instructed DHS to work with state and local law enforcement to identify and take into custody foreign nationals who posed a danger to public safety. *See* https://www.ice.gov/pep, comparing Secure Communities to PEP.

However, on January 25, 2017, as a result of President Trump's Executive Order No. 13768, entitled *Enhancing Public Safety in the Interior of the United States*, the Secure Communities program was reactivated and PEP was discontinued. https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united; *see also* https://www.ice.gov/secure-communities. ICE reports that more than 43,300 convicted criminal noncitizens were removed through the end of fiscal year 2017 as a result of this reactivation of Secure Communities. ICE, Secure Communities, at https://www.ice.gov/secure-communities; *see also* Michael D. Shear & Ron Nixon, *New Trump Deportation Rules Allow Far More Expulsions*, N.Y. Times, Feb. 21, 2017, https://www.nytimes.com/2017/02/21/us/politics/dhs-immigration-trump.html?_r=0; Nicholas Kulish, Caitlin Dickerson & Ron Nixon, *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. Times, Feb. 25, 2017, https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html.

At the same time that ICE has been focusing its efforts on removing immigrants with criminal convictions, the Department of Justice has increased criminal prosecution of immigration-related crimes. According to statistics obtained by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, criminal prosecutions for illegal entry and reentry into the United States were 52 percent of all federal criminal prosecutions in fiscal year 2016. Overall, the data shows that these types of immigration-related prosecutions are up 85.6 percent from the level reported in 2006. http://trac.syr.edu/tracreports/crim/446/; s*ee also* casebook pages 54-57 (§ 1.02[B][2]) (examining the current criminal immigration statutes). The number of criminal prosecutions continue to increase following the April 6, 2018 announcement by Attorney General Jeff Sessions that there would be a "zero-tolerance policy" for illegal entry and re-entry. https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry. Following the Attorney General's announcement, federal criminal prosecutions of people entering without authorization along the U.S.-Mexico border increased 30 percent. http://trac.syr.edu/immigration/reports/515/.

Page 640 (§ 6.01[D]): Add the following to Note 1:

28 U.S.C. § 2462 is the general federal statute of limitations for civil proceedings. It requires proceedings for the enforcement of "any civil fine, penalty, or forfeiture" to start no later than five years from the date when the claim accrued, except as otherwise provided by law.

Should this statute of limitations apply to immigration cases? *See Restrepo v. Att'y Gen.*, *617 F.3d 787*, 801-02 (3d Cir. 2010) (determining that removal is not a penalty and therefore the five-year statute of limitations proscribed in 28 U.S.C. § 2462 does not apply to removal proceedings).

Page 641 (§ 6.01[D]): Add the following Note to Problem 6-1:

3. More on Inadmissibility as a Ground of Deportability. This problem is another version of Problem 5-5. In Chapter 6, Miriam Misfortune may be subject to removal by being inadmissible at entry because her divorce from her U.S. citizen husband was final, although she did not know it, when she was admitted to the United States as a permanent resident.

In an unpublished decision, the BIA held that the government did not prove by clear and convincing evidence that an individual was inadmissible to the United States at the time of adjustment of status (INA § 237(a)(1)(A); 8 U.S.C. § 1227(a)(1)(A)). The BIA held that the foreign national did not receive residence through a willful misrepresentation, INA § 212(a)(6)(C)(i); 8 U.S.C. § 1182(a)(6)(C)(i), when the U.S. citizen spouse finalized the couple's divorce a month before the joint interview but the foreign national spouse believed the marriage was valid at the time of interview. *Matter of Theophilus Anum Sowah*, A078 393 756 (BIA Mar. 24, 2014), *available at* http://www.scribd.com/doc/215960495/Theophilus-Anum-Sowah-A078-393-756-BIA-Mar-24-2014. Although the record showed the respondent had received the initial divorce papers, he testified that he did not receive the final divorce papers. His wife accompanied him to the interview. Also, respondent and his wife continued to live together at the time of the immigration interview.

Even if she is found to be removable from the United States, Miriam may still be eligible for a waiver from removal. *See Vasquez v. Holder*, 602 F.3d 1003 (9th Cir. 2010), in which the Ninth Circuit determined that a noncitizen charged with removability under INA § 237(a)(1)(A) and (D) based upon a determination of marriage fraud is eligible for a waiver under INA § 237(a)(1)(H) to waive both charges because the charges are predicated on the same event--the entry into the United States through a fraudulent marriage.

A Board of Immigration Appeals decision, *In re Agour*, 26 I. & N. Dec. 566 (BIA 2015), held that adjustment of status is acceptable as the required admission needed for eligibility for a waiver under INA § 237(a)(1)(H); 8 U.S.C. § 1227(a)(1)(H). Agour was initially admitted to the United States in visitor status and received conditional and permanent resident status through marriage. Later, marriage fraud was alleged but Agour was found inadmissible under INA § 212(a)(6)(C) due to the submission of a fraudulent lease with her petition to remove conditional residence.

Rubio v. Lynch, 787 F.3d 288 (5th Cir. 2015), discussed in the Chapter 5 update, with its holding that a wave-through satisfies the requirement of being admitted in any status, may also support the use of an INA § 237(a)(H)(1) waiver.

Page 642 (§ 6.02[D][2]: For a concise comparison of the different burdens of proof used in removal proceedings, see section X.B. of The Fundamentals of Immigration Law, a detailed overview of immigration court removal proceedings created by a former immigration judge. The

Fundamentals guide was created as part of the Immigration Judge Benchbook, an important collection of resources, formerly available on the Justice Department website, that is routinely accessed by immigration judges as a tool to assist them in making their decisions regarding burdens of proof and other legal issues that arise in removal proceedings. In June of 2017, the Justice Department removed the Benchbook from its website. Attorneys filed Freedom of Information Act requests to secure the current version of the document. The Benchbook remains internally available to the judges. In the meantime, an archived copy of the Benchbook can be accessed at https://web.archive.org/web/20170427025030/https://www.justice.gov/eoir/immigration-judge-benchbook.

Page 660 (§ 6.02[D][1]): Add the following before Problem 6-4:

While workplace place raids are not a new enforcement method, ICE has increased such raids since President Trump issued Executive Order No. 13768, which prioritizes the detention and removal of immigrants who have been convicted of, charged with, or have committed elements of certain crimes. https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united. Although the executive order emphasizes the detention and removal of "criminal" immigrants, workplace raids frequently affect individuals who have immigration violations but no criminal history.

For example, in March 2017 in upstate New York, five apple pickers carpooling to work were seized by ICE, charged with immigration violations, and detained pending removal proceedings. ICE confirmed that the men did not have criminal records and were not the subject of any agency enforcement actions. Rosa Goldensohn, *ICE Arrests New York Farmworkers, Alarming Industry and Advocates*, Crain's New York Business, Mar. 23, 2017, at http://www.crainsnewyork.com/article/20170323/BLOGS04/170329954/ice-arrests-new-york-farmworkers-alarming-industry-and-advocates. Such arrests have had a chilling effect on immigrant workers in the apple industry, with many immigrant workers afraid to leave their homes and look for work.

However, in other industries, immigrant workers are standing up for their rights while facing the threat of deportation. In March 2017, 31 employees of Tom Cat Bakery in Queens, New York were given 10 business days to produce legal proof of their work eligibility or ICE would consider them to be "unauthorized to work." In response, the workers obtained legal counsel and staged rallies with local politicians and labor advocates, arguing that they have worked hard and paid their taxes for many years and that they should be able to continue to do so. *See* Cora Lewis, *These Workers Were Given an Ultimatum: Prove Your Legal Status or be Fired,"* BuzzFeed, Mar. 30, 2017, at http://www.cnbc.com/2017/03/30/these-workers-were-given-an-ultimatum-prove-your-legal-status-or-be-fired.html.

Page 661 (§ 6.02[D][1]): Add the following to Problem 6-4 Essential Materials:

INA § 274A; 8 U.S.C. § 1324a
INA § 274C; 8 U.S.C. § 1324c
Immigration & Naturalization Service v. Lopez-Mendoza [below]
Flores-Figueroa v. United States [below]

Page 675 (§ 6.02[D][1]): Add the following to Problem 6-4 Notes and Questions after *Lopez-Mendoza*:

1. More on Suppression of Evidence Obtained in a Workplace Raid. As you recall, in Problem 6-4 the factory owner seemed to give the U.S. immigration officers permission to enter the factory and speak to the workers. Can you make an argument to suppress under these circumstances? Do the employees have to answer the officers' questions or supply any documents to the officers? What if their employer directs them to cooperate with the immigration officers? *See* https://www.aclu.org/know-your-rights/what-do-if-questioned-about-your-immigration-status; *see also* https://www.nilc.org/get-involved/community-education-resources/know-your-rights/raids/.

Page 682 (§ 6.02[D][1]): Add the following to Note 2:

2. Crimes Involving Moral Turpitude. What if Hank, Elizabeth, and Sandra had presented false social security cards to the immigration officers upon being questioned about their work papers? What type of immigration consequences could they face if they were criminally charged and convicted for using these documents?

Assume Hank, Elizabeth, and Sandra were convicted of violating 42 U.S.C. § 408(a)(7)(B), which states:

> **(a) In general** Whoever—
>
> **(7)** for the purpose of causing an increase in any payment authorized under this subchapter (or any other program financed in whole or in part from Federal funds), or for the purpose of causing a payment under this subchapter (or any such other program) to be made when no payment is authorized thereunder, or for the purpose of obtaining (for himself or any other person) any payment or any other benefit to which he (or such other person) is not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose—
>
> . . .
>
> **(B)** with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person;
>
> . . .
>
> shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than five years, or both. 42 U.S.C. § 408(a)(7)(B)

What type of removal charge could the government lodge against Hank, Elizabeth, and Sandra as a result of their convictions?

The Seventh Circuit has held that a conviction for violating 42 U.S.C. § 408(a)(7)(B) was not categorically a crime involving moral turpitude because the statute can be violated by an intent to

deceive "for *any* . . . purpose." *Arias v. Lynch*, 834 F.3d 823-24 (7th Cir. 2016) (emphasis in original). To exemplify its analysis the court described a parent bringing a sick child to an emergency room and supplying a false social security number to receive care for their child and be able to pay for that care. *Id.* at 826-27. The court concluded that such an act does not seem "'inherently base, vile, or depraved' unless the terms 'base, vile, or depraved' have ceased to have any real meaning." *Id.* Furthermore, the court concluded:

> It seems inconsistent with the terms "base, vile, or depraved" to hold that an unauthorized immigrant who uses a false social security number so that she can hold a job, pay taxes, and support her family would be guilty of a crime involving moral turpitude, while an unauthorized immigrant who is paid solely in cash under the table and does not pay any taxes would not necessarily be guilty of a crime involving moral turpitude. A rule that all crimes that involve any element of deception categorically involve moral turpitude would produce results at odds with the accepted definition of moral turpitude as conduct that is "inherently base, vile, or depraved."

Id.

Assume the government charged Hank, Elizabeth, and Sandra as removable pursuant to INA § 212(a)(2)(A)(i)(I). Can you make an argument that their convictions were not crimes involving moral turpitude? Can you make an argument that they qualify for any exceptions to the charge of removal?

Page 686 (§ 6.02[D][2]): Add the following to Notes and Questions after *Barcenas-Barrera*:
As you have already noted, this chapter does not discuss all grounds of inadmissibility, but instead focuses on a few key grounds. For a complete and in-depth look at inadmissibility, refer back to Chapter 5 in its entirety.

Page 686 (§ 6.02[D][2]): Add the following as Note 3:

3. Immigration Violations May Result in Grounds of Inadmissibility or Deportability. One immigration violation is a false claim to U.S. citizenship under INA § 237(a)(3)(D); 8 U.S.C. § 1227(a)(3)(D). The exception is very narrow and no waiver exists. However, there are a number of "motor voter" cases where noncitizens are asked to register to vote while applying for state driver's licenses. In an Immigration Court decision of May 2, 2014 (Chicago, Illinois), the Immigration Judge found that a foreign national who had entered the United States in K-3 status, married to a U.S. citizen, merited adjustment of status as a matter of discretion despite registering to vote and voting in a general election.

Initially, the individual's application for adjustment of status was denied under INA § 212(a)(10)(D)(i); 8 U.S.C. § 1182(a)(10(D)(i), and she was charged with being deportable under INA §§ 237(a)(1)(A) and (a)(3)(D); 8 U.S.C. § 1227(a)(1)(A) and (a)(3)(D) as being both inadmissible at time of adjustment of status and removable for claiming to be a U.S. citizen. The noncitizen was asked if she would like to register to vote as part of her application for a state driver's license. She had difficulty understanding the process and the form. During the immigration

adjustment interview, she answered that she had voted. Testimony from an official at the state driver's license facility explained the process for voter registration and stated that state employee clerks do not ask individuals about their eligibility for voting due to age or citizenship; the clerks must ask all applicants if they want to register to vote and are not able to determine if an individual is a U.S. citizen from documents presented. *See* Marwa Eltagouri, *Immigrant Who Wrongly Voted Wins Right to Stay*, Chicago Tribune, July 5, 2014, at http://articles.chicagotribune.com/2014-07-05/news/ct-immigrant-court-ruling-met-20140706_1_richard-hanus-u-s-immigration-motor-voter-law.

Page 686 (§ 6.02[E][1]): Add the following as an alternative to existing Problem 6-5 and Question 1:

Problem 6-5 covers many issues introduced in Chapters 1 through 6. Henry, introduced before in Chapter 5, has been a permanent resident for three years when he is arrested and charged with several crimes that may have an adverse effect on his permanent resident status.

To generate discussion, we have provided general information about the charges and added INA §§ 273 and 274; 8 U.S.C. §§ 1323 and 1324 to the Essential Materials below. We have also placed the traffic stop and arrest in the only county in Ohio that participates in the INA § 287(g); 8 U.S.C. § 1357(g) program.

PROBLEM 6-5

In Problem 5-3, we met Patrick Thomas and his dad, Henry. In that hypothetical, Patrick, a U.S. citizen, had turned twenty-one years old and planned to petition for permanent residence on behalf of his father who was present in the United States without status for many years. His father had an issue affecting his ability to receive permanent residence: a past criminal offense.

In problem 6-5, it is now three years later. Henry is a permanent resident. For this problem, Henry received a waiver and his permanent resident status three years ago. Patrick contacts the immigration lawyer in Chicago again, Melissa Khan, to make an appointment for her to speak with Henry as soon as possible. His dad had found work with a trucking company in Michigan. Henry's first assignment was to drive a truckload of furniture from a warehouse in Ontario, Canada to a furniture store in Oxford, Ohio. Henry and the truck entered the United States without any problem but at a weigh station in just a few miles away from his destination, state police found three persons hiding in the back of truck. They were nationals of Paraguay and had no documentation permitting them to be in the United States or Canada. Also, the police determined that the furniture in the truck was stolen. Henry was arrested and is in a local jail awaiting trial at this time.

You are Henry's immigration lawyer. When you meet him to discuss his case, he says that he has been charged with several offenses including smuggling aliens across the U.S. border, transporting aliens within the United States and possession of stolen property ($40,000 in furniture). He has not yet had a criminal trial. You

are concerned that he may eventually be found deportable. Under which grounds may he be charged as deportable? Why?

Will Henry's offenses count as aggravated felonies?

Do you think there is an argument that Henry should be charged under grounds of inadmissibility? Why?

If any charges result in convictions, will Henry be removable?

PROBLEM 6-5: ESSENTIAL MATERIALS

INA § 101(a)(43)(G); 8 U.S.C. § 101(a)(43)(G)
INA § 101(a)(43)(M)(i); 8 U.S.C. § 1101(a)(43)(M)(i)
INA § 101(a)(43)(N); 8 U.S.C. § 1101(a)(43)(N)
INA § 101(a)(13)(C); 8 U.S.C. § 1101(a)(13)(C)
INA § 237(a)(1)(E); 8 U.S.C. § 1227(a)(1)(E)
INA § 237(a)(2)(A)(i)(I)-(II); 8 U.S.C. § 1227(a)(2)(A)(i)(I)-(II)
INA § 237(a)(2)(A)(ii); 8 U.S.C. § 1227(a)(2)(A)(ii)
INA § 237(a)(2)(A)(iii); 8 U.S.C. § 1227(a)(2)(A)(iii)
INA § 237(a)(2)(F); 8 U.S.C. § 1227(a)(2)(F)
INA § 273; 8 U.S.C. § 1323
INA § 274; 8 U.S.C. § 1324
INA § 287(g); 8 U.S.C. § 1357(g)
8 U.S.C. § 1722(a)(2)
CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR AND RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE § 71.05

PROBLEM 6-5: NOTES AND QUESTIONS

1. Nowhere Near the International Border. In Problem 6-5, Henry has just been arrested. As you read the essential materials and cases that follow, consider the intersection of immigration law and criminal law. You might want to check a map, but southern Ohio is several hundred miles away from the northern U.S. border. How is that relevant to Henry's legal rights?

As noted earlier in this update, Executive Order No. 13768 reactivated the Secure Communities program. Look at the list of 287(g) agreements available at https://www.ice.gov/factsheets/287g. Butler County, Ohio is currently the only place within Ohio that has a 287(g) agreement. How do you think the 287(g) agreement between ICE and the Butler County Sheriff's Office might be implemented in this case?

Consider Sheriff Jones's interview regarding his commitment to the 287(g) program, available at http://www.wlwt.com/article/sheriff-jones-if-you-commit-crimeyou-should-be-deported/8690722. Contrast Sheriff Jones's actions with the sheriffs mentioned in Jennifer Medina, *Fearing Lawsuits, Sheriffs Balk at U.S. Request to Hold Noncitizens for Extra Time*, N.Y. Times, July 5, 2014, at http://www.nytimes.com/2014/07/06/us/politics/fearing-lawsuits-sheriffs-

balk-at-us-request-to-detain-noncitizens-for-extra-time.html. Following a federal court decision in Oregon where a sheriff was found to have violated the civil rights of an immigrant by keeping her in the county jail pursuant to the Obama administration's immigration detainer program, more sheriffs are releasing noncitizens instead of keeping them in custody to provide Immigration and Customs Enforcement officials the time to determine if the individual had immigration violations making them removable.

Page 688 (§ 6.02[E][1]): Add the following at the end of Note 3:

Henry has not yet met with a criminal attorney. He tells you, his immigration attorney, that he did not know the furniture was stolen. Could this matter in his criminal proceedings? Consider *Matter of Alday-Dominguez*, 27 I. & N. Dec. 48 (BIA 2017), in which the BIA held that the aggravated felony receipt of stolen property provision in INA § 101(a)(43)(G); 8 U.S.C. § 1101(a)(43)(G) (2012), does not require that unlawfully received property be obtained by means of common law theft or larceny. The BIA explained that the term "stolen" in INA § 101(a)(43)(G) should be interpreted broadly and that the aggravated felony charge does not require a separate inquiry into how the property was stolen. *Id.* at 50-51.

Page 688 (§ 6.02[E][1]):

Full cite to *Kawashima v. Holder*: 565 U.S. 478, 132 S. Ct. 1166 (2012).

Page 709 (§ 6.02[E][1]): Add the following as Note 5 in Notes and Question Section after *Singh v. Mukasey*:

5. Ultimately, Mr. Singh won his case and his removal proceedings were terminated. *Singh v. Holder,* No. 13-481, 2014 U.S. App. LEXIS 4552 (2d Cir. Mar. 12, 2014). In the summary order, the Second Circuit determined that the government did not meet its burden under INA § 240(c)(3)(A); 8 U.S.C. § 1229a(c)(3)(A) of proving Mr. Singh deportable by clear and convincing evidence. The Second Circuit noted that while the tainted evidence was suppressed, the immigration judge chose to rely on Mr. Singh's testimony to infer that Mr. Singh knew his neighbor Mr. Bedi might choose to work in the United States, and that he did not have authorization to do so, and was therefore inadmissible. 2014 U.S. App. LEXIS 4552 at *3. The Second Circuit found these inferences to be "utterly unsupported by the record" and went even further, elaborating that "it would be absurd to require drivers to conduct full-scale investigations to determine potential immigration law violations of their passengers." *Id*. at *11. It concluded that further remand of the case would be "futile" as "the record does not support an inference of knowledge, the government has waived any opportunity to submit additional evidence, and the case has already dragged on for over a decade." *Id.* at *12.

Page 710 (§ 6.02[E][4]): Add the following to the end of the discussion on Aggravated Felony:

As you have seen, INA § 101(a)(43); 8 U.S.C. § 1101(a)(43), contains a long list of crimes that can serve as aggravated felonies for immigration purposes. Whether a particular state felony conviction constitutes an aggravated felony under section 101(a)(43) is an important and constantly litigated question of law, as the consequences of an aggravated felony removal charge

are quite severe. For example, in *Esquivel-Quintana v. Sessions*, 581 U.S. __, 137 S. Ct. 1562 (2017), the Supreme Court determined that for criminal convictions involving sexual abuse of a minor to qualify as "aggravated" felonies under section 101(a)(43)(A), such convictions must be "especially egregious felonies" as the term "sexual abuse of a minor" is listed in the same subparagraph as "murder" and "rape." 137 S. Ct. at 1566. Relying on its decision in *Kawashima* (*see* pages 688-98 of this chapter), the Court used the categorical approach to determine whether the state statue defining the crime at issue categorically fit within the "generic" federal definition that corresponded to the aggravated felony. *Id.* at 1568. After employing such analysis, the Court determined that under the generic federal definition, the victim must be sixteen years old or younger, and therefore the aggravated felony ground does not reach state statutory rape offenses where the younger participant could have been over sixteen years old. *Id.* at 1572. For an analysis of how the Court's decision may impact litigation of section 101(a)(43)(A) and other aggravated felony grounds of removal, see Immigrant Defense Project, *Practice Advisory:* Esquivel-Quintana v. Sessions*: Supreme Court Limits Reach of Aggravated Felony "Sexual Abuse of a Minor" and Provides Support on Other Crim-Imm Issues* (June 8, 2017), *at* https://www.immigrantdefenseproject.org/practice-advisories-listed-chronologically/.

In contrast, the BIA recently used a broader analysis to determine that an aggravated felony as defined in INA § 101(a)(43)(K)(i) covers a much larger group of criminal activity than it had previously determined to be the case. In *In re Ding,* 27 I. & N. Dec. 295, 298-99 (BIA 2018), the majority argued that the canons of statutory construction allow a word to mean different things in different sections of the same act. Therefore, as Congress "may have intended" the term "prostitution" to mean different things in separate sections of the INA, the majority held that the term as used in section 101(a)(43)(K)(i) "is not limited to offenses involving sexual intercourse but is defined as engaging in, or agreeing or offering to engage in, sexual conduct for anything of value." *Id*. Dissenting Board Member Patricia A. Cole argued that the majority's analysis was overly broad. *Id.* at 300. Board Member Cole contended that the majority did not provide adequate legal support for its broad definition of the term "prostitution" and that in fact the canons of statutory construction as established through applicable case law require an adjudicator to give the same meaning to identical words used in different sections of the same act. *Id.* at 301.

Who do you think makes the better argument? How do you think the U.S. Supreme Court would decide this issue?

Page 711 (§ 6.02[F]): Add the following subsection:

[5] Crimes Involving Moral Turpitude

Any foreign national who (I) is convicted of a crime involving moral turpitude committed within five years after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable. INA § 237(a)(2)(A)(i); 8 U.S.C. § 1227(a)(2)(A)(i). Additionally, a foreign national convicted of two or more crimes involving moral turpitude at any time after admission is deportable. INA § 237(a)(2)(A)(ii); 8 U.S.C. § 1227(a)(2)(A)(ii). It is important to remember that a crime involving moral turpitude can also serve as a separate ground of inadmissibility. *See* INA § 212(a)(2)(A)(i)(I); 8 U.S.C. § 1182(a)(2)(A)(i)(I). As previously discussed in Chapter 5 section 5.03[4] at pages 586-87 and prior updates of Chapter 5 of this

casebook, crimes involving moral turpitude are not defined within the statute, but rather through case law.

Page 712 (§ 6.03[A]): Add the following at the end of subsection A, just before sub-subsection [1]:

In addition to the definition of conviction provided above under *Matter of Ozkok*, convictions are not final while an appeal is pending. In *Orabi v. Att'y Gen*., 738 F.3d 535 (3d Cir. 2014), the court disagreed with the BIA's finding that a conviction requires only that a formal finding of guilt be entered against the individual. Instead, it held a conviction is not final for immigration purposes until direct appellate review of that conviction has been exhausted or waived.

Page 715 (§ 6.03[A][3]):

The full citation for *Padilla v. Kentucky* is now *Padilla v. Kentucky*, 557 U.S. 356 (2010).

Page 733 (§ 6.03[A][3]): Replace the existing Notes 1 and 2 with the following:

1. Standard for Post-Conviction Relief. Assume that Henry was represented by an immigration attorney named Paul Smith during his immigration removal proceedings. Henry presented his case and completed his removal proceedings while in detention. Henry's family met with Paul once and paid him to represent Henry. Paul never met Henry. Paul submitted a written filing to the immigration judge in which he entered his appearance as Henry's attorney of record, and pleaded to Henry's NTA on Henry's behalf by admitting all the factual allegations against Henry, including that Henry was guilty of the crime, and conceding that he was removable because he was convicted of an aggravated felony. Paul never discussed the NTA or the pleadings with Henry. Paul did not try to submit any applications for relief from removal.

Now that you have read about reopening a case due to ineffective assistance of counsel in *Lozada* and about the Sixth Amendment right to counsel requiring provision of advice about the immigration consequences of a conviction in *Padilla*, do you think immigration lawyer Melissa can help Henry? In both *Lozada* and *Padilla*, the individual must show that he relied on the advice or non-advice of his attorney when making decisions in the proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984), stated that to show ineffective assistance of counsel, a petitioner must demonstrate that the lawyer's performance was less than an objective standard of reasonableness and that the defendant in the criminal case was prejudiced by that performance. What would Henry have to show to reopen his immigration case? We discuss motions, appeals, and types of relief in this chapter and in Chapter 7, so just begin to think of the requirements and why a case could be reopened.

2. Does *Padilla* Apply Retroactively? Immediately following the Supreme Court's decision in *Padilla*, circuits were split regarding *Padilla*'s retroactivity. In a 7-2 ruling in 2013, the Supreme Court held in *Chaidez v. United States*, 568 U.S. 342 (2013), that *Padilla* does not apply retroactively to cases of noncitizens who pled guilty before the *Padilla* decision in 2010, without knowing the immigration consequences of a plea and whose cases are already final on direct review. The Court stated that *Padilla* established a "new rule" under *Teague v. Lane*, 489 U.S. 288

(1989). Therefore, it held that those noncitizens with guilty pleas before *Padilla* are unable to claim ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

Page 736 (§ 6.04[A]): Add the following at the bottom of page 736, after Chart 4:

In the summer of 2014, due to a rapid increase of children and adults with children arriving from Central America, the Office of the Chief Immigration Judge issued a memorandum explaining that the cases of the new arrivals would be "fast-tracked." In some parts of the country the special dockets are called "surge" dockets. We avoid the term "expedited" dockets to avoid confusion with removal under INA § 235(b); 8 U.S.C. § 1225(b).

The Memorandum, *Docketing Practices in Scheduling Unaccompanied Children Cases in Light of New Priorities* (Sept. 10, 2014), is at http://www.justice.gov/sites/default/files/eoir/legacy/2014/09/30/Docketing-Practices-Related-to-UACs-Sept2014.pdf. The Memorandum was updated and superseded in March 2015 to include specifics about adults with children. *Docketing Practices in Scheduling Unaccompanied Children Cases and Adults with Children Released on Alternatives to Detention Cases in Light of the New Priorities* (Mar. 24, 2015) ("Priority Memorandum"), at http://www.justice.gov/eoir/pages/attachments/2015/03/26/docketing-practices-related-to-uacs-and-awcatd-march2015.pdf.

The basic rules are that within twenty-one days of receiving a Notice to Appear (the charging document) from ICE, EOIR court administrators will schedule an initial master calendar hearing for unaccompanied children. EOIR also announced it would schedule adults with children within twenty-eight days of receiving the Notice to Appear.

Unaccompanied alien children are those who are unmarried, under the age of 18 at time of apprehension, and not with a parent, stepparent, or legal guardian. *See* Kate M. Manuel & Michael John Garcia, Congressional Research Service, *Unaccompanied Alien Children—Legal Issues: Answers to Frequently Asked Questions* (July 18, 2014), *available at* http://trac.syr.edu/immigration/library/P8889.pdf. This report gives the background of the statutes and regulations that govern children in removal proceedings. See the material in Chapter 7 on special immigrant juveniles and in Chapter 8 on asylum and withholding for discussion of special protections for children.

In most large immigration courts, the Acting Chief Immigration Judge assigned special judges to hear these priority docket cases. While the cases are to be started quickly, the Priority Memorandum reminds Immigration Judges that they can grant continuances so that children or adults with children can locate counsel or for other usual reasons for continuances.

In some cities, the result was that the immigration court began to schedule hundreds of cases per week. Public interest and private counsel scrambled to mobilize resources to handle the prioritized cases. In some cities and states, funds were appropriated to aid the unaccompanied children by funding some immigration defense. *See, e.g.,* Nikita Stewart, *Program to Give Legal Help to Young Migrants*, N.Y. Times, Sept. 22, 2014, http://www.nytimes.com/2014/09/23/nyregion/groups-to-provide-lawyers-for-children-who-

face-deportation.html ($1.9 million appropriated by New York City Council); Reuters, *California Sets Up Fund for Legal Representation of Immigrant Children*, N.Y. Times, Sept. 27, 2014, http://www.nytimes.com/reuters/2014/09/27/us/27reuters-usa-immigration-california.html ($3 million appropriated to experienced nonprofit legal providers).

The federal government also created the first funding for counsel for children out of a community service appropriation. The Justice AmeriCorps program was designed to both help the immigration courts improve efficiency and to provide some representation to children. Corporation for National and Community Service, Justice AmeriCorps Legal Services for Unaccompanied Children, *at* http://www.nationalservice.gov/build-your-capacity/grants/funding-opportunities/2014/justice-americorps-legal-services; *see also* Kirk Semple, *Youths Facing Immigration Court are to be Given Legal Counsel*, N.Y. Times, July 6, 2014, http://www.nytimes.com/2014/06/07/us/us-to-provide-lawyers-for-children-facing-deportation.html ($2 million set aside to create a new Justice AmeriCorps program with the Corporation for Community Service).

In July 2014, the American Civil Liberties Union, in conjunction with the American Immigration Council, Northwest Immigrant Rights Project, Public Counsel, and K&L Gates LLP, sued in U.S District Court in Seattle, Washington, on behalf of unrepresented immigrant children in removal proceedings. On June 24, 2016, the district judge certified a class that covers all children under eighteen who are in immigration proceedings in the Ninth Circuit on or after June 24, 2016, who lack counsel, are unable to afford legal representation, and are potentially eligible for asylum. *F.L.B. v Lynch*, 2016 U.S. Dist. LEXIS 82653 (W.D. Wa. June 24, 2016).

However, in September of 2016, the Ninth Circuit ruled that the class action could not go forward because Congress had channeled judicial review of immigration cases through the courts of appeal and only on a petition for review after litigation before the Immigration Judge and the BIA. *J. E. F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016). The panel was reluctant to allow the plaintiffs to bypass the administrative structure even though the ruling would mean that each individual child would have to argue for appointed counsel and it could be many months, if not years, before an appropriate case reached the Court of Appeals. Counsel for the class argued that attorneys are not present to help the children preserve the request for appointment of counsel and that children who were completely unrepresented were unlikely to be able to articulate why counsel were essential and required in their case.

In her concurrence, Judge McKeown wrote:

> Eventually, an appeal asserting a right to government-funded counsel will find its way from the immigration courts to a Court of Appeals through the petition for review process. It would be both inappropriate and premature to comment on the legal merits of such a claim. But, no matter the ultimate outcome of such an appeal, Congress and the Executive should not simply wait for a judicial determination before taking up the "policy reasons and . . . moral obligation" to respond to the dilemma of the thousands of children left to serve as their own advocates in the immigration courts in the meantime. The stakes are too high. To give meaning to "Equal Justice Under Law," the tag line engraved on the U.S. Supreme Court building, to ensure the fair and effective administration of our immigration system,

> and to protect the interests of children who must struggle through that system, the problem demands action now.

Id. at 1043.

Judge McKeown also noted that the federal government had created the Justice AmeriCorps program to help ameliorate the harms of the lack of appointed counsel. *Id.* at 1043 n.12.

In January 2018, a separate panel of the Ninth Circuit ruled that a young boy, assisted by his mother in a removal proceeding had not shown a due process violation and therefore, it was not a constitutional violation for the Immigration Judge to proceed without counsel. C.J.L.G. v. Sessions, 880 F.3d 1122 (9th Cir. 2018). Writing for the three-judge panel, Judge Callaghan described the asylum claim presented by C.J., then 15 years old, and concluded that the child had failed to show he was prejudiced by the lack of counsel and using the three-part balancing test of Mathews v. Eldridge, that the record did not show that counsel was essential to a fair hearing.

It is worth reading the part of this decision that summarizes the conduct of the immigration hearing. Later in Chapter 8 we will explore the complexity of establishing claims for asylum. Ask yourself if you, as a law student, would have known how to support and articulate a claim for asylum for C.J.

C.J.L.G. v. Sessions, 880 F.3d 1122 (9th Cir. 2018)

> **I**.
> **A**.
>
> C.J. is a sympathetic petitioner. A native and citizen of Honduras, he repeatedly spurned the Mara gang's entreaties to join its ranks despite death threats made against him and his family. After the Maras threatened C.J. at gunpoint, C.J. and his mother, Maria, fled Honduras.
>
> On June 21, 2014, C.J. and Maria arrived in the United States without inspection. C.J. was 13 years old at the time. The Department of Homeland Security ("DHS") apprehended C.J. and Maria four days later, and served Maria with a notice to appear ("NTA") for C.J. Maria signed the NTA on behalf of her son. DHS provided Maria with a list of organizations that provide *pro bono* legal services.
>
> In September 2014, DHS placed C.J. in removal proceedings in Los Angeles based on his illegal entry into the United States. C.J. appeared for his November 25, 2014 hearing with Maria but without legal representation, as he would for each of his hearings before the IJ. The government was represented by counsel at all of the hearings. Because neither Maria nor C.J. speaks English, an interpreter was provided.

B.

At the November 2014 hearing, the IJ informed Maria that her son had "the right to have an attorney" at private expense. When Maria told the IJ that she did not have money for an attorney, the IJ told her that she had "two options": "Either we can go forward and you can speak and represent your son here today," or "I can continue your case to another day" to give Maria time to secure counsel. Maria accepted the IJ's offer to continue the case.

At the next hearing, held on January 25, 2015, Maria told the IJ that she had "looked for an attorney and they are charging me $6,500 for each one, so I could not afford that amount." The IJ then ordered a three-month continuance, but told Maria that it would be the last one, and that, if she returned without an attorney, C.J.'s case would go forward.

The third hearing was held on April 24, 2015. Because Maria had still not retained counsel, the IJ told her that she would proceed with the case and that Maria could "represent your son here today." Maria said that she understood. The IJ then told Maria and C.J. that they had the right to present documents and other evidence, and could review and object to the government's evidence. The IJ also told them that they could call witnesses and question the government's witnesses.

The IJ then went over the NTA with Maria. Maria conceded the allegation that C.J. had unlawfully entered the United States because he was not admitted or paroled. The IJ therefore found C.J. removable. The IJ then proceeded to ask Maria several questions about C.J., in the course of which Maria stated that C.J.'s father had left them "a long time ago." The IJ then asked Maria if C.J. had a "fear of returning back to Honduras because of his race or religion or nationality or political opinion or membership in a social group." Maria answered: "Yes, because of the gangs." The IJ responded: "Ma'am, I will tell you right now that most likely that is not going to be a reason for [C.J.] to remain in the United States."

The IJ then gave Maria an asylum form to complete. The IJ again told Maria that she could continue looking for an attorney to represent C.J. in his removal proceedings. When the IJ asked Maria if she had any questions, Maria said: "[T]ell me about the asylum." The IJ responded: "Well, we don't need—you mean about why the fear or what happened?" Maria replied: "Well, yes, I am fearful to have my child return to Honduras." To which the IJ said: "Okay. Well, that's what you can put in all the applications and bring that back."

Maria filed the asylum application at the next hearing, held on June 29, 2015. The application contains threadbare statements in support of C.J.'s asylum claim and much of what is written is borderline inscrutable and non-responsive. Nevertheless, after reviewing the application, the IJ stated: "Everything looks to be okay at this point, so I'm going to go ahead and accept the application." The IJ then set the case

for one more hearing, and reiterated to Maria that she could still try to hire an attorney. The IJ also provided Maria with a 2014 State Department country conditions report for Honduras, which was in English.

The proceeding reconvened on February 29, 2016. C.J. was still unrepresented. The IJ asked Maria if she would be "assisting [C.J.] as you've been doing in the past," and she said that she would. The IJ then asked C.J. questions under oath regarding his background and asylum application. The IJ asked C.J. if he had had any contact with his father, and C.J. confirmed that he had not for many years. After admitting into the record C.J.'s asylum application, his birth certificate, and the country report, the IJ asked C.J. about his fear of returning to Honduras. C.J. testified that the Mara gang had approached him three times in an effort to recruit him. Each time he refused, and the Maras threatened to kill him if he did not join. C.J. was not physically harmed, but during the third confrontation a gang member put a gun to C.J.'s head and gave him one day to decide whether to join. This escalation was apparently prompted by the gang's discovery that C.J. had told his mother about its recruitment efforts. The Maras also threatened to kill C.J.'s mother, aunt, and uncles. C.J. and his mother fled Honduras that same day. C.J. testified that he was afraid to return to Honduras "[b]ecause if I arrive there [the Mara gang] will kill me."

The IJ then asked C.J.—who was 13 years old when he left Honduras—whether he had "tr[ied] to live anywhere else in Honduras," to which C.J. responded: "No." The IJ also asked C.J. if he had asked the police for help, to which he replied: "No, they couldn't do anything." When pressed, C.J. stated that he was "very afraid."

The DHS attorney did not ask C.J. any questions or call any witnesses. The IJ then asked Maria if there was "anything that you want to tell me regarding your son and why you're fearful if he returns back to Honduras or anything else you believe he didn't tell me." Maria replied: "No, that's all. I—I'm very afraid to go back. I don't—I'm afraid that something will happen to my child." The IJ then said: "And is that why you came to the United States, because [C.J.] was being threatened by the gangs?" Maria replied: "Yes."

C.

The IJ issued a written denial of C.J.'s application for asylum, withholding of removal, and CAT relief. The IJ found C.J. to be credible, and determined that his fear of returning to Honduras was subjectively reasonable. But she held that C.J. lacked an objectively reasonable basis for asylum relief. First, C.J. failed to show that he had suffered harm tantamount to persecution. Second, C.J. did not show "credible, direct and specific evidence . . . that would support an objectionably [sic] reasonable fear of [future] persecution should he return to Honduras." Third, C.J. had not established membership on the basis of a protected ground. And fourth, C.J. failed to show that the government was unable or unwilling to control the Maras. Because C.J. could not establish eligibility for asylum, the IJ concluded that his

> withholding of removal claim—which sets a higher standard for showing persecution than asylum—necessarily failed. The IJ also rejected C.J.'s CAT claim on the ground that "[C.J.] has failed to meet his burden in showing that there is anyone in Honduras that would seek to torture him, but [sic] certainly no one with the acquiescence of the Honduran government."

C.J.L.G. v. Sessions, 880 F.3d 1122, 1129-31 (9th Cir. 2018). A petition for rehearing en banc was granted in April 2018.

With the 2016 presidential election several things have changed. President Trump announced he would not fund the AmeriCorps program and grantees of Justice AmeriCorps were formally notified that their funding would end in the current fiscal year.

The EOIR also announced an end of the priority dockets. Children's cases, even unaccompanied children, would now be scheduled in the same manner as other removal cases. See Memorandum of Chief Immigration Judge Mary Beth Keller, *Case Processing Priorities* (Jan. 31, 2017), *available at* http://www.sfbar.org/forms/immigration/eoir-processing-priorities-memo-1-31-17.pdf.

While at first blush the lack of expedited processing may seem beneficial, the scheduling delays may mean that some children are not scheduled in the courts for a very long period and the delay in the first hearing may delay a child or family from seeking legal advice. According to statistics compiled by TRAC, the immigration court backlog of children's cases reached 88,069 at the end of August 2017. http://trac.syr.edu/immigration/reports/482/. Expedited treatment of the cases was also instrumental in recruiting pro bono counsel because they could expect children's cases to be completed more rapidly as opposed to delays of one or two years or more for regular removal cases. There are now more children than ever before appearing in immigration court without an attorney.

Figure 1. Percent Unaccompanied Children Still Unrepresented by Fiscal Year Case Began

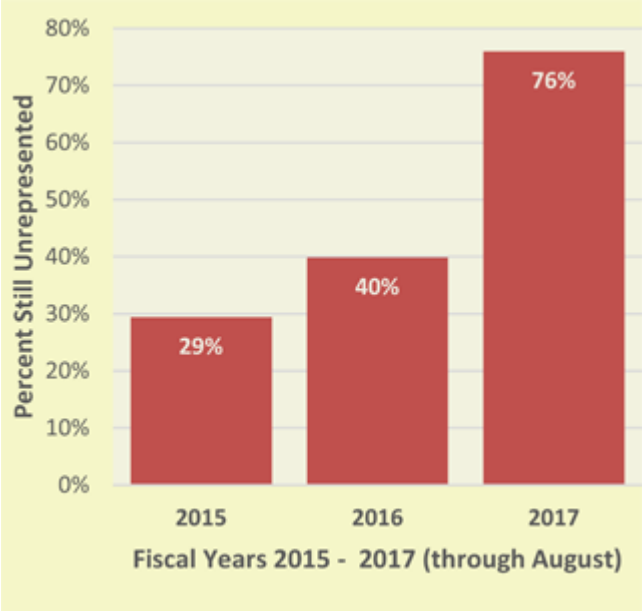


Image courtesy of TRAC Reports, Inc. http://trac.syr.edu/immigration/reports/482/.

Page 738 (§ 6.04[A][2]): Add the following to the end of the discussion regarding the Notice to Appear:

Although INA § 239a; 8 U.S.C. § 1229 indicates that the Notice to Appear (NTA) must include the time, date and place of the hearing, in practice this information is usually omitted and instead the NTA indicates that the time, date and/or place of the hearing is "to be determined." On June 21, 2018, the Supreme Court held that a putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a notice to appear for purposes of the statute. *Pereira v. Sessions*, 585 U. S. __, 138 S. Ct. 2105 (2018). This decision is significant because an individual's eligibility for certain types of immigration relief may turn on the date an NTA was issued by the government.

Within one week of the decision, some immigration judges began granting termination motions in cases where the original NTA was not completed. Further, ICE offices began to call in people to receive a new, updated and completed NTA.

See the discussion of cancellation of removal and the direct consequence of *Pereira* in the update for Chapter 7.

Page 739 (§ 6.04[A][3]): Add the following at the end of subsection [3], just before [4]:

As discussed throughout this book, immigration proceedings are considered civil proceedings. While individuals have the right to be represented in immigration proceedings, there is no provision for appointed counsel. However, many law schools, bar associations, and other non-profit organizations have pro bono initiatives to assist noncitizens in removal proceedings in Immigration Court.

The New York Immigrant Family Unity Project (NYIFUP) is one such program. It offers pro bono counsel to indigent noncitizens in immigration proceedings at New York City's Varick Street Immigration Court. It initially received one year of funding from the New York City Counsel for a pilot program being administered by the Vera Institute of Justice beginning in fall 2013. In June 2014, the New York Immigrant Family Unity Project was included in the New York City proposed budget and expanded the program to include detained, indigent noncitizens in proceedings at the Varick Street; Newark, New Jersey; and Elizabeth, New Jersey Immigration Courts. *See also* Kirk Semple, *Public Defender System for Immigrants Facing Deportation Would Pay for Itself, Study Says,* N.Y. Times, *at* http://www.nytimes.com/2014/05/30/nyregion/study-favors-free-counsel-to-navigate-deportation.html (May 29, 2014), which reports on the findings of a study conducted by NERA Economic Consulting and released by the New York City Bar Association. The report found that appointing attorneys to represent noncitizens in immigration proceedings would reduce government expenses for detaining and removing noncitizens and lead to more efficiency.

In 2017, the New York City Council vowed to continue to fund the NYIFUP program over the Mayor's objections that people with certain convictions should not receive public funds. Emma Whitford, *City Council Undermines De Blasio's Effort To Restrict* ***Immigrant Defense Funding, Gothamist*****, June 7, 2017, *at*** **http://gothamist.com/2017/06/07/council_speaker_makes_last_minute_b.php.**

Other cities and states also began new initiatives to fund legal defense efforts for immigrants. In 2017 the governor of New York, Andrew Cuomo, announced a new Liberty Defense Project and the state legislature appropriated nearly 16 million dollars to support a variety of immigrant defense efforts. https://www.ny.gov/programs/liberty-defense-project.

The California state Senate approved a $12 million appropriation for immigrant legal defense in April 2017. Cities such as Los Angeles, Santa Clara, San Francisco, and San Jose all appropriated funds for immigrant defense in the spring of 2017. Casey Tolan, *As Trump Threatens Deportations, Bay Area Funding [sic] Immigrants' Legal Defense*, San Jose Mercury News May 9, 2017, at http://www.mercurynews.com/2017/05/08/california-bay-area-immigrant-legal-defense-deportation/.

Page 741 (§ 6.05[A]): Add the following just before the paragraph that starts "The ACUS Study reported that…":

The federal government's demand for immigration detention facilities and bed space continues to grow due to a congressional bed mandate. This has resulted in the privatization of many detention facilities. William Selway & Margaret Kirkwood, *Congress Mandates Jail Beds for 34,000 Immigrants as Private Prisons Profit*, Bloomberg Businessweek, Sept. 24, 2013, *at* http://www.bloomberg.com/news/2013-09-24/congress-fuels-private-jails-detaining-34-000-immigrants.html.

Page 743: Replace *In Re Patel* with *In re Siniauskas* below:

IN RE SINIAUSKAS
27 I. & N. Dec. 207 (B.I.A. 2018)

MALPHRUS, Board Member:

In a decision dated May 15, 2017, an Immigration Judge granted the respondent's request for a change in custody status and ordered him released on bond in the amount of $25,000. The Department of Homeland Security ("DHS") has appealed from that decision. The appeal will be sustained, and the respondent will be ordered detained without bond.

The respondent is a native and citizen of Lithuania. He entered the United States as a nonimmigrant visitor in 2000 and has admitted that he remained longer than permitted. The respondent is married to a lawful permanent resident, and he has a United States citizen daughter.

An alien in a custody determination under section 236(a) of the Immigration and Nationality Act, 8 U.S.C. § 1226(a) (2012), must establish to the satisfaction of the Immigration Judge and the Board that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight. *Matter of Fatahi*, 26 I&N Dec. 791, 793−94 (BIA 2016); *Matter of Adeniji*, 22 I&N Dec. 1102, 1112−13 (BIA 1999), *modified on other grounds*, *Matter of Garcia Arreola*, 25 I&N Dec. 267 (BIA 2010). "Dangerous aliens are properly detained without bond," so an "Immigration Judge should only set a bond if he first determines that the alien does not present a danger to the community." *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009). The purpose behind detaining criminal aliens is to ensure their appearance at removal proceedings and to prevent them from engaging in further criminal activity. *Matter of Kotliar*, 24 I&N Dec. 124, 127 (BIA 2007).

The DHS contends that the respondent did not meet his burden of establishing that he is not a danger to the community.[11] We agree. The record reflects that the respondent has three convictions for driving under the influence between 2006 and 2007, and he was arrested for a fourth offense in 2017. Two of his convictions, as well as the recent charge, involved accidents. Based on the most recent arrest, the respondent was taken into DHS custody. 1 The Immigration Judge initially found that the respondent was a danger to the community and denied bond on March 13, 2017. The DHS's appeal relates to a subsequent hearing on May 15, 2017, where the Immigration Judge accepted additional evidence and granted bond. Given our

[11] The Immigration Judge initially found that the respondent was a danger to the community and denied bond on March 13, 2017. The DHS's appeal relates to a subsequent hearing on May 15, 2017, where the Immigration Judge accepted additional evidence and granted bond. Given our decision to sustain the appeal, we need not address whether the Immigration Judge erred in finding that changed circumstances warranted the subsequent bond redetermination hearing.

decision to sustain the appeal, we need not address whether the Immigration Judge erred in finding that changed circumstances warranted the subsequent bond redetermination hearing.

The respondent argues that driving under the influence is not a crime of violence and that it has been 10 years since he was convicted of that offense. He presented evidence of treatment by a certified naturopathic physician and his active participation in Alcoholics Anonymous meetings, which the Immigration Judge found to be "active steps to address his obvious alcohol problem." The respondent argues that his recent arrest for driving under the influence is an aberration that involved mitigating circumstances because it occurred on the first anniversary of his mother's death.

"Drunk driving is an extremely dangerous crime." *Begay v. United States*, 553 U.S. 137, 141 (2008), *abrogated on other grounds*, *Johnson v. United States*, 135 S. Ct. 2551 (2015). It takes "a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2166 (2016). "[T]he very nature of the crime of [driving while intoxicated] presents a 'serious risk of physical injury' to others . . . ." *United States v. DeSantiago-Gonzalez*, 207 F.3d 261, 264 (5th Cir. 2000); *see also Marmolejo-Campos v. Holder*, 558 F.3d 903, 913 (9th Cir. 2009) (noting that "the dangers of drunk driving are well established").

In bond proceedings, it is proper for the Immigration Judge to consider not only the nature of a criminal offense but also the specific circumstances surrounding the alien's conduct. *See Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006) (stating that relevant factors in determining whether an alien should be released from immigration custody include how extensive, recent, and serious the alien's criminal activity is). It is also proper to consider both arrests and convictions. *Id.* at 40−41.

Driving under the influence is a significant adverse consideration in bond proceedings. We recognize that the respondent's last conviction for driving under the influence occurred 10 years ago. However, his recent arrest for the same offense undercuts his argument that he has established rehabilitation and does not pose a danger to the community. The respondent does not dispute that he was recently arrested and that the charges are still pending. While we are sympathetic to the fact that the arrest occurred on the first anniversary of his mother's death, this possible reason for his transgression does not negate the dangerousness of his conduct.[12] The respondent asserts that he will not repeat his dangerous drinking and driving behavior, but his actions are a better indication of his future conduct than his assurances to the contrary. *See Matter of Roberts*, 20 I&N Dec. 294, 303 (BIA

[12] The respondent does not dispute that at the time of two of his convictions for driving under the influence, he was also convicted of driving without a license. These convictions are not undermined by the fact that he was ineligible for a Pennsylvania driver's license or that he may have a valid international driver's license from Lithuania.

1991) (noting that an alien's "assurances" alone are not sufficient to "show genuine rehabilitation"). 2 The respondent does not dispute that at the time of two of his convictions for driving under the influence, he was also convicted of driving without a license. These convictions are not undermined by the fact that he was ineligible for a Pennsylvania driver's license or that he may have a valid international driver's license from Lithuania.

The respondent has significant family ties, including his lawful permanent resident wife and a United States citizen daughter. His daughter has filed a visa petition on his behalf, which has been approved. He also has a fixed address and a long residence in the United States, although he has no legal status. Moreover, the respondent has a history of employment including owning a business, has support from his church, and has been involved in charitable activities. While these family and community ties may be significant to whether the respondent is a flight risk, he has not shown how they mitigate his dangerousness because of his drinking and driving.

In *Matter of Guerra*, 24 I&N Dec. at 40–41, we listed a variety of factors to consider in bond redeterminations, some of which generally relate to whether an alien is a flight risk, while others typically concern whether he is a danger to the community. An alien's family ties and his possible eligibility for discretionary relief based on those ties are proper considerations in deciding whether he is a flight risk. *See Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987) (stating that a respondent who is likely to be granted relief has a greater motivation to appear for removal than one who has less potential to obtain relief). Considerations such as a fixed address, a residence of long duration, a history of employment, and other community ties may similarly impact an alien's risk of flight. However, the respondent was not found to be a flight risk.

The issue in this case is whether the respondent is a danger to the community, and family and community ties generally do not mitigate an alien's dangerousness. While there may be a situation where a family member's or other's influence over a young respondent's conduct could affect the likelihood that he would engage in future dangerous activity, this is not such a case. The respondent is an adult and has not shown how his family circumstances would mitigate his history of drinking and driving, except to explain that the most recent incident occurred on the anniversary of his mother's death. The factors that the respondent claims mitigate or negate his dangerousness existed prior to his most recent arrest, and they did not deter his conduct.

We recognize that the Immigration Judge set a significant bond of $25,000, which he said "reflects the seriousness with which this court views the respondent's repeated conduct." However, an Immigration Judge should only set a monetary bond if the respondent first establishes that he is not a danger to the community. *Matter of Urena*, 25 I&N Dec. at 141.

> This is not a case involving a single conviction for driving under the influence from 10 years ago. The respondent has multiple convictions for driving under the influence from that period and a recent arrest for the same conduct, which undermines his claim that he has been rehabilitated. Under these circumstances, we are unpersuaded that the respondent has met his burden to show that that he is not a danger to the community. *See Matter of Fatahi*, 26 I&N Dec. at 793−94. We therefore conclude that he is not eligible for bond. Accordingly, the DHS's appeal will be sustained, the Immigration Judge's decision will be vacated, and the respondent will be ordered detained without bond.
>
> **ORDER:** The appeal of the Department of Homeland Security is sustained and the Immigration Judge's May 15, 2017, decision is vacated.
>
> **FURTHER ORDER:** The respondent is ordered detained without bond.

In re Siniauskas highlights the difficulties faced by immigration attorneys advocating for their clients' release from immigration detention. It is important that advocates highlight all positive factors in a client's case, while downplaying any negative factors. The immigration judge weighs these factors and makes a discretionary decision to either release the foreign national on bond or continue to detain the person pending the completion of the removal hearing. Notice that the immigration judge initially set Mr. Siniauskas' bond at $25,000, an amount too high for most foreign nationals to pay. Many times immigration attorneys will make a motion for a bond redetermination, or appeal a final bond determination in order to try and lower the amount of the bond. But, as the burden is on the foreign national to prove that they are not a danger to the community or a flight risk, in most cases the immigration judge's initial discretionary decision is final.

Should the burden be on the foreign national in bond proceedings? For a thorough analysis arguing why the burden of proof should be on the government in these type of proceedings, see Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 Case W. Res. L. Rev. 75 (2016).

Page 762 (§ 6.05[C]): Add the following after *Demore v. Kim*, just before [1] Detention Issues:

Increasingly, advocates are challenging detention as part of removal. For example, in five habeas cases decided in June 2015 alone, the litigants successfully challenged the government's interpretation of provisions for mandatory detention under INA § 236; 8 U.S.C. § 1226. *Antoniou v. Shanahan*, 112 F. Supp. 3d 1 (S.D.N.Y. 2015); *Minto v. Decker*, 108 F. Supp. 3d 189 (S.D.N.Y. 2015); *Singh v. Sabol*, 2015 U.S. Dist. LEXIS 72149 (M.D. Pa. June 4, 2015), *Sutherland v. Shanahan*, 108 F. Supp. 3d 172 (S.D.N.Y. 2015); *Bugianishvili v. McConnell*, 2015 U.S. Dist. LEXIS 82138 (S.D.N.Y. June 24, 2015).

In *Bugianishvili,* the court found that prolonged detention without bond during removal proceedings is unconstitutional. Bugianishvili is a long time permanent resident. Between 2009 and 2014, he was arrested three times for shoplifting and pleaded guilty to attempted petit larceny, petit larceny, and criminal possession of stolen property under New York law. He was sentenced to thirty days in jail and one day of community service. He completed his incarceration in 2009.

ICE agents arrested Bugianishvili in October 2014 and charged him with removability under INA § 237(a)(2)(ii); 8 U.S.C. § 1227(a)(2)(ii), the conviction of two or more crimes of moral turpitude not arising out of a single scheme of criminal misconduct. ICE found Bugianishvili subject to mandatory detention without bond. Bugianishvili moved for a bond hearing and one was held in April 2015. The immigration judge denied the motion for bond without considering the merits. Bugianishvili's attorneys submitted a habeas petition in U.S. District Court the same day.

While Bugianishvili was arguing that the offenses were not crimes of moral turpitude and receiving an initial decision in his favor, followed by one concluding that the offenses were subject to INA § 237(a)(2)(ii), Bugianishvili's U.S. citizen daughter submitted an immigrant visa petition (I-130) on his behalf. A visa would be available to him as an immediate relative and Bugianishvili could submit a waiver application, as he had a qualifying relative (pursuant to INA § 212(h)). Despite requests from his attorneys for ICE to expedite the processing of the immigrant visa petition, months passed and Bugianishvili remained in custody. Following a grant of the I-130 in May 2015, the next hearing for Bugianishvili was scheduled for October 2015.

The U.S. District Court acknowledged that under the INA, the "Attorney General shall take into custody any alien who . . . is deportable by reason of having [two convictions for CIMTs not arising out of a single scheme of criminal misconduct] . . . when the alien is released" from criminal incarceration underlying the government's charge of removability.

The district court discussed *Demore v. Kim* and *Zadvydas v. Davis* and their findings regarding the length of detention, due process, and the ability to achieve the purpose of detention. Here, Bugianishvili was held for almost eight months, almost "8 times longer than the criminal incarceration underlying the government's charge of removability." The court found Bugianishvili's case to differ from those offered by the government to argue that his appeal was the cause of the delay by stating that Bugianishvili's proceedings had just begun, his next hearing was four months away, and another hearing might be required—raising the possibility of detention without bond for a lengthy and unspecified amount of time. The court held that to be unconstitutional.

In February 2018, the Supreme Court decided *Jennings v. Rodriguez*. *Jennings* was argued twice before the Supreme Court, in part to allow Justice Gorsuch to participate. A decision was issued two years after the cert petition was granted.

The Supreme Court focused on three issues: (1) whether foreign nationals subject to mandatory detention have the right to bond hearings after being held for at least six months; (2) whether such foreign nationals can be released on bond if the government does not meet its burden of clear and convincing evidence that he or she is a flight risk or a danger to the community; and (3) if subsequent bond hearings must be scheduled every six months, that such foreign nationals are held in immigration detention. *See* http://www.scotusblog.com/case-files/cases/jennings-v-rodriguez/?wpmp_switcher=desktop. In late June, 2017, the Court set the case for reargument in the fall of 2017 and the court issued a decision reversing the Ninth Circuit. See the excerpt below.

In the Second Circuit, lawful permanent residents and others held in pre-removal order detention have won the right to bond hearings as a matter of both constitutional and statutory interpretation.

Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015), *cert. denied*, 133 S. Ct. 2494 (2016). The *Lora* order has resulted in the immigration court prioritizing detained cases to try to resolve the case before the six-month bond hearing. See the January 31, 2017 Priorities memorandum cited above.

On July 5, 2017, the Ninth Circuit affirmed a lower court finding that pursuant to the *Flores* settlement relating to children in removal proceedings, all children in federal custody are entitled to bond hearings. The federal government had argued that the jurisdiction to make custodial decisions lay solely the Department of Health and Human Services, even when a child is in removal proceedings. The Ninth Circuit panel called the federal government's failure to allow a bond hearing before the immigration court a breach of the settlement. The panel noted:

> For all children in ORR custody, these hearings compel the agency to provide its justifications and specific legal grounds for holding a given minor. The record shows that, in the absence of such hearings, unaccompanied minors, their parents, and their counsel are often given conflicting or confusing information about why a child is being detained. Bond hearings provide the concrete information needed to advocate for a minor's release.

Flores v. Sessions, 862 F.3d 863, 868 (9th Cir. 2017).

The interaction of the rights of children in detention under *Flores* with the right of the federal government to detain adults in the expedited removal context has become one of the main issues of how to handle the cases of immigrant adults and children separated during the summer of 2018.

[Authors' Note: In Chapter 2, we discussed the expedited removal process and the power of the government to detain people as part of the admission and inspection process. At the end of that chapter we included a discussion of *Zadvydas v. Ashcroft* and *Clark v. Martinez*, mentioned throughout *Jennings* below. *Zadvydas* and *Clark* specifically address the power to detain without bond hearings people who have not been formally admitted or inspected. We have placed *Jennings* here as it addresses the right to bond for people in removal proceedings generally, but the case also revisits issues considered in both *Zadvydas* and *Clark.* Note that people can be placed into regular removal proceedings under INA § 240; 8 U.S.C. § 1229a, if CBP determines that they are not subject to the grounds of expedited removal but otherwise deemed to be inadmissible to the United States. Further, those individuals who succeed in establishing a "credible fear of persecution" are to be placed into regular removal proceedings. And as *Jennings* explains below, people apprehended in the interior of the United States are placed in regular removal proceedings and charged with deportability under INA § 237; 8 U.S.C. § 1227, the main subject of this Chapter 6.

We have added the INA citation to the Supreme Court opinion below. While federal courts routinely cite the U.S. code, Immigration Judges and the DHS components use the INA citations in the regulations, forms, and legal guidance documents. Further, the agency regulations often match the INA section and not the U.S. code numbering system.]

Jennings v. Rodriguez

583 U.S. ___, 138 S. Ct. 830 (2018)

Justice Alito delivered the opinion of the Court, except as to Part II.

Every day, immigration officials must determine whether to admit or remove the many aliens who have arrived at an official "port of entry" (e.g., an international airport or border crossing) or who have been apprehended trying to enter the country at an unauthorized location. Immigration officials must also determine on a daily basis whether there are grounds for removing any of the aliens who are already present inside the country. The vast majority of these determinations are quickly made, but in some cases deciding whether an alien should be admitted or removed is not as easy. As a result, Congress has authorized immigration officials to detain some classes of aliens during the course of certain immigration proceedings. Detention during those proceedings gives immigration officials time to determine an alien's status without running the risk of the alien's either absconding or engaging in criminal activity before a final decision can be made.

In this case we are asked to interpret three provisions of U.S. immigration law that authorize the Government to detain aliens in the course of immigration proceedings. All parties appear to agree that the text of these provisions, when read most naturally, does not give detained aliens the right to periodic bond hearings during the course of their detention. But by relying on the constitutional-avoidance canon of statutory interpretation, the Court of Appeals for the Ninth Circuit held that detained aliens have a statutory right to periodic bond hearings under the provisions at issue.

Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems. But a court relying on that canon still must interpret the statute, not rewrite it. Because the Court of Appeals in this case adopted implausible constructions of the three immigration provisions at issue, we reverse its judgment and remand for further proceedings.

I
A

To implement its immigration policy, the Government must be able to decide (1) who may enter the country and (2) who may stay here after entering.

1
That process of decision generally begins at the Nation's borders and ports of entry, where the Government must determine whether an alien seeking to enter the country is admissible. Under 122 Stat. 867, [INA 235;]8 U. S. C. §1225, an alien who "arrives in the United States," or "is present" in this country but "has not been admitted," is treated as "an applicant for admission." [INA § 235(a)(1);]

§1225(a)(1). Applicants for admission must "be inspected by immigration officers" to ensure that they may be admitted into the country consistent with U. S. immigration law. [INA § 235(a)(3)] §1225(a)(3).

As relevant here, applicants for admission fall into one of two categories, those covered by [INA 235(b)(1);] §1225(b)(1) and those covered by [INA § 235(b)(2);] §1225(b)(2). Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. *See* [INA § 235(b)(1)(A)(i);] §§1225(b)(1)(A)(i) (citing INA §§ 212(a)(6)C), (a)(7);] §§1182(a)(6)(C), (a)(7)). Section [INA § 235(b)(1);]1225(b)(1) also applies to certain other aliens designated by the Attorney General in his discretion. *See* [INA § 235(b)(1)(A)(iii);] §1225(b)(1)(A)(iii). Section [INA § 235(b)(2);]1225(b)(2) is broader. It serves as a catchall provision that applies to all applicants for admission not covered by [INA § 235(b)(1);] §1225(b)(1) (with specific exceptions not relevant here). *See* [INA §§ 235(b)(2)(A), (B);] §§1225(b)(2)(A), (B).

Both [INA § 235(b)(1);] §1225(b)(1) and [INA § 235(b)(2);] §1225(b)(2) authorize the detention of certain aliens. Aliens covered by INA §1225(b)(1) are normally ordered removed "without further hearing or review" pursuant to an expedited removal process. [INA 235(b)(1)(A)(i);] §1225(b)(1)(A)(i). But if a [INA § 235(b)(1);] §1225(b)(1) alien "indicates either an intention to apply for asylum . . . or a fear of persecution," then that alien is referred for an asylum interview. [INA § 235(b)(1)(A)(ii);] §1225(b)(1)(A)(ii). If an immigration officer determines after that interview that the alien has a credible fear of persecution, "the alien shall be detained for further consideration of the application for asylum." §1225(b)(1)(B)(ii). Aliens who are instead covered by §1225(b)(2) are detained pursuant to a different process. Those aliens "shall be detained for a [removal] proceeding" if an immigration officer "determines that [they are] not clearly and beyond a doubt entitled to be admitted" into the country. §1225(b)(2)(A).

Regardless of which of those two sections authorizes their detention, applicants for admission may be temporarily released on parole "for urgent humanitarian reasons or significant public benefit." §1182(d)(5)(A); *see also* 8 CFR §§212.5(b), 235.3 (2017). Such parole, however, "shall not be regarded as an admission of the alien." 8 U. S. C. §1182(d)(5)(A). Instead, when the purpose of the parole has been served, "the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." *Ibid.*

2

Even once inside the United States, aliens do not have an absolute right to remain here. For example, an alien present in the country may still be removed if he or she falls "within one or more . . . classes of deportable aliens." [INA § 237(a);] §1227(a). That includes aliens who were inadmissible at the time of entry or who

have been convicted of certain criminal offenses since admission. See [INA §§ 237(a)(1), (2);] §§1227(a)(1), (2).

Section 1226 [INA § 236] generally governs the process of arresting and detaining that group of aliens pending their removal. As relevant here, [§ 236;] §1226 distinguishes between two different categories of aliens. Section [236;]1226(a) sets out the default rule: The Attorney General may issue a warrant for the arrest and detention of an alien "pending a decision on whether the alien is to be removed from the United States." [§ 236(a);] §1226(a). "Except as provided in subsection (c) of this section," the Attorney General "may release" an alien detained under [§ 236(a);] §1226(a) "on bond . . . or conditional parole." *Ibid.*

Section 1226(c) [INA § 236(c)], however, carves out a statutory category of aliens who may not be released under [§ 236(a)] §1226(a). Under [§ 236(c)] §1226(c), the "Attorney General shall take into custody any alien" who falls into one of several enumerated categories involving criminal offenses and terrorist activities. [INA § 236(c)(1);] §1226(c)(1). The Attorney General may release aliens in those categories "only if the Attorney General decides . . . that release of the alien from custody is necessary" for witness-protection purposes and "the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." [INA § 236(c)(2)] §1226(c)(2). Any release under those narrow conditions "shall take place in accordance with a procedure that considers the severity of the offense committed by the alien." *Ibid.* [13]1

In sum, U. S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under [INA §§ 235(b)(1) and (b)(2);] §§1225(b)(1) and (b)(2). It also authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings under [INA § 236(a) and (c);] §§1226(a) and (c). The primary issue is the proper interpretation of [INA §§ 235(b), 236(a), and 236(c);] §§1225(b), 1226(a), and 1226(c).

B

Respondent Alejandro Rodriguez is a Mexican citizen. Since 1987, he has also been a lawful permanent resident of the United States. In April 2004, after Rodriguez was convicted of a drug offense and theft of a vehicle, the Government detained him under [INA § 236;] §1226 and sought to remove him from the country. At his

[13] Anyone who believes that he is not covered by [INA § 236(c);] § 1226(c) may also ask for what is known as a "*Joseph* hearing." *See Matter of Joseph,* 22 I & N Dec. 799 (BIA 1999). At a *Joseph* hearing, that person "may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the [Government] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention." [citing *Demore v. Kim*]. Whether respondents are entitled to *Joseph* hearings is not before this Court.

removal hearing, Rodriguez argued both that he was not removable and, in the alternative, that he was eligible for relief from removal. In July 2004, an Immigration Judge ordered Rodriguez deported to Mexico. Rodriguez chose to appeal that decision to the Board of Immigration Appeals, but five months later the Board agreed that Rodriguez was subject to mandatory removal. Once again, Rodriguez chose to seek further review, this time petitioning the Court of Appeals for the Ninth Circuit for review of the Board's decision.

In May 2007, while Rodriguez was still litigating his removal in the Court of Appeals, he filed a habeas petition in the District Court for the Central District of California, alleging that he was entitled to a bond hearing to determine whether his continued detention was justified. Rodriguez's case was consolidated with another, similar case brought by Alejandro Garcia, and together they moved for class certification. The District Court denied their motion, but the Court of Appeals for the Ninth Circuit reversed. *** It concluded that the proposed class met the certification requirements of Rule 23 of the Federal Rules of Civil Procedure, and it remanded the case to the District Court.***

On remand, the District Court certified the following class:

"[A]ll non-citizens within the Central District of California who: (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a hearing to determine whether their detention is justified." ***

The District Court named Rodriguez as class representative of the newly certified class, *Ibid.*, and then organized the class into four subclasses based on the four "general immigration detention statutes" under which it understood the class members to be detained: Sections [INA 235(b), 236(a), 236(c) and 241(a);] 1225(b), 1226(a), 1226(c), and 1231(a). *** Each of the four subclasses was certified to pursue declaratory and injunctive relief. 2011 Order. On appeal, the Court of Appeals held that the [INA § 241(a);] §1231(a) subclass had been improperly certified, but it affirmed the certification of the other three subclasses. ***

In their complaint, Rodriguez and the other respondents argued that the relevant statutory provisions—[INA §§ 235(b), 236(a) and 236(c);] §§1225(b), 1226(a), and 1226(c)—do not authorize "prolonged" detention in the absence of an individualized bond hearing at which the Government proves by clear and convincing evidence that the class member's detention remains justified. Absent such a bond-hearing requirement, respondents continued, those three provisions would violate the Due Process Clause of the Fifth Amendment. In their prayer for relief, respondents thus asked the District Court to require the Government "to provide, after giving notice, individual hearings before an immigration judge for . .

. each member of the class, at which [the Government] will bear the burden to prove by clear and convincing evidence that no reasonable conditions will ensure the detainee's presence in the event of removal and protect the community from serious danger, despite the prolonged length of detention at issue." Third Amended Complaint***Respondents also sought declaratory relief. *Ibid.*

As relevant here, the District Court entered a permanent injunction in line with the relief sought by respondents, and the Court of Appeals affirmed. *** Relying heavily on the canon of constitutional avoidance, the Court of Appeals construed [INA §§ 235(b) and 236(c);] §§1225(b) and 1226(c) as imposing an implicit 6-month time limit on an alien's detention under these sections. *** After that point, the Court of Appeals held, the Government may continue to detain the alien only under the authority of [INA § 236(a)'] §1226(a).The Court of Appeals then construed [INA 236(a);] §1226(a) to mean that an alien must be given a bond hearing every six months and that detention beyond the initial 6-month period is permitted only if the Government proves by clear and convincing evidence that further detention is justified. ***

The Government petitioned this Court for review of that decision, and we granted certiorari. 579 U. S. ___, 136 S. Ct. 2489 (2016).

II

Before reaching the merits of the lower court's interpretation, we briefly address whether we have jurisdiction to entertain respondents' claims. We discuss two potential obstacles, [INA § 242(b)(9) and 236(e);]8 U. S. C. §§1252(b)(9) and 1226(e). [Authors' Note: we omitted the discussion of whether Congress had foreclosed access to judicial review in the federal courts. We also omitted the concurring opinion of Justice Thomas that focused solely on his finding that the court had no jurisdiction. In 1996, Congress amended the INA to restrict the form and timing of judicial review and for some people foreclosed judicial review of expedited removal or discretionary actions.]

III

When "a serious doubt" is raised about the constitutionality of an act of Congress, "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U. S. 22, 62(1932). Relying on this canon of constitutional avoidance, the Court of Appeals construed §§1225(b), 1226(a), and 1226(c) to limit the permissible length of an alien's detention without a bond hearing. Without such a construction, the Court of Appeals believed, the "'prolonged detention without adequate procedural protections'" authorized by the provisions "'would raise serious constitutional concerns.'" 804 F. 3d, at 1077 (quoting *Casas-Castrillon v. DHS*, 535 F. 3d 942, 950 (9th Cir. 2008)).

The canon of constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Clark v. Martinez*, 543 U. S. 371, 385 (2005). In the absence of more than one plausible construction, the canon simply "'has no application.'" ***.

The Court of Appeals misapplied the canon in this case because its interpretations of the three provisions at issue here are implausible. In Parts III-A and III-B, we hold that, subject only to express exceptions, [INA §§ 235(b) and 236(c);] §§1225(b) and 1226(c) authorize detention until the end of applicable proceedings. And in Part III-C, we hold that there is no justification for any of the procedural requirements that the Court of Appeals layered onto [INA § 236(a);] §1226(a) without any arguable statutory foundation.

A

As noted,[INA § 235(b);] §1225(b) applies primarily to aliens seeking entry into the United States ("applicants for admission" in the language of the statute). Section [235(b);] 1225(b) divides these applicants into two categories. First, certain aliens claiming a credible fear of persecution under [INA § 235(b)(1);] §1225(b)(1) "shall be detained for further consideration of the application for asylum." [INA § 235(b)(1)(B)(ii);] §1225(b)(1)(B)(ii). Second, aliens falling within the scope of [INA § 235(b)(2);] §1225(b)(2) "shall be detained for a [removal] proceeding." [INA § 235(b)(2)(A);] §1225(b)(2)(A).

Read most naturally, [these sections] thus mandate detention of applicants for admission until certain proceedings have concluded. Section [INA § 235(b)(1);] 1225(b)(1) aliens are detained for "further consideration of the application for asylum," and ***(b)(2) aliens are in turn detained for "[removal] proceeding[s]." Once those proceedings end, detention under [INA § 235(b);] §1225(b) must end as well. Until that point, however, nothing in the statutory text imposes any limit on the length of detention. And neither [section] says anything whatsoever about bond hearings.

Despite the clear language of [INA §§ 235(b)(1) and (b)(2);] §§1225(b)(1) and (b)(2), respondents argue—and the Court of Appeals held—that those provisions nevertheless can be construed to contain implicit limitations on the length of detention. But neither of the two limiting interpretations offered by respondents is plausible.

1

First, respondents argue that [these sections] contain an implicit 6-month limit on the length of detention. Once that 6-month period elapses, respondents contend,

aliens previously detained under those provisions must instead be detained under the authority of [INA § 236(a);] §1226(a), which allows for bond hearings in certain circumstances.
There are many problems with this interpretation. Nothing in the text of [these sections] even hints that those provisions restrict detention after six months, but respondents do not engage in any analysis of the text. Instead, they simply cite the canon of constitutional avoidance and urge this Court to use that canon to read a "six-month reasonableness limitation" into [INA § 235(b);] §1225(b). ***.

That is not how the canon of constitutional avoidance works. Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases. Instead, the canon permits a court to "choos[e] between competing plausible interpretations of a statutory text." *Clark*, *supra*, at 381 (emphasis added). To prevail, respondents must thus show that [INA § 235(b);] §1225(b)'s detention provisions may plausibly be read to contain an implicit 6-month limit. And they do not even attempt to defend that reading of the text.

In much the same manner, the Court of Appeals all but ignored the statutory text. Instead, it read *Zadvydas v. Davis*, 533 U. S. 678(2001), as essentially granting a license to graft a time limit onto the text of §1225(b). *Zadvydas*, however, provides no such authority.

Zadvydas concerned [INA § 241(a)(6);] §1231(a)(6), which authorizes the detention of aliens who have already been ordered removed from the country. Under this section, when an alien is ordered removed, the Attorney General is directed to complete removal within a period of 90 days*** and the alien must be detained during that period***. After that time elapses, however, [INA § 241(a)(6);] §1231(a)(6) provides only that certain aliens "may be detained" while efforts to complete removal continue. ***

In *Zadvydas*, the Court construed [INA § 241(a)(6);] §1231(a)(6) to mean that an alien who has been ordered removed may not be detained beyond "a period reasonably necessary to secure removal," 533 U. S., at 699, and it further held that six months is a presumptively reasonable period, *Id.*, at 701. After that, the Court concluded, if the alien "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the Government must either rebut that showing or release the alien. *Ibid.*

The *Zadvydas* Court justified this interpretation by invoking the constitutional-avoidance canon, and the Court defended its resort to that canon on the ground that [INA § 241(a)(6);] §1231(a)(6) is ambiguous. Specifically, the Court detected ambiguity in the statutory phrase "may be detained." "'[M]ay,'" the Court said, "suggests discretion" but not necessarily "unlimited discretion. In that respect the word 'may' is ambiguous." *Id.*, at 697. The Court also pointed to the absence of any explicit statutory limit on the length of permissible detention following the entry of an order of removal. *Ibid.*

Zadvydas represents a notably generous application of the constitutional-avoidance canon, but the Court of Appeals in this case went much further. It failed to address whether *Zadvydas*'s reasoning may fairly be applied in this case despite the many ways in which the provision in question in *Zadvydas*, [INA § 241(a)(6);] §1231(a)(6), differs materially from those at issue here, [INA §§ 235(b)(1) and (b)(2);] §§1225(b)(1) and (b)(2). Those differences preclude the reading adopted by the Court of Appeals.

To start, [INA §§ 235(b)(1) and (b)(2);] §§1225(b)(1) and (b)(2), unlike [INA § 241(a)(6);] §1231(a)(6), provide for detention for a specified period of time. Section 1225(b)(1) mandates detention "for further consideration of the application for asylum," [INA §§ 235(b)(1)(B)(ii) and (b)(2);] §1225(b)(1)(B)(ii), and §1225(b)(2) requires detention "for a [removal] proceeding," [INA § 235(b)(2)(A);] §1225(b)(2)(A). The plain meaning of those phrases is that detention must continue until immigration officers have finished "consider[ing]" the application for asylum, [INA § 235(b)(1)(B)(ii);] §1225(b)(1)(B)(ii), or until removal proceedings have concluded,[INA § 235(b)(2)(A);] §1225(b)(2)(A). By contrast, Congress left the permissible length of detention under [INA § 241(a)(6);] §1231(a)(6) unclear.

Moreover, in *Zadvydas*, the Court saw ambiguity in [INA § 241(a)(6);] §1231(a)(6)'s use of the word "may." Here, by contrast, [INA §§ 235(b)(1) and (b)(2);] §§1225(b)(1) and (b)(2) do not use the word "may." Instead, they unequivocally mandate that aliens falling within their scope "shall" be detained. "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *** That requirement of detention precludes a court from finding ambiguity here in the way that *Zadvydas* found ambiguity in [INA § 241(a)(6);] §1231(a)(6).

Zadvydas's reasoning is particularly inapt here because there is a specific provision authorizing release from [INA § 235(b);] §1225(b) detention whereas no similar release provision applies to §1231(a)(6). With a few exceptions not relevant here, the Attorney General may "for urgent humanitarian reasons or significant public benefit" temporarily parole aliens detained under §§1225(b)(1) and (b)(2). [no parallel cite in INA exists]; 8 U. S. C. §1182(d)(5)(A). That express exception to detention implies that there are no other circumstances under which aliens detained under §1225(b) may be released. *** "Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (expressio unius est exclusio alterius)"). That negative implication precludes the sort of implicit time limit on detention that we found in *Zadvydas*. [14]

[4] According to the dissent, we could have applied the *expressio unius* canon in *Zadvydas* as well because there was also an "alternative avenue for relief, namely, bail," available for aliens detained under [INA § 241(a)(6); § 1231(a)(6).*** But the dissent overlooks the fact that the provision granting bail was precisely the same provision that the Court purported to be interpreting, so the canon was not applicable. ***

In short, a series of textual signals distinguishes the provisions at issue in this case from *Zadvydas*'s interpretation of [INA § 241(a)(6);] §1231(a)(6). While *Zadvydas* found [the post removal statute] to be ambiguous, the same cannot be said of [the expedited removal statute]: Both provisions mandate detention until a certain point and authorize release prior to that point only under limited circumstances. As a result, neither provision can reasonably be read to limit detention to six months.

2
***

B

While the language of [INA §§ 235(b)(1) and (b)(2);] §§1225(b)(1) and (b)(2) is quite clear, [INA § 236(c);] §1226(c) is even clearer. As noted, [INA § 236;] §1226 applies to aliens already present in the United States. Section [INA § 236(a);] 1226(a) creates a default rule for those aliens by permitting—but not requiring—the Attorney General to issue warrants for their arrest and detention pending removal proceedings. [This section] also permits the Attorney General to release those aliens on bond, "[e]xcept as provided in subsection (c) of this section." Section [INA 236(c);] 1226(c) in turn states that the Attorney General "shall take into custody any alien" who falls into one of the enumerated categories involving criminal offenses and terrorist activities. [INA 236(c)(1);] 8 U. S. C. §1226(c)(1). Section 1226(c) then goes on to specify that the Attorney General "may release" one of those aliens "only if the Attorney General decides" both that doing so is necessary for witness-protection purposes and that the alien will not pose a danger or flight risk. ***

*** [INA 236(c);] §1226(c) does not on its face limit the length of the detention it authorizes. In fact, by allowing aliens to be released "only if" the Attorney General decides that certain conditions are met, [this section] reinforces the conclusion that aliens detained under its authority are not entitled to be released under any circumstances other than those expressly recognized by the statute. And together with [INA 236(a);] §1226(a), [INA§ 236(c);] §1226(c) makes clear that detention of aliens within its scope must continue "pending a decision on whether the alien is to be removed from the United States." [INA § 236(a);] §1226(a).

In a reprise of their interpretation of [INA § 235(b);] §1225(b), respondents argue, and the Court of Appeals held, that [INA § 236(c);] §1226(c) should be interpreted to include an implicit 6-month time limit on the length of mandatory detention. Once again, that interpretation falls far short of a "plausible statutory construction."

In defense of their statutory reading, respondents first argue that [INA § 236(c);] §1226(c)'s "silence" as to the length of detention "cannot be construed to authorize prolonged mandatory detention, because Congress must use 'clearer terms' to authorize 'long-term detention.'" Brief for Respondents 34 (quoting *Zadvydas*, 533 U. S., at 697. But[INA § 236(c);] §1226(c) is not "silent" as to the length of

detention. It mandates detention "pending a decision on whether the alien is to be removed from the United States," [INA § 236(a);] §1226(a), and it expressly prohibits release from that detention except for narrow, witness-protection purposes. Even if courts were permitted to fashion 6-month time limits out of statutory silence, they certainly may not transmute existing statutory language into its polar opposite. The constitutional-avoidance canon does not countenance such textual alchemy.

Indeed, we have held as much in connection with [INA § 236(c);] §1226(c) itself. In *Demore v. Kim*, 538 U. S., at 529, we distinguished [INA § 236(c);] §1226(c) from the statutory provision in *Zadvydas* by pointing out that detention under [INA § 236(c);] §1226(c) has "a definite termination point": the conclusion of removal proceedings. As we made clear there, that "definite termination point"—and not some arbitrary time limit devised by courts—marks the end of the Government's detention authority under [INA § 236(c);] §1226(c).
***

We hold that [INA § 236(c);] §1226(c) mandates detention of any alien falling within its scope and that detention may end prior to the conclusion of removal proceedings "only if" the alien is released for witness-protection purposes.

C

Finally, as noted, [INA § 236(a);] §1226(a) authorizes the Attorney General to arrest and detain an alien "pending a decision on whether the alien is to be removed from the United States." ***. As long as the detained alien is not covered by [INA § 236(c);] §1226(c), the Attorney General "may release" the alien on "bond . . . or conditional parole." [INA § 236(a);] §1226(a). Federal regulations provide that aliens detained under [this section] receive bond hearings at the outset of detention. *See* 8 CFR §§236.1(d)(1), 1236.1(d)(1).

The Court of Appeals ordered the Government to provide procedural protections that go well beyond the initial bond hearing established by existing regulations—namely, periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the alien's continued detention is necessary. Nothing in §1226(a)'s text—which says only that the Attorney General "may release" the alien "on . . . bond"—even remotely supports the imposition of either of those requirements. Nor does [INA § 236(a);] §1226(a)'s text even hint that the length of detention prior to a bond hearing must specifically be considered in determining whether the alien should be released.

IV

For these reasons, the meaning of the relevant statutory provisions is clear—and clearly contrary to the decision of the Court of Appeals. But the dissent is undeterred. It begins by ignoring the statutory language for as long as possible,

devoting the first two-thirds of its opinion to a disquisition on the Constitution. Only after a 19-page prologue does the dissent acknowledge the relevant statutory provisions.

The dissent frames the question of interpretation as follows: Can §§1225(b), 1226(c), and 1226(a) be read to require bond hearings every six months "without doing violence to the statutory language," post, at 20 (opinion of Breyer, J.)? According to the dissent, the answer is "yes," but the dissent evidently has a strong stomach when it comes to inflicting linguistic trauma. ***

Let us start with the simple term "detain." According to the dissent, "detain" means the absence of "unrestrained freedom." Post, at 21. An alien who is subject to any one of "numerous restraints"—including "a requirement to obtain medical treatment," "to report at regular intervals," or even simply to comply with "a curfew"—is "detained" in the dissent's eyes, even if that alien is otherwise free to roam the streets. *Ibid.*

This interpretation defies ordinary English usage. The dictionary cited by the dissent, the Oxford English Dictionary (OED), defines "detain" as follows: "[t]o keep in confinement or under restraint; to keep prisoner." 4 OED 543 (2d ed. 1989) (emphasis added); see also OED (3d ed. 2012), http://www.oed.com/view/Entry/51176 (same). Other general-purpose dictionaries provide similar definitions. ***

How does the dissent attempt to evade the clear meaning of "detain"? It resorts to the legal equivalent of a sleight-of-hand trick. First, the dissent cites a passage in Blackstone stating that arrestees could always seek release on bail. ***. Then, having established the obvious point that a person who is initially detained may later be released from detention, the dissent reasons that this means that a person may still be regarded as detained even after he is released from custody. *** That, of course, is a nonsequitur. Just because a person who is initially detained may later be released, it does not follow that the person is still "detained" after his period of detention comes to an end.

If there were any doubt about the meaning of the term "detain" in the relevant statutory provisions, the context in which they appear would put that doubt to rest. Title 8 of the United States Code, the title dealing with immigration, is replete with references that distinguish between "detained" aliens and aliens who are free to walk the streets in the way the dissent imagines. Section [INA § 236(a);] 1226(a), for instance, distinguishes between the power to "continue to detain the arrested alien" and the power to "release the alien on . . . bond." But if the dissent were right, that distinction would make no sense: An "alien released on bond" would also be a "detained alien." Here is another example: In §1226(b), Congress gave the Attorney General the power to "revoke" at any time "a bond or parole authorized under subsection (a) of this section, rearrest the alien under the original warrant, and detain the alien." It beggars belief that Congress would have given the Attorney

General the power to detain a class of aliens who, under the dissent's reading, are already "detained" because they are free on bond. But that is what the dissent would have us believe. Consider, finally, the example of §1226(c). As noted, that provision obligates the Attorney General to "take into custody" certain aliens whenever they are "released, without regard to whether the alien is released on parole, supervised release, or probation." On the dissent's view, however, even aliens "released on parole, supervised release, or probation" are "in custody"—and so there would be no need for the Attorney General to take them into custody again.

***

It is true, as the dissent points out, that *Zadvydas* found "that the words ' "may be detained" ' [are] consistent with requiring release from long-term detention," *** (quoting 533 U. S., at 682), but that is not because there is any ambiguity in the term "detain." As we have explained, the key statutory provision in *Zadvydas* said that the aliens in question "may," not "shall," be detained, and that provision also failed to specify how long detention was to last. Here, the statutory provisions at issue state either that the covered aliens "shall" be detained until specified events take place, *see* 8 U. S. C. §1225(b)(1)(B)(ii) ("further consideration of the application for asylum"); §1225(b)(2)(A) ("a [removal] proceeding"), or provide that the covered aliens may be released "only if" specified conditions are met, §1226(c)(2). The term that the *Zadvydas* Court found to be ambiguous was "may," not "detain." See 533 U. S., at 697. And the opinion in that case consistently used the words "detain" and "custody" to refer exclusively to physical confinement and restraint. *See Id.*, at 690 (referring to "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint" (emphasis added)); *Id.*, at 683 (contrasting aliens "released on bond" with those "held in custody").

The dissent offers no plausible interpretation of §§1225(b), 1226(c), and 1226(a). But even if we were to accept the dissent's interpretation and hold that "detained" aliens in the "custody" of the Government include aliens released on bond, that would still not justify the dissent's proposed resolution of this case. The Court of Appeals held that aliens detained under the provisions at issue must be given periodic bond hearings, and the dissent agrees. See post, at 2 ("I would interpret the statute as requiring bail hearings, presumptively after six months of confinement"). But the dissent draws that 6-month limitation out of thin air. However broad its interpretation of the words "detain" and "custody," nothing in any of the relevant provisions imposes a 6-month time limit on detention without the possibility of bail. So if the dissent's interpretation is right, then aliens detained under §§1225(b), 1226(c), and 1226(a) are entitled to bail hearings as soon as their detention begins rather than six months later. "Detained" does not mean "released on bond," and it certainly does not mean "released on bond but only after six months of mandatory physical confinement."

The dissent's utterly implausible interpretation of the statutory language cannot support the decision of the court below.

V

Because the Court of Appeals erroneously concluded that periodic bond hearings are required under the immigration provisions at issue here, it had no occasion to consider respondents' constitutional arguments on their merits. Consistent with our role as "a court of review, not of first view," ***we do not reach those arguments. Instead, we remand the case to the Court of Appeals to consider them in the first instance.

Before the Court of Appeals addresses those claims, however, it should reexamine whether respondents can continue litigating their claims as a class. When the District Court certified the class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, it had their statutory challenge primarily in mind. Now that we have resolved that challenge, however, new questions emerge.

Specifically, the Court of Appeals should first decide whether it continues to have jurisdiction despite 8 U. S. C. §1252(f)(1). Under that provision, "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [§§1221-1232] other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." Section 1252(f)(1) thus "prohibits federal courts from granting classwide injunctive relief against the operation of §§1221-1223[2]." American-Arab Anti-Discrimination Comm., 525 U. S., at 481. The Court of Appeals held that this provision did not affect its jurisdiction over respondents' statutory claims because those claims did not "seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized by the statutes." 591 F. 3d, at 1120. This reasoning does not seem to apply to an order granting relief on constitutional grounds, and therefore the Court of Appeals should consider on remand whether it may issue classwide injunctive relief based on respondents' constitutional claims. ***

Similarly, the Court of Appeals should also consider on remand whether a Rule 23(b)(2) class action litigated on common facts is an appropriate way to resolve respondents' Due Process Clause claims. "[D]ue process is flexible," we have stressed repeatedly, and it "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U. S. 471, 481(1972); *see also Landon v. Plasencia*, 459 U. S. 21, 34 (1982).

VI

We reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings.

It is so ordered.

Justice Kagan took no part in the decision of this case.

[Authors' Note: We omitted the concurrence by Justice Thomas. He concurred in the result but wrote separately as he believed the court lacked jurisdiction to hear a class action habeas challenge.]

DISSENT

Justice Breyer, with whom Justice Ginsburg and Justice Sotomayor join, dissenting.

This case focuses upon three groups of noncitizens held in confinement. Each of these individuals believes he or she has the right to enter or to remain within the United States. The question is whether several statutory provisions of the Immigration and Nationality Act, 8 U. S. C. §1101 et seq., forbid granting them bail.

The noncitizens at issue are asylum seekers, persons who have finished serving a sentence of confinement (for a crime), or individuals who, while lacking a clear entitlement to enter the United States, claim to meet the criteria for admission ***. The Government has held all the members of the groups before us in confinement for many months, sometimes for years, while it looks into or contests their claims. But ultimately many members of these groups win their claims and the Government allows them to enter or to remain in the United States. Does the statute require members of these groups to receive a bail hearing, after, say, six months of confinement, with the possibility of release on bail into the community provided that they do not pose a risk of flight or a threat to the community's safety?

The Court reads the statute as forbidding bail, hence forbidding a bail hearing, for these individuals. In my view, the majority's interpretation of the statute would likely render the statute unconstitutional. Thus, I would follow this Court's longstanding practice of construing a statute "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." [citation omitted] And I would interpret the statute as requiring bail hearings, presumptively after six months of confinement. *Cf. Zadvydas v. Davis*, 533 U. S. 678, 701 (2001).

I

The Respondents

Because of their importance to my conclusion, I shall repeat, with references to record support, the key characteristics of the groups of noncitizens who appear before us.

First, as I have said, the respondents in this case are members of three special classes of noncitizens, the most important of whom (1) arrive at our borders seeking asylum or (2) have committed crimes but have finished serving their sentences of imprisonment. We also consider those who (3) arrive at our borders believing they are entitled to enter the United States for reasons other than asylum seeking, but lack a clear entitlement to enter.

Second, all members of the first group, the asylum seekers, have been found (by an immigration official) to have a "credible fear of persecution" in their home country should the United States deny them admittance. [INA § 235(b)(1)(B)(ii); 8 U. S. C. §1225(b)(1)(B)(ii). All members of the second group have, as I have said, finished serving their criminal sentences of confinement. [INA § 236(c)(1);] §1226(c)(1). All members of the third group may have (or may simply believe they have) a strong claim for admittance, but they are neither "clearly and beyond a doubt entitled to be admitted" nor conclusively determined to be inadmissible by an immigration officer on grounds of fraud or lack of required documentation. [INA § 235(b)(2)(A);] §1225(b)(2)(A); *see* [INA §§ 235(b)(1)(A)(i), 212(a)(6)(C), (a)(7);] §§1225(b)(1)(A)(i), 1182(a)(6)(C), (a)(7).

Third, members of the first two classes number in the thousands. *See* Brief for 46 Social Science Researchers and Professors as Amici Curiae 6, 8 (identifying, in 2015, 7,500 asylum seekers and 12,220 noncitizens who have finished serving sentences of criminal confinement, a portion of whom are class members detained for more than six months).

Fourth, detention is often lengthy. The classes before us consist of people who were detained for at least six months and on average one year. *** The record shows that the Government detained some asylum seekers for 831 days (nearly 2Â½ years), 512 days, 456 days, 421 days, 354 days, 319 days, 318 days, and 274 days—before they won their cases and received asylum. *** It also shows that the Government detained one noncitizen for nearly four years after he had finished serving a criminal sentence, and the Government detained other members of this class for 608 days, 561 days, 446 days, 438 days, 387 days, and 305 days—all before they won their cases and received relief from removal. ***

Fifth, many of those whom the Government detains eventually obtain the relief they seek. Two-thirds of the asylum seekers eventually receive asylum. *** Nearly 40% of those who have served criminal sentences receive relief from removal, because, for example, their earlier conviction involved only a short sentence. *** (between one-half and two-thirds of the class served sentences less than six months, e.g., a 2-month sentence for being under the influence of a controlled substance, or an 8-day jail term for a minor firearms offense).

Sixth, these very asylum seekers would have received bail hearings had they first been taken into custody within the United States rather than at the border. *See In re*

X-K-, 23 I. & N. Dec. 731, 734-735 (BIA 2005); [INA § 236(a);] 8 U. S. C. §1226(a).

Seventh, as for those who have finished serving their sentences (for crimes), some of those who are less dangerous would (on the majority's view) be held without bail the longest, because their claims will take longer to adjudicate. Moreover, those noncitizens would have no opportunity to obtain bail while they pursue their claims, but if they lose their claims, the Government must release them, typically within six months, if the Government can find no other country willing to take them. *See Zadvydas*, *supra*, at 701.

Eighth, all the respondents are held in detention within the geographical boundaries of the United States, either in facilities controlled by United States Immigration and Customs Enforcement (ICE) or in state or local jails that hold them on ICE's behalf. App. 302-304; see ICE, Detention Facility Locator, online at http://www.ice.gov/detention-facilities (all Internet materials as last visited Feb. 21, 2018).

Ninth, the circumstances of their detention are similar, so far as we can tell, to those in many prisons and jails. And in some cases the conditions of their confinement are inappropriately poor. See Dept. of Homeland Security (DHS), Office of Inspector General (OIG), DHS OIG Inspection Cites Concerns With Detainee Treatment and Care at ICE Detention Facilities (2017) (reporting instances of invasive procedures, substandard care, and mistreatment, e.g., indiscriminate strip searches, long waits for medical care and hygiene products, and, in the case of one detainee, a multiday lock down for sharing a cup of coffee with another detainee).

These record-based facts make evident what I said at the outset: The case concerns persons whom immigration authorities believe are not citizens and may not have a right to enter into, or remain within, the United States. Nonetheless they likely have a reasonable claim that they do have such a right. The Government detains them, often for many months while it determines the merits of, or contests, their claims. To repeat the question before us: Does the statute entitle an individual member of one of these classes to obtain, say, after six months of detention, a bail hearing to decide whether he or she poses a risk of flight or danger to the community and, if not, to receive bail?

II

The Constitutional Question

The majority reads the relevant statute as prohibiting bail and hence prohibiting a bail hearing. In my view, the relevant constitutional language, purposes, history, tradition, and case law all make clear that the majority's interpretation at the very

least would raise "grave doubts" about the statute's constitutionality. *See Jin Fuey Moy*, 241 U. S., at 401.

A

Consider the relevant constitutional language and the values that language protects. The Fifth Amendment says that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law." An alien is a "person." *See Wong Wing v. United States*, 163 U. S. 228, 237-238 (1896). To hold him without bail is to deprive him of bodily "liberty." *See United States v. Salerno*, 481 U. S. 739, 748-751, (1987). And, where there is no bail proceeding, there has been no bail-related "process" at all. The Due Process Clause—itself reflecting the language of the Magna Carta—prevents arbitrary detention. Indeed, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U. S. 71, 80 (1992); *see also Demore v. Kim*, 538 U. S. 510, 532 (2003) (Kennedy, J., concurring); *Zadvydas*, 533 U. S., at 718 (Kennedy, J., dissenting).

The Due Process Clause foresees eligibility for bail as part of "due process." *** It not only "permits the unhampered preparation of a defense," but also "prevent[s] the infliction of punishment prior to conviction." *** It consequently limits the Government's ability to deprive a person of his physical liberty where doing so is not needed to protect the public, *** or to assure his appearance at, say, a trial or the equivalent***. Why would this constitutional language and its bail-related purposes not apply to members of the classes of detained persons at issue here?

***

It is clear that the Fifth Amendment's protections extend to "all persons within the territory of the United States." *Wong Wing, supra,* at 238. But the Government suggests that those protections do not apply to asylum seekers or other arriving aliens because the law treats arriving aliens as if they had never entered the United States; hence they are not held within its territory.

This last-mentioned statement is, of course, false. All of these noncitizens are held within the territory of the United States at an immigration detention facility. Those who enter at JFK airport are held in immigration detention facilities in, e.g., New York; those who arrive in El Paso are held in, e.g., Texas. At most one might say that they are "constructively" held outside the United States: the word "constructive" signaling that we indulge in a "legal fiction," shutting our eyes to the truth. But once we admit to uttering a legal fiction, we highlight, we do not answer, the relevant question: Why should we engage in this legal fiction here?

The legal answer to this question is clear. We cannot here engage in this legal fiction. No one can claim, nor since the time of slavery has anyone to my knowledge successfully claimed, that persons held within the United States are totally without constitutional protection. Whatever the fiction, would the Constitution leave the

Government free to starve, beat, or lash those held within our boundaries? If not, then, whatever the fiction, how can the Constitution authorize the Government to imprison arbitrarily those who, whatever we might pretend, are in reality right here in the United States? The answer is that the Constitution does not authorize arbitrary detention. And the reason that is so is simple: Freedom from arbitrary detention is as ancient and important a right as any found within the Constitution's boundaries. ***

B

The Due Process Clause, among other things, protects "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors," and which were brought by them to this country. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856). A brief look at Blackstone makes clear that at the time of the American Revolution the right to bail was "settled"—in both civil and criminal cases.

Blackstone tells us that every prisoner (except for a convict serving his sentence) was entitled to seek release on bail. 4 COMMENTARIES ON THE LAWS OF ENGLAND 296-297 (1769). This right applied in every criminal case. Ibid. A noncapital defendant could seek bail from a local magistrate; a capital defendant could seek bail at a hearing before the Court of King's Bench. *See ibid*. Although a capital defendant had no right to obtain bail, he could always seek it, because "the court of king's bench . . . may bail for any crime whatsoever, be it treason, murder, or any other offense, according to the circumstances of the case." *Id*., at 296, 18 How. 272, 277, 15 L. Ed. 372. And although King Charles I initially claimed the right to hold a prisoner without bail on secret national security grounds, *see* Darnel's Case, 3 How. St. Tr. 1 (K. B. 1627), Parliament responded by extracting from the King (via the 1628 Petition of Right) a promise to cease such detention. See 2 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 107-110 (4th ed. 1771). From then on, bail was available even when a prisoner was held on the personal command of the King. Ibid. That is why Blackstone says that the King's Bench or its judges "may bail in any Case whatsoever," 4 Analysis of the Laws of England 148 (6th ed. 1771), indeed, in civil cases too, for in Blackstone's time some private civil cases might have begun with an arrest. See 3 Blackstone, Commentaries 290 (1768). And bail was likewise an alternative to detention where a judgment debtor was unable to pay a civil judgment in the era of debtor's prison. *See*, *e.g.*, *Beers v. Haughton*, 34 U.S. 329 (1835) (explaining that under Ohio law, "if a defendant, upon a [writ of] capias, does not give sufficient appearance bail, he shall be committed to prison"); *Hamilton v. Dunklee*, 1 N. H. 172 (1818).

American history makes clear that the settlers brought this practice with them to America. The Judiciary Act of 1789 conferred rights to bail proceedings in all federal criminal cases. §33, 1 Stat. 91. It said that for a noncapital defendant "bail shall be admitted" and for a capital defendant bail may be admitted in the discretion of a district judge, a circuit judge, or a Justice of the Supreme Court, taking account

of "the offence, and of the evidence, and the usages of law." Ibid. Congress enacted this law during its debate over the Bill of Rights, which it subsequently sent to the States for ratification. See 1 Annals of Cong. 90 (1789); *see also Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) (Members of the First Congress were "men of great learning and ability, . . . who had acted a principal part in framing, supporting, or opposing" the Constitution itself). Colonial law had been similarly, or in some instances even more, protective. *** Similar laws have consistently remained part of our legal tradition. In all federal criminal cases federal Acts have provided for bail proceedings. Bail Reform Act of 1984, 18 U. S. C. §3141 et seq.; Bail Reform Act of 1966, 18 U. S. C. §3146 et seq. (1964 ed., Supp. II). Every State has similar or more generous laws. ***

Standards for granting bail have changed somewhat over time. Initially the sole factor determining the outcome of a bail proceeding was risk of flight. ***

***

The cases before us, however, are not criminal cases. Does that fact make a difference? The problem is that there are not many instances of civil confinement (aside from immigration detention, which I address below). Mental illness does sometimes provide an example. Individuals dangerous to themselves or to others may be confined involuntarily to a mental hospital. *See, e.g., United States v. Comstock,* 560 U. S. 126 (2010); *Kansas v. Hendricks*, 521 U. S. 346 (1997). Those persons normally do not have what we would call "a right to a bail hearing." But they do possess equivalent rights: They have the right to a hearing prior to confinement and the right to review of the circumstances at least annually. *See Comstock, supra*, at 130-131 (initial hearing followed by review every six months); *Hendricks, supra*, at 353 (initial hearing followed by yearly review). And the mentally ill persons detained under these schemes are being detained because they are dangerous. That being so, there would be no point in providing a bail hearing as well. *** But there is every reason for providing a bail proceeding to the noncitizens at issue here, because they have received no individualized determination that they pose a risk of flight or present a danger to others, nor is there any evidence that most or all of them do.

This Court has also protected the right to a bail hearing during extradition proceedings. *Wright v. Henkel*, 190 U. S. 40, (1903)***

The strongest basis for reading the Constitution's bail requirements as extending to these civil, as well as criminal, cases, however, lies in the simple fact that the law treats like cases alike. And reason tells us that the civil confinement at issue here and the pretrial criminal confinement that calls for bail are in every relevant sense identical. There is no difference in respect to the fact of confinement itself. And I can find no relevant difference in respect to bail-related purposes.
Which class of persons—criminal defendants or asylum seekers—seems more likely to have acted in a manner that typically warrants confinement? A person

charged with a crime cannot be confined at all without a finding of probable cause that he or she committed the crime. And the majority of criminal defendants lose their cases. *** A high percentage of the noncitizens before us, however, ultimately win the right they seek, the right to be in the United States.

Nor am I aware of any evidence indicating that the noncitizens seeking to enter, or to remain within, the United States are more likely than criminal defendants to threaten the safety of the community if released. In any event, this is a matter to be determined, case by case, at bail hearings.

Which group is more likely to present a risk of flight? Again, I can find no evidence suggesting that asylum seekers or other noncitizens generally present a greater risk of flight than persons imprisoned for trial where there is probable cause to believe that the confined person has committed a crime. In any event, this matter too is to be determined, case by case, at bail hearings.

If there is no reasonable basis for treating these confined noncitizens worse than ordinary defendants charged with crimes, 18 U. S. C. § 3142; worse than convicted criminals appealing their convictions, § 3143(b); worse than civilly committed citizens, ***; worse than identical noncitizens found elsewhere within the United States, ***; and worse than noncitizens who have committed crimes, served their sentences, and been definitively ordered removed (but lack a country willing to take them), *** their detention without bail is arbitrary. Thus, the constitutional language, purposes, and tradition that require bail in instances of criminal confinement also very likely require bail in these instances of civil confinement. That perhaps is why Blackstone wrote that the law provides for the possibility of "bail in any case whatsoever." 4 ANALYSIS OF THE LAWS OF ENGLAND, at 148.

C

My examination of the cases from this Court that considered detention of noncitizens and bail suggests that this Court, while sometimes denying bail to individuals, generally has not held that bail proceedings are unnecessary. Indeed, it almost always has suggested the contrary.

1. In 1882 Congress enacted two laws that restricted immigration: The first prohibited the entry of "Chinese laborers." The Chinese Exclusion Act, ch. 126, 22 Stat. 58. The second prohibited the entry of "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." Act of Aug. 3, 1882, 22 Stat. 214. Neither said a word about bail. But in one instance, an excluded Chinese woman was detained in jail in San Francisco pending her return to China. She sought bail. *In re Ah Moy*, 21 F. 808 (CC Cal. 1884). Justice Field, sitting as a Circuit Judge, wrote that the court lacked the authority to order bail because doing so would allow her to enter the United States—just what the statute forbade. *** The other sitting Circuit Judge (Judge Sawyer) disagreed. *** He pointed out that the alien would remain "in the custody and control of the law

while lawfully on bail." Ibid. He added that it "would be a great hardship, not to say a gross violation of her personal rights," to refuse bail for 15 days before her ship arrived as long as she could provide "security satisfactory to the court" that she would indeed depart when it did. *** The alien appealed to this Court, Cheong Ah Moy v. United States, 113 U. S. 216, (1885), but before this Court could decide, the ship departed with Cheong Ah Moy aboard.

2. In *Wong Wing v. United States*, 163 U. S. 228 (1896), the Court struck down as unconstitutional a statute that said alien Chinese laborers should be "imprisoned at hard labor" for up to a year before being deported. Id., at 235. In doing so, the Court wrote that although a sentence to hard labor was unlawful, "detention, or temporary confinement," was constitutional, because "[d]etention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused." Ibid. But an analogy to criminal detention is an analogy to instances in which bail hearings are required.

3. In *Tod v. Waldman*, 266 U. S. 113 (1924), the Waldman family, like many of the respondents here, challenged their exclusion. They had arrived at Ellis Island fleeing religious persecution in Ukraine. They were detained because the immigration inspector believed the mother illiterate, one of the daughters disabled, and the whole family likely to become public charges. They appealed to the Labor Department, which ordered Mrs. Waldman retested for literacy, requiring her to read both Yiddish and Hebrew. She could not. She then petitioned for a writ of habeas corpus on the grounds that (1) as a religious refugee she was exempt from the literacy requirement; (2) in any event, she need read only one language, not two; (3) her daughter was not disabled; and (4) the Department of Labor should have allowed her to appeal administratively. ***

The relevant statutory provisions, just like the present statute, *** said that an arriving person, unless "clearly and beyond a doubt entitled" to land, "shall be detained for examination . . . by a board of special inquiry." Act of Feb. 5, 1917, §16, 39 Stat. 886. By the time the case reached this Court, however, the family had been allowed bail. *** This Court ordered the Department of Labor to provide the family with an administrative appeal. Then, after initially "remand[ing] the petitioners to the custody of immigration authorities" pending the outcome of the appeal, id., at 120, the Court clarified in a rehearing order that "[n]othing in the order of this Court shall prejudice an application for release on bail of the respondents pending compliance with the mandate of this Court." *Tod v. Waldman*, 266 U. S. 547, 548 (1925). This statement is inconsistent with the earlier opinion of Justice Field, sitting as a Circuit Judge, because it shows that even an alien challenging her exclusion could be released on bail.

4. In *Carlson v. Landon*, 342 U. S. 524 (1952), this Court upheld the denial of bail to noncitizen Communists being held pending deportation, despite a statute that permitted bail proceedings. *** It did so because it considered the individuals to be a risk to security. It said nothing to suggest that bail proceedings were unnecessary.

5. In *Shaughnessy v. United States ex rel. Mezei*, 345 U. S. 206 (1953), the Attorney General had ordered a noncitizen permanently excluded from the United States on the ground that his "entry would be prejudicial to the public interest for security reasons." Id., at 208; *see* Subversive Activities Control Act of 1950, §§22-23, 64 Stat. 1006-1012. He "sat on Ellis Island because this country shut him out and others were unwilling to take him in." 345 U. S., at 20. After 21 months in confinement he filed a petition for a writ of habeas corpus seeking judicial review of the exclusion decision or release on bail until he could be removed to another country. Id., at 207. This Court refused to review the exclusion decision on the ground that the security matter fell totally within the President's authority, pursuant to an express congressional delegation of power. Id., at 210. The Court also denied Mezei a bail proceeding because in an "exclusion proceeding grounded on danger to the national security . . . neither the rationale nor the statutory authority for" release on bail exists. Id., at 216. It denied bail, however, after the Attorney General had already found, on an individualized basis, not only that Mezei was a security risk and consequently not entitled to either admission or bail, but also that he could be denied a hearing on the matter because the basis for that decision could not be disclosed without harm to national security. Id., at 208-209. The respondents in this case have been the subject of no such individualized findings. And unlike Mezei, who was requesting bail after his exclusion proceedings had ended (while the Attorney General searched for a country that would take him—a matter that we again confronted in *Zadvydas*), the respondents here continue to litigate the lawfulness of their exclusion itself. Thus, Mezei, but not the respondents here, was in a sense in the position of a convicted criminal who had lost his appeal, not a criminal awaiting trial (or the results of an appeal).

6. *Zadvydas v. Davis*, 533 U. S. 678 (2001), concerned a noncitizen who had lawfully resided in this country, committed a serious crime, completed his prison sentence, and was then ordered deported. Id., at 684. *Zadvydas* sought release on bail during the time the Government searched for a country that would take him. ***The governing statute said an alien such as *Zadvydas* "may be detained" pending his removal to another country. [INA § 241(a)(6);] 8 U. S. C. §1231(a)(6). We interpreted those words as requiring release from detention once it became clear that there was "no significant likelihood of removal in the reasonably foreseeable future"—presumptively after a period of confinement of six months. 533 U. S., at 701. We read the statute as requiring this release because a "statute permitting indefinite detention of an alien would raise a serious constitutional problem." Id., at 690.

From a constitutional perspective, this case follows a fortiori from *Zadvydas*. Here only a bail hearing is at issue, not release on bail, much less permanent release. And here there has been no final determination that any of the respondents lacks a legal right to stay in the United States—the bail hearing at issue concern conditional release pending that final determination. It is immaterial that detention here is not literally indefinite, because while the respondents' removal proceedings must end

eventually, they last an indeterminate period of at least six months and a year on average, thereby implicating the same constitutional right against prolonged arbitrary detention that we recognized in *Zadvydas*.

7. In *Demore v. Kim*, 538 U. S. 510 (2003), we held that the Government could constitutionally hold without bail noncitizens who had committed certain crimes, had completed their sentences, and were in removal proceedings. See §1226(c). But we based our holding on the short-term nature of the confinement necessary to complete proceedings.*** The Court wrote that the "detention at stake . . . lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." *Id*., at 530. We added:

"[I]n 85% of the cases in which aliens are detained [pursuant to the relevant statute], removal proceedings are completed in an average time of 47 days and a median of 30 days. In the remaining 15% of cases, in which the alien appeals the decision of the immigration judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter." *Id*., at 529 (citation omitted).

Demore himself, an outlier, was detained for six months. *Id*., at 530-531.

The Court then found detention constitutional "during the limited period" necessary to arrange for removal, and we contrasted that period of detention with the detention at issue in *Zadvydas*, referring to the detention in *Demore* as being "of a much shorter duration." 538 U. S., at 526, 528. Justice Kennedy stated in a concurrence that the Due Process Clause might require bail hearings "if the continued detention became unreasonable or unjustified." Id., at 532. Dissenting, I wrote that, had I believed that *Demore* "had conceded that he [was] deportable," then, despite *Zadvydas*, "I would conclude that the Government could detain him without bail for the few weeks ordinarily necessary for formal entry of a removal order." 538 U. S., at 576 (opinion concurring in part and dissenting in part).

The Government now tells us that the statistics it gave to the Court in *Demore* were wrong. Detention normally lasts twice as long as the Government then said it did. And, as I have pointed out, thousands of people here are held for considerably longer than six months without an opportunity to seek bail. *** We deal here with prolonged detention, not the short-term detention at issue in *Demore*. Hence *Demore*, itself a deviation from the history and tradition of bail and alien detention, cannot help the Government.

The upshot is the following: The Constitution's language, its basic purposes, the relevant history, our tradition, and many of the relevant cases point in the same interpretive direction. They tell us that an interpretation of the statute before us that would deny bail proceedings where detention is prolonged would likely mean that the statute violates the Constitution. The interpretive principle that flows from this

conclusion is clear and longstanding: "'[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.'" Rust v. Sullivan, 500 U. S. 173, 190, *** Moreover, a "statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *Jin Fuey Moy*, 241 U. S., at 401. These legal principles reflect a realistic assumption, namely, that Congress—particularly a Congress that did not consider a constitutional matter—would normally have preferred a constitutional interpretation to an interpretation that may render a statute an unconstitutional nullity. And that is so even where the constitutional interpretation departs from the most natural reading of the statute's language. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988); *see also National Federation of Independent Business v. Sebelius*, 567 U. S. 519, 563, 574-576, (2012) (majority opinion and opinion of Roberts, C.J.).

III

The Statutory Provisions

The question remains whether it is possible to read the statute as authorizing bail. As desirable as a constitutional interpretation of a statute may be, we cannot read it to say the opposite of what its language states. The word "animal" does not include minerals, no matter how strongly one might wish that it did. Indeed, where "'Congress has made its intent in the statute clear, we must give effect to that intent,'" even if doing so requires us to consider the constitutional question, and even if doing so means that we hold the statute unconstitutional. *Zadvydas*, 533 U. S., at 696, (quoting *Miller v. French*, 530 U. S. 327, 336(2000)). In my view, however, we can, and should, read the relevant statutory provisions to require bail proceedings in instances of prolonged detention without doing violence to the statutory language or to the provisions' basic purposes.

A

Asylum Seekers

The relevant provision governing the first class of noncitizens, the asylum seekers, is [INA § 235(b)(1)(B)(ii);] §1225(b)(1)(B)(ii). It says that, if an immigration "officer determines at the time" of an initial interview with an alien seeking to enter the United States "that [the] alien has a credible fear of persecution . . ., the alien shall be detained for further consideration of the application for asylum." *See* Appendix A-1, infra. I have emphasized the three key words, namely, "shall be detained." Do those words mean that the asylum seeker must be detained without bail?

They do not. First, in ordinary English and in light of the history of bail, the word "detain" is ambiguous in respect to the relevant point. The Oxford English

Dictionary (OED), surveying the history of the word, notes that Edward Hall, a famous 16th-century legal scholar and author of Hall's Chronicle, wrote: "A traytor . . . is apprehended and deteigned in prisone for his offence," a use of the word, as we know from Blackstone, that is consistent with bail. See supra, at 8-9; OED (3d ed., Dec. 2012), http://www.oed.com/view/Entry/51176 (annot. to def. 1). David Hume, the famous 18th-century historian and philosopher, writes of being "detained in strict confinement," thereby implying the existence of detention without strict confinement. Ibid. A 19th-century novelist writes, "'Beg your pardon, sir,' said the constable, . . . 'I shall be obliged to detain you till this business is settled'"—again a use of "detain" that we know (from Blackstone) is consistent with bail. *Ibid*. And the OED concludes that the primary meaning of "detain" is "[t]o keep in confinement or under restraint; to keep prisoner." Ibid. (emphasis added). To grant bail, we know, is not to grant unrestrained freedom. Rather, where the Act elsewhere expressly permits bail, it requires "bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General." [INA § 236(a)(2)(A);] 8 U. S. C. § 1226(a)(2)(A). Similarly in the criminal context, bail imposes numerous restraints, ranging from the provision of a bond, to restrictions on residences and travel, to the imposition of a curfew, to a requirement to obtain medical treatment, to report at regular intervals, or even to return to custody at specified hours. *See* 18 U. S. C. § 3142(c)(1)(B) (listing possible conditions for the pretrial release of federal criminal defendants).

At the very least, because the word "detain" in this context refers to a comparatively long period of time, it can readily coexist with a word such as "bail" that refers to a shorter period of conditional release. For instance, there is nothing inconsistent in saying: During his exile, he was permitted to pay short visits to his home country; during the period of active hostilities, the soldiers would lay down their arms and fraternize on Christmas Day; during his overseas detention, he was allowed home to see his sick mother; or during his detention pending proceedings, he was permitted bail.

Second, our precedent treats the statutory word "detain" as consistent with bail. In *Waldman*, we considered an immigration statute that stated (in respect to arriving aliens) that "[e]very alien who may not appear to the examining inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry." Act of Feb. 5, 1917, §16, 39 Stat. 886 (emphasis added). The Court indicated that bail was available, stating that "[n]othing in the order of this court shall prejudice an application for release on bail." 266 U. S., at 548, 45 S. Ct. 193. In so stating, the Court was simply following precedent, such as Wright v. Henkel, where the Court wrote that bail is available even where not "specifically vested by statute." 190 U. S., at 63. When Congress passed the relevant provisions of the Act in 1996, it legislated against this historical backdrop, at a time when the precise language that it adopted had been interpreted by this Court to permit bail. *See Monessen Southwestern R. Co. v. Morgan*, 486 U. S. 330, 338(1988) ("Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that 'Congress at

least acquiesces in, and apparently affirms, that [interpretation]'" (quoting *Cannon v. University of Chicago*, 441 U. S. 677, 703(1979))).

Third, the Board of Immigration Appeals reads the word "detain" as consistent with bail, for it has held that its regulations, implementing the same statutory provision as is before us, allow bail for asylum seekers who are apprehended inside the United States within 100 miles of the border, rather than at a border crossing. *See In re X-K-*, 23 I. & N. Dec., at 732, 734-735 (discussing 8 CFR §1003.19(h)(2)(i) (2004)). The same statute, same language applies to the detention of those asylum seekers and the ones before us, so the statute must be consistent with bail in the Board of Immigration Appeals' view.

Fourth, in *Zadvydas* we found (to avoid similar constitutional questions) that the words "'may be detained'" were consistent with requiring release from long-term detention. 533 U. S., at 682 (quoting 8 U. S. C. §1231(a)(6)). The majority correctly notes that here the language substitutes the word "shall" for the word "may." *Ante*, at 14-16. But the majority is wrong to distinguish *Zadvydas* on this basis. There the Court did not emphasize the word "detain," for the question at issue was release from detention. And the key word was consequently "may," suggesting discretion. Here the question concerns the right to a bail hearing during detention. And the key linguistic ambiguity concerns the word "detention." Is that word consistent with bail proceedings? The answer, for the reasons I have stated, is "yes."

Fifth, the statute does not even mention long-term detention without bail. Whether the statute speaks in terms of discretion ("may," as in *Zadvydas*) or mandatory action ("shall," as in this case), the Government's argument is wrong for the same reason: Congress does not unambiguously authorize long-term detention without bail by failing to say when detention must end. As we recognized in *Zadvydas*, Congress anticipated long-term detention elsewhere in the Act, providing for review every six months of terrorist aliens detained under 8 U. S. C. [INA § 507(b)(2)(C);] §1537(b)(2)(C), but it did not do so here. *See* 533 U. S., at 697.

Sixth, the Act provides that an asylum applicant whose proceedings last longer than six months may be given work authorization. [INA § 208(d)(2);] §1158(d)(2). The majority would apply this provision to some asylum applicants but not the ones before us. *** Of course, the statute does not contain that limitation. Read most naturally, the provision offers some indication that Congress, in the same statute, did not require asylum seekers to remain confined without bail at the 6-month mark.

Seventh, there is a separate statutory provision that purports to do precisely what the majority says this one does, providing that certain aliens "shall be detained . . . until removed." [INA § 235(b)(1)(B)(iii)(IV);] §1225(b)(1)(B)(iii)(IV) *** (detention must continue until proceedings "have finished"). The problem for the majority is that this other provision applies only to those who, unlike the respondents, have no credible fear of persecution. The provision that applies here lacks similar language.

Linguistic ambiguity, while necessary, is not sufficient. I would also ask whether the statute's purposes suggest a congressional refusal to permit bail where confinement is prolonged. The answer is "no." There is nothing in the statute or in the legislative history that reveals any such congressional intent. The most likely reason for its absence is that Congress, like the Government when it appeared before us in *Demore*, believed there were no such instances, or at least that there were very few. Indeed, the Act suggests that asylum proceedings ordinarily finish quickly. *See* [INA § 208;] §1158(d)(5)(A) (providing that absent "exceptional circumstances," final administrative adjudication (not including appeal) must be completed "within 180 days," and any appeal must be filed "within 30 days" of the decision). And for those proceedings that last longer than six months, we know that two-thirds of asylum seekers win their cases. Thus, legislative silence suggests not disapproval of bail, but a lack of consideration of the matter. For present purposes that is sufficient. It means that Congress did not intend to forbid bail. An interpretation that permits bail—based upon history, tradition, statutory context, and precedent—is consistent, not inconsistent, with what Congress intended the statutory provision to do.

The majority apparently finds a contrary purpose in the fact that other provisions of the statute permit the Attorney General to release an alien on parole "'for urgent humanitarian reasons or significant public benefit'" and impose bail-like conditions. *** Yet under the majority's interpretation of "detain," the same argument could have been made in *Zadvydas*. We held that noncitizens presumptively are entitled to release after six months of detention, notwithstanding an available alternative avenue for relief, namely, bail. 533 U. S., at 683. There is no reason to reach a different result here. While the Government historically used this provision to take account of traditional bail factors (flight risk, safety risk), the President since issued an Executive Order directing parole to be granted "in all circumstances only when an individual demonstrates urgent humanitarian reasons or a significant public benefit." Exec. Order. No. 13767, 82 Fed. Reg. 8793 (2017). And besides, Congress' provision of parole to permit, for example, release for the purpose of medical care or to testify in a court proceeding—which adds to the circumstances under which a noncitizen can be released from confinement—says nothing about whether Congress intended to cut back on those circumstances in respect to the meaning of "detain" and the historical understanding that detention permits bail.

B

Criminals Who Have Served Their Sentences

The relevant statutory provision, [INA § 236(c); §1226(c), says in paragraph (1) that the "Attorney General shall take into custody any alien who . . . is deportable [or inadmissible] by reason of having committed [certain crimes] when the alien is released," presumably (or ordinarily) after having served his sentence. It then goes

on to say, in paragraph (2), that the "Attorney General may release [that] alien . . . only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness [or to certain related others]." *See* Appendix A-2, *infra*.

I have emphasized the relevant phrases: "take into custody" in the first paragraph, and "may release [that] alien . . . only if" in the second paragraph. We have long interpreted "in custody" as "not requir[ing] that a prisoner be physically confined." *Maleng v. Cook*, 490 U. S. 488, 491(1989) (per curiam). In the habeas context, we have held that "a person released on bail or on his own recognizance" is "'in custody' within the meaning of the statute." *Hensley v. Municipal Court, San Jose-Milpitas Judicial Dist., Santa Clara Cty*., 411 U. S. 345, 349,(1973)***. The reason is simple, as I already have explained, ***: A person who is released on bail "is subject to restraints 'not shared by the public generally.'" *** [A] prisoner who had been placed on parole was still 'in custody'" because his "release from physical confinement . . . was not unconditional; instead, it was explicitly conditioned on his reporting regularly to his parole officer, remaining in a particular community, residence, and job, and refraining from certain activities"***

Moreover, there is no reason to interpret "custody" differently than "detain." The OED defines "custody" as "[t]he state of being detained," http://www.oed.com/view/ Entry/46305 (def. 5). "Detained," as I have previously pointed out, can be read consistently with bail. See supra, at 20-23. The OED also defines the statutory phrase, "take (a person) into custody," as "to arrest and imprison (a person)," http://www.oed.com/view/Entry/46305 (def. 5). And we know from the history, tradition, case law, and other sources earlier discussed, including Blackstone, that arresting and imprisoning a person is consistent with a bail hearing and a subsequent grant of bail, even where a statute contains words such as "commitment" or "detain." ***

But what about the second phrase, stating that the Attorney General "may release [that] alien . . . only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness"? Does the presence of the words "only if" show that the statute automatically denies bail for any other reason?

It does not. That is because the phrase has nothing to do with bail. It has to do with a special program, the Witness Protection Program, set forth in 18 U. S. C. §3521. That program allows the Attorney General to relocate the witness, to give him an entirely new identity, to help his family similarly, and to pay him a stipend, among other things. §§3521(a)(1), (b)(1). The Attorney General may "take such action as [he] determines to be necessary to protect the person," presumably even free the witness from whatever obligations might require him to report to an immigration or judicial authority. §3521(b)(1). Accordingly, when the Attorney General " release[s]" an alien under 8 U. S. C. §1226(c)(2), he does not grant bail; he may

well do far more, freeing the witness from a host of obligations and restraints, including those many obligations and restraints that accompany bail. ***.

This understanding of "release" in [INA § 236(c);] §1226(c) is consistent with the OED's definition of "release" as "to free from restraint" or even "to liberate from . . . an obligation" (not simply "to free from . . . captivity"), http://www.oed.com/view/Entry/161859 (def. 6(a)). And it is consistent with our earlier reading of the word "detain." *** Following the OED's definition of "detain" as "under restraint," we have understood the word "detention" to include the state of being "under" those "restraints" that typically accompany bail. *** That is to say, both the individual on bail and the individual not on bail are "detained"; and the Attorney General, through his Witness Protection Program powers can free the individual from both. To repeat: The provision at issue means that the Attorney General "may release" the detained person from the restraints that accompany detainment—whether that individual has been detained with, or without, bail.

So understood the phrase has nothing to do with the issue before us: whether a confined individual is, or is not, entitled to bail or a bail hearing. It simply means that the Attorney General cannot free that person from all, or most, restraining conditions (including those that accompany bail) unless the alien is placed in the Witness Protection Program. So read, the words "only if" neither favor nor disfavor a reading of the statute consistent with the right to a bail proceeding.

The purpose-related reasons that argue for a bail-favorable reading are also applicable here. Congress did not consider the problem of long-term detention. It wrote the statute with brief detention in mind. *See* H. R. Rep. No. 104-469, pt. 1, p. 123, and n. 25 (1996) (stating that the "average stay [was] 28 days"). Congress did not know (for apparently the Government did not know in *Demore*) that the average length of detention for this class would turn out to be about a year. Nor did Congress necessarily know that about 40% of class members eventually obtain the right to remain in the United States.

I should add that reading the statute as denying bail to those whose detention is prolonged is anomalous. Those whose removal is legally or factually questionable could be imprisoned indefinitely while the matter is being decided. Those whose removal is not questionable (for they are under a final removal order) could be further imprisoned for no more than six months. See supra, at 4, 17. In fact, even before our decision in *Zadvydas*, the Government gave bail hearings to noncitizens under a final order of removal after six months of detention. *See* 533 U. S., at 683.

C

Other Applicants for Admission

The statutory provision that governs the third category of noncitizens seeking admission at the border is[INA § 235(b)(2)(A);] §1225(b)(2)(A). It says that "if the

examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." ***
The Government tells us that this miscellaneous category consists of persons who are neither (1) clearly eligible for admission, nor (2) clearly ineligible.*** A clearly eligible person is, of course, immediately admitted. A clearly ineligible person—someone who lacks the required documents, or provides fraudulent ones—is "removed . . . without further hearing or review." [INA § 235(b)(1)(A)(i);] §1225(b)(1)(A)(i); *see* [INA §§ 212(a)960(C), (a)(7);] §§1182(a)(6)(C), (a)(7). But where the matter is not clear, i.e., where the immigration officer determines that an alien "is not clearly and beyond a doubt entitled to be admitted," he is detained for a removal proceeding. [INA § 235(b)(2)(A);] §1225(b)(2)(A). Like all respondents, this class has been detained for at least six months. It may include persons returning to the United States who have work permits or other documents seemingly entitling them to entry, but whom an immigration officer suspects are inadmissible for some other reason, such as because they may have incomplete vaccinations or have committed student visa abuse or a crime of "moral turpitude." See [INA § 212(a);] §1182(a) (delineating classes of aliens ineligible for admission). For instance, the Federal Register is replete with examples of offenses that immigration authorities have thought are crimes of moral turpitude but that the courts of appeals later determine are not. *See, e.g., Goldeshtein v. INS*, 8 F. 3d 645, 648 (9th Cir. 1993) (structuring financial transactions to avoid currency reports); *Nunez v. Holder*, 594 F. 3d 1124, 1138 (9th Cir. 2010) (indecent exposure). It also may include individuals who claim citizenship by virtue of birth or parentage but who lack documents clearly proving their claim.

The critical statutory words are the same as those I have just discussed in the context of the asylum seekers—"shall be detained." There is no more plausible reason here than there was there to believe those words foreclose bail. *** The constitutional considerations, the statutory language, and the purposes underlying the statute are virtually the same. Thus, the result should be the same: Given the constitutional considerations, we should interpret the statute as permitting bail.

IV

[Omitted is the majority of the dissent's discussion that the subject matter is appropriate and not barred by the INA limits on judicial review.]

At a minimum I can find nothing in the statute or in the cases to which the majority refers that would prevent the respondents from pursuing their action, obtaining a declaratory judgment, and then using that judgment to obtain relief, namely, a bail hearing, in an individual case. Thus, I believe the lower courts are free to consider

the constitutionality of the relevant statutory provisions as the majority now interprets them.

V

Conclusion

The relevant constitutional language, purposes, history, traditions, context, and case law, taken together, make it likely that, where confinement of the noncitizens before us is prolonged (presumptively longer than six months), bail proceedings are constitutionally required. Given this serious constitutional problem, I would interpret the statutory provisions before us as authorizing bail. Their language permits that reading, it furthers their basic purposes, and it is consistent with the history, tradition, and constitutional values associated with bail proceedings. I believe that those bail proceedings should take place in accordance with customary rules of procedure and burdens of proof rather than the special rules that the Ninth Circuit imposed.

The bail questions before us are technical but at heart they are simple. We need only recall the words of the Declaration of Independence, in particular its insistence that all men and women have "certain unalienable Rights," and that among them is the right to "Liberty." We need merely remember that the Constitution's Due Process Clause protects each person's liberty from arbitrary deprivation. And we need just keep in mind the fact that, since Blackstone's time and long before, liberty has included the right of a confined person to seek release on bail. It is neither technical nor unusually difficult to read the words of these statutes as consistent with this basic right. I would find it far more difficult, indeed, I would find it alarming, to believe that Congress wrote these statutory words in order to put thousands of individuals at risk of lengthy confinement all within the United States but all without hope of bail. I would read the statutory words as consistent with, indeed as requiring protection of, the basic right to seek bail.
Because the majority does not do so, with respect, I dissent.

APPENDIXES [Authors' Note: It is very unusual for a case to contain a reprint of the statute. We have left this appendix but omitted the appendix of state laws in the original.]

A

Statute Applicable to Asylum Seekers
[INA§ 235;] 8 U. S. C. §1225. "Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing
"(b) Inspection of applicants for admission
"(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled
"(A) Screening

"(i) In general
"If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section [INA §212(a)(6)(C) or 212(a)(7);] 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.
"(ii) Claims for asylum
"If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section [INA 212(a)(6)(C) or 212(a)(7);] 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section [INA § 208;] 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).
"(B) Asylum interviews
"(i) Conduct by asylum officers
"An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.
"(ii) Referral of certain aliens
"If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum."

Statute Applicable to Criminal Aliens
[INA § 236;] 8 U. S. C. §1226. "Apprehension and detention of aliens
"(a) Arrest, detention, and release
"On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—
"(1) may continue to detain the arrested alien; and
"(2) may release the alien on—
"(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
"(B) conditional parole;
"(c) Detention of criminal aliens
"(1) Custody
"The Attorney General shall take into custody any alien who—
"(A) is inadmissible by reason of having committed any offense covered in section [INA 212(a)(2);] 1182(a)(2) of this title,
"(B) is deportable by reason of having committed any offense covered in section [INA § 237(a)(2)(A)(ii);] 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

"(C) is deportable under section [INA § 237(a)(2)(A)(i);] 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or

"(D) is inadmissible under section [INA § 212(a)(3)(B);] 1182(a)(3)(B) of this title or deportable under section [INA § 237(a)(4)(B);] 1227(a)(4)(B) of this title,

"when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

"(2) Release

"The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien."

Statute Applicable to Miscellaneous Applicants for Admission

[INA § 235;] 8 U. S. C. §1225. "Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

"(b) Inspection of applicants for admission

"(2) Inspection of other aliens

"(A) In general

"Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section [INA § 240] 1229a of this title.

"(B) Exception

"Subparagraph (A) shall not apply to an alien—

"(i) who is a crewman,

"(ii) to whom paragraph (1) applies, or

"(iii) who is a stowaway.

"(C) Treatment of aliens arriving from contiguous territory

"In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section [INA § 240] 1229a of this title."

Page 762 § 6.05[C][1]: Add the following at the end of [1] Detention Issues:

You have read about detention for persons with criminal convictions and removal orders. As noted at the beginning of the 2015 update for Chapter 6, the number of people seeking asylum and other

immigration relief being detained by the Department of Homeland Security has increased exponentially. Many of the individuals being held have relatives and strong ties in the United States and do not pose a threat U.S. safety and security. The detentions cost the United States hundreds of dollars per person detained per day.

Advocates have noted that detained women and children do not have adequate healthcare and are sometimes held in facilities kept at low temperatures, causing physical illness as well as negative mental health effects. There has been renewed attention to the settlement agreement in *Reno v. Flores*, a 1993 U.S. Supreme Court case regarding policies for the detention, release and treatment of minors in immigration custody. *Reno v. Flores*, 507 U.S. 292 (1993). DHS filed a motion to modify the *Flores* settlement agreement on February 27, 2015, following plaintiffs' memorandum to support a motion to enforce settlement of the class action. In January 2017, U.S. District Judge Dolly Gee determined that the Office of Refugee Resettlement of the Department of Health and Human Services had breached the *Flores* settlement agreement because it was denying unaccompanied immigrant children the right to a bond hearing. Judge Gee granted the plaintiff's motion to enforce Paragraph 24A of the *Flores* settlement agreement, which states that a minor in deportation proceedings has the right to a bond redetermination hearing before an immigration judge unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing. *Flores v. Lynch*, 2017 U.S. Dist. LEXIS 144827 (C.D. Cal. Jan. 20, 2017). The Ninth Circuit upheld that decision in July 2017. *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017).

Page 764 (§ 6.05[C][2]): Add the following as a new paragraph at the end of subsection [2], just before subsection [3]:

The government and the BIA have recognized the need for safeguards in immigration proceedings for noncitizens who may be mentally incompetent to represent themselves. Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, *Civil Immigration Detention: Guidance for New Identification and Information Sharing Procedures Related to Unrepresented Detainees With Serious Mental Disorders or Conditions* (Apr. 22, 2013), *at* https://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainess_mental_disorders.pdf; *In re M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011).

Chapter 7: Relief from Removal

Page 768 (Problem 7-1): Problem 7.1 presents a complex scenario that allows you to explore the many types of relief from removal available, determine if a type of relief corresponds to the fact pattern in Problem 7.1, and discuss which forms of relief may be the best ones for Tim Yang and why.

On June 26, 2015, the U.S. Supreme Court ruled that same-sex couples may legally marry throughout the United States. *Obergefell v. Hodges*, 576 U.S. __ , 135 S. Ct. 2584 (2015). Earlier, on June 26, 2013, the U.S. Supreme Court overturned Section 3 of the Defense of Marriage Act (DOMA). *United States v. Windsor*, 570 U.S. 1066 (2013). Section 3 of DOMA had defined marriage as being between a man and a woman. Therefore, it is now possible to consider additional avenues of relief in Problem 7.1 based on the relationship of Tim and his partner, John.

Information about USCIS processing of petitions and applications based on same-sex marriages is on the USCIS website at http://www.uscis.gov/family/same-sex-marriages. The USCIS will recognize a same-sex marriage as long as the couple was married in the United States or in a foreign country that recognizes same-sex marriage.

The State Department's Foreign Affairs Manual (FAM) now contains this provision:

> **9 FAM 102.8-1(E) Same-Sex Marriages**
>
> *(CT:VISA-367; 05-26-2017)*
>
> Same-sex marriage is valid for visa adjudication purposes, as long as the marriage is recognized in the "place of celebration," whether entered into in the United States or a foreign country. The same-sex marriage is valid even if the applicant is applying in a country in which same-sex marriage is illegal.

Returning to Problem 7.1, this means Tim may qualify for a family-based adjustment of status pursuant to an immediate relative petition if he and John marry. From the facts, Tim and John are in a long-term relationship and marriage may be the next step for them.

Page 771.
The text contains an image of a Notice to Appear relating to Problem 7-1. Can you find the errors in the Notice? How might counsel respond to a Notice to Appear with these types of errors? Review Note 1 on page 675 in Chapter 6 concerning Motions to Suppress and/or Terminate.

In the Supplement below we provide you with another Notice to Appear to evaluate in new Problem 7-3.1.

In the update to Chapter 6 you read about a recent Supreme Court decision finding that the DHS had not complied with all of the requirements of INA § 239; 8 U.S.C. § 1229 when it fails to include the location and date of the removal hearing on a Notice to Appear. *See Pereira v. Session*, __ U.S. __, 138 S. Ct. 2105 (2018).

The case concerned the form of relief known as "cancellation of removal." *See generally* INA § 240A(a) and (b); 8 U.S.C. § 1229b(A) and (B). The first form of cancellation of removal is for people who already have permanent resident status and need cancellation to defeat removal. The second type of cancellation of removal is for those who have not been permanent residents but are seeking a path to regularize their status. Both forms of relief are discretionary and have many elements. *Pereira* dealt with the second form of cancellation and whether the government successfully cut off Mr. Pereira's eligibility for cancellation when it issued a Notice to Appear without a set time and location of hearing.

One of the issues in Tim Yang's case is whether he has continued to maintain lawful permanent resident status as he lived abroad for more than one year and whether his absence precludes his eligibility for the first type of cancellation. The *Pereira* case does not explicitly address the first type of cancellation. However, many believe that the case has a wider implication for the validity of the Notice to Appear if essential information is missing.

Here is the relevant subsection of the cancellation statute discussed in *Pereira*:

> (d) Special rules relating to continuous residence or physical presence.
>
> (1) Termination of continuous period.
>
> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 239(a) [8 USCS § 1229(a)], or (B) when the alien has committed an offense referred to in section 212(a)(2) [8 USCS § 1182(a)(2)] that renders the alien inadmissible to the United States under section 212(a)(2) [8 USCS § 1182(a)(2)] or removable from the United States under section 237(a)(2) or 237(a)(4) [8 USCS § 1227(a)(2) or 1227(a)(4)], whichever is earliest.
>
> (2) Treatment of certain breaks in presence.
>
> An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

We have added an excerpt from the case below. As you read it, consider how it might be useful not just for those seeking cancellation but for the hundreds of thousands of people who received Notices to Appear without a time and place specified at the time of initial service.

Authors' Note: The INA citation for cancellation is INA § 240A. We have not added the citation throughout the edited case. However, in immigration court, it is typical for immigration judges to ask whether this is a 240A(a) case for an person already a lawful resident seeking to remain or a 240A(b) case for a person seeking status. Some judges simply refer to the forms used and will ask

"Are you make a 42A or 42B application?" *See e.g.,* https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir42b.pdf.

Pereira v. Sessions

__ U.S. __, 138 S. Ct. 2105 (2018)

Justice Sotomayor delivered the opinion of the Court.

Nonpermanent residents, like petitioner here, who are subject to removal proceedings and have accrued 10 years of continuous physical presence in the United States, may be eligible for a form of discretionary relief known as cancellation of removal. [INA § 240A(b)(1);] 8 U.S.C. § 1229b(b)(1). Under the so-called "stop-time rule" set forth in § 1229b(d)(1)(A), however, that period of continuous physical presence is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." Section 1229(a), in turn, provides that the Government shall serve noncitizens in removal proceedings with "written notice (in this section referred to as a 'notice to appear') . . . specifying" several required pieces of information, including "[t]he time and place at which the [removal] proceedings will be held." §1229(a)(1)(G)(i).

The narrow question in this case lies at the intersection of those statutory provisions. If the Government serves a noncitizen with a document that is labeled "notice to appear," but the document fails to specify either the time or place of the removal proceedings, does it trigger the stop-time rule? The answer is as obvious as it seems: No. A notice that does not inform a noncitizen when and where to appear for removal proceedings is not a "notice to appear under section 1229(a)" and therefore does not trigger the stop-time rule. The plain text, the statutory context, and common sense all lead inescapably and unambiguously to that conclusion.

I

A

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-546, the Attorney General of the United States has discretion to "cancel removal" and adjust the status of certain nonpermanent residents. § 1229b(b). To be eligible for such relief, a nonpermanent resident must meet certain enumerated criteria, the relevant one here being that the noncitizen must have "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [an] application" for cancellation of removal. § 1229b(b)(1)(A).

IIRIRA also established the stop-time rule at issue in this case. Under that rule, "any period of . . . continuous physical presence in

> the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a) of this title."[15] § 1229b(d)(1)(A). Section 1229(a), in turn, provides that "written notice (in this section referred to as a 'notice to appear') shall be given . . . to the alien . . . specifying":
>
> "(A) The nature of the proceedings against the alien.
>
> "(B) The legal authority under which the proceedings are conducted.
>
> "(C) The acts or conduct alleged to be in violation of law.
>
> "(D) The charges against the alien and the statutory provisions alleged to have been violated.
>
> "(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) of this section and (ii) a current list of counsel prepared under subsection (b)(2) of this section.
>
> "(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.
>
> "(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.
>
> "(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.
>
> "(G)(i) The time and place at which the [removal] proceedings will be held.

"(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings."

§ 1229(a)(1) (boldface added).

---

[15] [FN 3 in original] Although the Court charges me with "compar[ing] apples to oranges," *** Congress was the one that equated orders to show cause and notices to appear for purposes of the stop-time rule. By ignoring that decision, the Court rewrites the statute to *its* taste.

The statute also enables the Government to "change or postpon[e] . . . the time and place of [the removal] proceedings." §1229(a)(2)(A). To do so, the Government must give the noncitizen "a written notice . . . specifying . . . the new time or place of the proceedings" and "the consequences . . . of failing, except under exceptional circumstances, to attend such proceedings." Ib*id.* The Government is not required to provide written notice of the change in time or place of the proceedings if the noncitizen is "not in detention" and "has failed to provide [his] address" to the Government. § 1229(a)(2)(B).

The consequences of a noncitizen's failure to appear at a removal proceeding can be quite severe. If a noncitizen who has been properly served with the "written notice required under paragraph (1) or (2) of section 1229(a)" fails to appear at a removal proceeding, he "shall be ordered removed in absentia" if the Government "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." § 1229a(b)(5)(A). Absent "exceptional circumstances," a noncitizen subject to an in absentia removal order is ineligible for some forms of discretionary relief for 10 years if, "at the time of the notice described in paragraph (1) or (2) of section 1229(a)," he "was provided oral notice . . . of the time and place of the proceedings and of the consequences" of failing to appear. § 1229a(b)(7). In certain limited circumstances, however, a removal order entered in absentia may be rescinded—*e.g.*, when the noncitizen "demonstrates that [he] did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." § 1229a(b)(5)(C)(ii).

B

In 1997, shortly after Congress passed IIRIRA, the Attorney General promulgated a regulation stating that a "notice to appear" served on a noncitizen need only provide "the time, place and date of the initial removal hearing, where practicable." 62 Fed. Reg. 10332 (1997). Per that regulation, the Department of Homeland Security (DHS), at least in recent years, almost always serves noncitizens with notices that fail to specify the time, place, or date of initial removal hearings whenever the agency deems it impracticable to include such information. See Brief for Petitioner 14; Brief for Respondent 48-49; Tr. of Oral Arg. 52-53 (Government's admission that "almost 100 percent" of "notices to appear omit the time and date of the proceeding over the last three years"). Instead, these notices state that the times, places, or dates of the initial hearings are "to be determined." Brief for Petitioner 14.

In *Matter of Camarillo*, 25 I. & N. Dec. 644 (2011), the Board of Immigration Appeals (BIA) addressed whether such notices trigger the stop-time rule even if they do not specify the time and date of the removal proceedings. The BIA concluded that they do. *Id.*, at 651. It reasoned that the statutory phrase "notice to appear 'under section [1229](a)'" in the stop-time rule "merely specifies the document the DHS must serve on the alien to trigger the 'stop-time' rule," but

otherwise imposes no "substantive requirements" as to what information that document must include to trigger the stop-time rule. *Id.*, at 647.

C

Petitioner Wescley Fonseca Pereira is a native and citizen of Brazil. In 2000, at age 19, he was admitted to the United States as a temporary "non-immigrant visitor." App. to Pet. for Cert. 3a. After his visa expired, he remained in the United States. Pereira is married and has two young daughters, both of whom are United States citizens. He works as a handyman and, according to submissions before the Immigration Court, is a well-respected member of his community.

In 2006, Pereira was arrested in Massachusetts for operating a vehicle while under the influence of alcohol. On May 31, 2006, while Pereira was detained, DHS served him (in person) with a document labeled "Notice to Appear." App. 7-13. That putative notice charged Pereira as removable for overstaying his visa, informed him that "removal proceedings" were being initiated against him, and provided him with information about the "[c]onduct of the hearing" and the consequences for failing to appear. *Id.*, at 7, 10-12. Critical here, the notice did not specify the date and time of Pereira's removal hearing. Instead, it ordered him to appear before an Immigration Judge in Boston "on a date to be set at a time to be set." *Id.*, at 9 (underlining in original).

More than a year later, on August 9, 2007, DHS filed the 2006 notice with the Boston Immigration Court. The Immigration Court thereafter attempted to mail Pereira a more specific notice setting the date and time for his initial removal hearing for October 31, 2007, at 9:30 a.m. But that second notice was sent to Pereira's street address rather than his post office box (which he had provided to DHS), so it was returned as undeliverable. Because Pereira never received notice of the time and date of his removal hearing, he failed to appear, and the Immigration Court ordered him removed in absentia. Unaware of that removal order, Pereira remained in the United States.

In 2013, after Pereira had been in the country for more than 10 years, he was arrested for a minor motor vehicle violation (driving without his headlights on) and was subsequently detained by DHS. The Immigration Court reopened the removal proceedings after Pereira demonstrated that he never received the Immigration Court's 2007 notice setting out the specific date and time of his hearing. Pereira then applied for cancellation of removal, arguing that the stop-time rule was not triggered by DHS' initial 2006 notice because the document lacked information about the time and date of his removal hearing.

The Immigration Court disagreed, finding the law "quite settled that DHS need not put a date certain on the Notice to Appear in order to make that document effective." App. to Pet. for Cert. 23a. The Immigration Court therefore concluded that Pereira could not meet the 10-year physical-presence requirement under §

1229b(b), thereby rendering him statutorily ineligible for cancellation of removal, and ordered Pereira removed from the country. The BIA dismissed Pereira's appeal. Adhering to its precedent in Camarillo, the BIA agreed with the Immigration Court that the 2006 notice triggered the stop-time rule and that Pereira thus failed to satisfy the 10-year physical-presence requirement and was ineligible for cancellation of removal.

The Court of Appeals for the First Circuit denied Pereira's petition for review of the BIA's order. 866 F.3d 1 (2017). Applying the framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837(1984), the Court of Appeals first found that the stop-time rule in §1229b(d)(1) is ambiguous because it "does not explicitly state that the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence." 866 F.3d, at 5. Then, after reviewing the statutory text and structure, the administrative context, and pertinent legislative history, the Court of Appeals held that the BIA's interpretation of the stop-time rule was a permissible reading of the statute. *Id.*, at 6-8.

II

A

The Court granted certiorari in this case*** to resolve division among the Courts of Appeals on a simple, but important, question of statutory interpretation: Does service of a document styled as a "notice to appear" that fails to specify "the items listed" in § 1229(a)(1) trigger the stop-time rule?[16]***

As a threshold matter, the Court notes that the question presented by Pereira, which focuses on all "items listed" in § 1229(a)(1), sweeps more broadly than necessary to resolve the particular case before us. Although the time-and-place information in a notice to appear will vary from case to case, the Government acknowledges that "[m]uch of the information Section 1229(a)(1) calls for does not" change and is therefore "included in standardized language on the I-862 notice-to-appear form." Brief for Respondent 36 (referencing 8 U.S.C. §§ 1229(a)(1)(A)-(B), (E)-(F), and (G)(ii)). In fact, the Government's 2006 notice to Pereira included all of the information required by §1229(a)(1), except it failed to specify the date and time of Pereira's removal proceedings. See App. 10-12. Accordingly, the dispositive question in this case is much narrower, but no less vital: Does a "notice to appear" that does not specify the "time and place at which

[16] Nor can the Court get away with labeling its self-contradictions as "judicial restraint." *Ante, at 8*, n. 5. Either §1229(a)(1) sets out the essential characteristics of a notice to appear or it does not; the Court cannot stop at a halfway point unsupported by either text or logic while maintaining that its resting place is "clear" in light of the statutory text. *Ante, at 9*.

the proceedings will be held," as required by §1229(a)(1)(G)(i), trigger the stop-time rule? [17]

In addressing that narrower question, the Court need not resort to *Chevron* deference, as some lower courts have done, for Congress has supplied a clear and unambiguous answer to the interpretive question at hand. *See* 467 U.S., at 842-843 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"). A putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a "notice to appear under section 1229(a)," and so does not trigger the stop-time rule.

B

The statutory text alone is enough to resolve this case. Under the stop-time rule, "any period of . . . continuous physical presence" is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). By expressly referencing §1229(a), the statute specifies where to look to find out what "notice to appear" means. Section 1229(a), in turn, clarifies that the type of notice "referred to as a 'notice to appear'" throughout the statutory section is a "written notice . . . specifying," as relevant here, "[t]he time and place at which the [removal] proceedings will be held." §1229(a)(1)(G)(i). Thus, based on the plain text of the statute, it is clear that to trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, "specif[ies]" the "time and place" of the removal proceedings.

It is true, as the Government and dissent point out, that the stop-time rule makes broad reference to a notice to appear under "section 1229(a)," which includes paragraph (1), as well as paragraphs (2) and (3). *** But the broad reference to § 1229(a) is of no consequence, because, as even the Government concedes, only paragraph (1) bears on the meaning of a "notice to appear." *** By contrast, paragraph (2) governs the "[n]otice of change in time or place of proceedings," and paragraph (3) provides for a system to record noncitizens' addresses and phone numbers. Nowhere else within § 1229(a) does the statute purport to delineate the requirements of a "notice to appear." In fact, the term "notice to appear" appears only in paragraph (1) of § 1229(a).

If anything, paragraph (2) of §1229(a) actually bolsters the Court's interpretation of the statute. Paragraph (2) provides that, "in the case of any change or postponement in the time and place of [removal] proceedings," the Government

[17] Of course, courts should still demand that the Government justify why whatever is left off a notice to appear does not deprive it of its essential character as a "notice to appear." As the Government rightly concedes, for example, a blank sheet of paper would not constitute a "notice to appear." Tr. of Oral Arg. 39; see Brief for Respondent 35-36. But for all the reasons the Government gives, omission of the date and time of a future removal proceeding is not, by itself, enough to turn a notice to appear into something else.

shall give the noncitizen "written notice . . . specifying . . . the new time or place of the proceedings." § 1229(a)(2)(A)(i). By allowing for a "change or postponement" of the proceedings to a "new time or place," paragraph (2) presumes that the Government has already served a "notice to appear under section 1229(a)" that specified a time and place as required by § 1229(a)(1)(G)(i). Otherwise, there would be no time or place to "change or postpon[e]." § 1229(a)(2). Notably, the dissent concedes that paragraph (2) confirms that a notice to appear must "state the 'time and place' of the removal proceeding as required by § 1229(a)(1).'" *** The dissent nevertheless retorts that this point is "entirely irrelevant." *** Not so. Paragraph (2) clearly reinforces the conclusion that "a notice to appear under section 1229(a)," § 1229b(d)(1), must include at least the time and place of the removal proceedings to trigger the stop-time rule.

Another neighboring statutory provision lends further contextual support for the view that a "notice to appear" must include the time and place of the removal proceedings to trigger the stop-time rule. Section 1229(b)(1) gives a noncitizen "the opportunity to secure counsel before the first [removal] hearing date" by mandating that such "hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear." For § 1229(b)(1) to have any meaning, the "notice to appear" must specify the time and place that the noncitizen, and his counsel, must appear at the removal hearing. Otherwise, the Government could serve a document labeled "notice to appear" without listing the time and location of the hearing and then, years down the line, provide that information a day before the removal hearing when it becomes available. Under that view of the statute, a noncitizen theoretically would have had the "opportunity to secure counsel," but that opportunity will not be meaningful if, given the absence of a specified time and place, the noncitizen has minimal time and incentive to plan accordingly, and his counsel, in turn, receives limited notice and time to prepare adequately. It therefore follows that, if a "notice to appear" for purposes of § 1229(b)(1) must include the time-and-place information, a "notice to appear" for purposes of the stop-time rule under § 1229b(d)(1) must as well. After all, "it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012) (internal quotation marks omitted).[18]

Finally, common sense compels the conclusion that a notice that does not specify when and where to appear for a removal proceeding is not a "notice to

[18] The Court responds to this point in two ways. First, it faults me for failing to offer a reason "rooted in the statutory tex[t] for treating time-and-place information as any less crucial than charging information for purposes of triggering the stop-time rule. ***But exactly the same criticism can be leveled against the Court's own reading, which noticeably fails to offer any reason "rooted in the statutory text" why time-and-place information should be treated as any *more* crucial than charging information for purposes of triggering the stop-time rule. Second, the Court also observes misleadingly that "there is no reason why a notice to appear should have only one essential function," and that a notice to appear might thus serve the dual purpose of both presenting charges and informing an alien "when and where to appear." *Ibid.* Of course it might, but it is also equally reasonable to interpret a notice to appear as serving only one of those functions. Under *Chevron*, it was the Government—not this Court—that was supposed to make that interpretive call.

appear" that triggers the stop-time rule. If the three words "notice to appear" mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens "notice" of the information, *i.e.*, the "time" and "place," that would enable them "to appear" at the removal hearing in the first place. Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings. To hold otherwise would empower the Government to trigger the stop-time rule merely by sending noncitizens a barebones document labeled "Notice to Appear," with no mention of the time and place of the removal proceedings, even though such documents would do little if anything to facilitate appearance at those proceedings.[19] "'We are not willing to impute to Congress . . . such [a] contradictory and absurd purpose,'" *United States v. Bryan*, 339 U.S. 323, 342 (1950), particularly where doing so has no basis in the statutory text.

III

Straining to inject ambiguity into the statute, the Government and the dissent advance several overlapping arguments. None is persuasive.

A

First, the Government posits that § 1229(a) "is not worded in the form of a definition" and thus cannot circumscribe what type of notice counts as a "notice to appear" for purposes of the stop-time rule. Brief for Respondent 32. Section 1229(a), however, does speak in definitional terms, at least with respect to the "time and place at which the proceedings will be held": It specifically provides that the notice described under paragraph (1) is "referred to as a 'notice to appear,'" which in context is quintessential definitional language. 8 It then defines that term as a "written notice" that, as relevant here, "specif[ies] . . . [t]he time and place at which the [removal] proceedings will be held." § 1229(a)(1)(G)(i). Thus, when the term "notice to appear" is used elsewhere in the statutory section, including as the trigger for the stop-time rule, it carries with it the substantive time-and-place criteria required by §1229(a).

Resisting this straightforward understanding of the text, the dissent posits that "§ 1229(a)(1)'s language can be understood to define what makes a notice to appear complete." *** In the dissent's view, a defective notice to appear is still a "notice to appear" even if it is incomplete—much like a three-wheeled Chevy is still a car. *** The statutory text proves otherwise. [ ] Section 1229(a)(1) does not say a "notice to appear" is "complete" when it specifies the time and place of the removal proceedings. Rather, it defines a "notice to appear" as a "written notice" that "specif[ies]," at a minimum, the time and place of the removal proceedings. § 1229(a)(1)(G)(i). Moreover, the omission of time-and-place information is not, as

the dissent asserts, some trivial, ministerial defect, akin to an unsigned notice of appeal. Cf. Becker v. Montgomery, 532 U.S. 757, 763, 768 (2001). Failing to specify integral information like the time and place of removal proceedings unquestionably would "deprive [the notice to appear] of its essential character." ***

B

The Government and the dissent next contend that Congress' use of the word "under" in the stop-time rule renders the statute ambiguous. *** Recall that the stop-time rule provides that "any period of . . . continuous physical presence" is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." § 1229b(d)(1)(A). According to the Government, the word "under" in that provision means "subject to," "governed by," or "issued under the authority of." *** The dissent offers yet another alternative, insisting that "under" can also mean "authorized by." *** Those definitions, the Government and dissent maintain, support the BIA's view that the stop-time rule applies so long as DHS serves a notice that is "authorized by," or "subject to or governed by, or issued under the authority of" § 1229(a), even if the notice bears none of the time-and-place information required by that provision.***

We disagree. It is, of course, true that "[t]he word 'under' is [a] chameleon" that "'must draw its meaning from its context.'" *Kucana v. Holder*, 558 U.S. 233, 245 (2010) (quoting *Ardestani v. INS*, 502 U.S. 129, 135(1991)). But nothing in the text or context here supports either the Government's or the dissent's preferred definition of "under." Based on the plain language and statutory context discussed above, we think it obvious that the word "under," as used in the stop-time rule, can only mean "in accordance with" or "according to," for it connects the stop-time trigger in §1229b(d)(1) to a "notice to appear" that contains the enumerated time-and-place information described in § 1229(a)(1)(G)(i). See 18 OXFORD ENGLISH DICTIONARY 950 (2d ed. 1989) (defining "under" as "[i]n accordance with"); BLACK'S LAW DICTIONARY 1525 (6th ed. 1990) (defining "under" as "according to"). So construed, the stop-time rule applies only if the Government serves a "notice to appear" "[i]n accordance with" or "according to" the substantive time-and-place requirements set forth in § 1229(a). *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519(2013) (internal quotation marks omitted). Far from generating any "degree of ambiguity," *** the word "under" provides the glue that bonds the stop-time rule to the substantive time-and-place requirements mandated by § 1229(a).

C

The Government argues that surrounding statutory provisions reinforce its preferred reading. *** It points, for instance, to two separate provisions relating to in absentia removal orders: § 1229a(b)(5)(A), which provides that a noncitizen may be removed in absentia if the Government has provided "written notice required

under paragraph (1) or (2) of section 1229(a)"; and § 1229a(b)(5)(C)(ii), which provides that, once an in absentia removal order has been entered, the noncitizen may seek to reopen the proceeding if, inter alia, he "demonstrates that [he] did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." According to the Government, those two provisions use the distinct phrases "required under" and "in accordance with" as shorthand for a notice that satisfies §1229(a)(1)'s requirements, whereas the stop-time rule uses the phrase "under section 1229(a)" to encompass a different type of notice that does not necessarily include the information outlined in § 1229(a)(1). See Brief for Respondent 25-26. That logic is unsound. The Government essentially argues that phrase 1 ("written notice required under paragraph (1) . . . of section 1229(a)") and phrase 2 ("notice in accordance with paragraph (1) . . . of section 1229(a)") can refer to the same type of notice even though they use entirely different words, but that phrase 3 ("notice to appear under section 1229(a)") cannot refer to that same type of notice because it uses words different from phrases 1 and 2. But the Government offers no convincing reason why that is so. The far simpler explanation, and the one that comports with the actual statutory language and context, is that each of these three phrases refers to notice satisfying, at a minimum, the time-and-place criteria defined in §1229(a)(1).

Equally unavailing is the Government's invocation of § 1229a(b)(7). *** Under that provision, a noncitizen who is ordered removed in absentia is ineligible for various forms of discretionary relief for a 10-year period if the noncitizen, "at the time of the notice described in paragraph (1) or (2) of section 1229(a) of [Title 8], was provided oral notice . . . of the time and place of the proceedings" and "of the consequences . . . of failing, other than because of exceptional circumstances," to appear. § 1229a(b)(7). The Government argues that the express reference to "the time and place of the proceedings" in § 1229a(b)(7) shows that, when Congress wants to attach substantive significance to whether a noncitizen is given information about the specific "time and place" of a removal proceeding, it knows exactly how to do so. *** But even if § 1229a(b)(7) may impose harsher consequences on noncitizens who fail to appear at removal proceedings after having specifically received oral notice of the time and place of such proceedings, that reveals nothing about the distinct question here—*i.e.*, whether Congress intended the stop-time rule to apply when the Government fails to provide written notice of the time and place of removal proceedings. As to that question, the statute makes clear that Congress fully intended to attach substantive significance to the requirement that noncitizens be given notice of at least the time and place of their removal proceedings. A document that fails to include such information is not a "notice to appear under section 1229(a)" and thus does not trigger the stop-time rule.

D

Unable to find sure footing in the statutory text, the Government and the dissent pivot away from the plain language and raise a number of practical

concerns. These practical considerations are meritless and do not justify departing from the statute's clear text. *See Burrage v. United States*, 571 U.S. 204 (2014).

The Government, for its part, argues that the "administrative realities of removal proceedings" render it difficult to guarantee each noncitizen a specific time, date, and place for his removal proceedings. *** That contention rests on the misguided premise that the time-and-place information specified in the notice to appear must be etched in stone. That is incorrect. As noted above, § 1229(a)(2) expressly vests the Government with power to change the time or place of a noncitizen's removal proceedings so long as it provides "written notice . . . specifying . . . the new time or place of the proceedings" and the consequences of failing to appear. *See* § 1229(a)(2) ***. Nothing in our decision today inhibits the Government's ability to exercise that statutory authority after it has served a notice to appear specifying the time and place of the removal proceedings.

The dissent raises a similar practical concern, which is similarly misplaced. The dissent worries that requiring the Government to specify the time and place of removal proceedings, while allowing the Government to change that information, might encourage DHS to provide "arbitrary dates and times that are likely to confuse and confound all who receive them." *** The dissent's argument wrongly assumes that the Government is utterly incapable of specifying an accurate date and time on a notice to appear and will instead engage in "arbitrary" behavior. ***The Court does not embrace those unsupported assumptions. As the Government concedes, "a scheduling system previously enabled DHS and the immigration court to coordinate in setting hearing dates in some cases." *** Given today's advanced software capabilities, it is hard to imagine why DHS and immigration courts could not again work together to schedule hearings before sending notices to appear.

Finally, the dissent's related contention that including a changeable date would "mislead" and "prejudice" noncitizens is unfounded. *** As already explained, if the Government changes the date of the removal proceedings, it must provide written notice to the noncitizen, § 1229(a)(2). This notice requirement mitigates any potential confusion that may arise from altering the hearing date. In reality, it is the dissent's interpretation of the statute that would "confuse and confound" noncitizens*** by authorizing the Government to serve notices that lack any information about the time and place of the removal proceedings.

E

In a last ditch effort to salvage its atextual interpretation, the Government invokes the alleged purpose and legislative history of the stop-time rule. Brief for Respondent 37-40. Even for those who consider statutory purpose and legislative history, however, neither supports the Government's atextual position that Congress intended the stop-time rule to apply when a noncitizen has been deprived notice of the time and place of his removal proceedings. By the Government's own account, Congress enacted the stop-time rule to prevent noncitizens from exploiting

administrative delays to "buy time" during which they accumulate periods of continuous presence. *Id.*, at 37-38 (citing H. R. Rep. No. 104-469, pt. 1, p. 122 (1996)). Requiring the Government to furnish time-and-place information in a notice to appear, however, is entirely consistent with that objective because, once a proper notice to appear is served, the stop-time rule is triggered, and a noncitizen would be unable to manipulate or delay removal proceedings to "buy time." At the end of the day, given the clarity of the plain language, we "apply the statute as it is written." *Burrage*, 571 U.S., at 218.

IV

For the foregoing reasons, the judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice Kennedy, concurring.

I agree with the Court's opinion and join it in full.

This separate writing is to note my concen with the way in which the Court's opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837(1984), has come to be understood and applied. The application of that precedent to the question presented here by various Courts of Appeals illustrates one aspect of the problem.

The first Courts of Appeals to encounter the question concluded or assumed that the notice necessary to trigger the stop-time rule found in 8 U. S. C. §1229b(d)(1) was not "perfected" until the immigrant received all the information listed in §1229(a)(1). *Guamanrrigra v. Holder*, 670 F.3d 404, 410 (2d. Cir. 2012) (per curiam); *See also Dababneh v. Gonzales*, 471 F.3d 806, 809 (7th Cir. 2006); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937, n. 3 (9th Cir. 2005) (per curiam).

That emerging consensus abruptly dissolved not long after the Board of Immigration Appeals (BIA) reached a contrary interpretation of § 1229b(d)(1) in *Matter of Camarillo*, 25 I. & N. Dec. 644 (2011). After that administrative ruling, in addition to the decision under review here, at least six Courts of Appeals, citing *Chevron*, concluded that § 1229b(d)(1) was ambiguous and then held that the BIA's interpretation was reasonable. *See Moscoso-Castellanos v. Lynch*, 803 F.3d 1079, 1083 (9th Cir. 2015); *O'Garro v. United States Atty. Gen.*, 605 Fed. Appx. 951, 953 (11th Cir. 2015) (per curiam); *Guaman-Yuqui v. Lynch*, 786 F.3d 235, 239-240 (2d Cir. 2015) (per curiam); *Gonzalez-Garcia v. Holder*, 770 F.3d 431, 434-435 (6th Cir. 2014); *Yi Di Wang v. Holder*, 759 F.3d 670, 674-675 (7th Cir. 2014); *Urbina v. Holder*, 745 F.3d 736, 740 (4th Cir. 2014). *But See Orozco-Velasquez v. Attorney General United States*, 817 F.3d 78, 81-82 (3d Cir. 2016). The Court correctly concludes today that those holdings were wrong because the BIA's interpretation finds little support in the statute's text.

In according *Chevron* deference to the BIA's interpretation, some Courts of Appeals engaged in cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned, 467 U.S., at 843, n. 9 and whether the BIA's interpretation was reasonable, *id.*, at 845. In *Urbina v. Holder*, for example, the court stated, without any further elaboration, that "we agree with the BIA that the relevant statutory provision is ambiguous." 745 F.3d, at 740. It then deemed reasonable the BIA's interpretation of the statute, "for the reasons the BIA gave in that case." Ib*id.* This analysis suggests an abdication of the Judiciary's proper role in interpreting federal statutes.

The type of reflexive deference exhibited in some of these cases is troubling. And when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still. *See Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C. J., dissenting) ("We do not leave it to the agency to decide when it is in charge"). Given the concerns raised by some Members of this Court, *See*, *e.g.*, *id.*, at 312-328; *Michigan v. EPA*, 576 U.S. ___, ___, 135 S. Ct. 2699 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-1158 (10th Cir. 2016) (Gorsuch, J., concurring), it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary. *See*, *e.g.*, *Arlington*, *supra*, at 312-316 (Roberts, C. J., dissenting).

Justice Alito, dissenting.

Although this case presents a narrow and technical issue of immigration law, the Court's decision implicates the status of an important, frequently invoked, once celebrated, and now increasingly maligned precedent, namely, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under that decision, if a federal statute is ambiguous and the agency that is authorized to implement it offers a reasonable interpretation, then a court is supposed to accept that interpretation. Here, a straightforward application of *Chevron* requires us to accept the Government's construction of the provision at issue. But the Court rejects the Government's interpretation in favor of one that it regards as the best reading of the statute. I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.

I

***

The question presented by this case is whether the stop-time rule is triggered by service of a notice to appear that is incomplete in some way. A provision of the amended Immigration and Nationality Act requires that the Government serve an

alien who it seeks to remove with a notice to appear "specifying" a list of things, including "[t]he nature of the proceedings against the alien," "[t]he legal authority under which the proceedings are conducted," "[t]he acts or conduct alleged to be in violation of law," "[t]he charges against the alien and the statutory provisions alleged to have been violated," and (what is relevant here) "[t]he time and place at which the proceedings will be held." §§ 1229(a)(1)(A), (B), (C), (D), (G)(i).

***

The Board of Immigration Appeals (BIA) has rejected this interpretation of the stop-time rule in the past. It has held that "[a]n equally plausible reading" is that the stop-time rule "merely specifies the document the [Government] must serve on the alien to trigger the 'stop-time' rule and does not impose substantive requirements for a notice to appear to be effective in order for that trigger to occur." *In re Camarillo*, 25 I. & N. Dec. 644, 647 (2011). It therefore held in this case that Pereira is ineligible for cancellation of removal.

II

A

Pereira, on one side, and the Government and the BIA, on the other, have a quasi-metaphysical disagreement about the meaning of the concept of a notice to appear. Is a notice to appear a document that contains certain essential characteristics, namely, all the information required by § 1229(a)(1), so that any notice that omits any of that information is not a "notice to appear" at all? Or is a notice to appear a document that is conventionally called by that name, so that a notice that omits some of the information required by § 1229(a)(1) may still be regarded as a "notice to appear"?

Picking the better of these two interpretations might have been a challenge in the first instance. But the Court did not need to decide that question, for under *Chevron* we are obligated to defer to a Government agency's interpretation of the statute that it administers so long as that interpretation is a "'permissible'" one. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). All that is required is that the Government's view be "reasonable"; it need not be "the only possible interpretation, nor even the interpretation deemed most reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). Moreover, deference to the Government's interpretation "is especially appropriate in the immigration context" because of the potential foreign-policy implications. *Aguirre-Aguirre*, *supra*, at 425. In light of the relevant text, context, statutory history, and statutory purpose, there is no doubt that the Government's interpretation of the stop-time rule is indeed permissible under *Chevron*.

***

C

Finally, the Court turns to "common sense" to support its preferred reading of the text. According to the Court, it should be "obvious" to anyone that "a notice that does not specify when and where to appear for a removal proceeding is not a 'notice to appear.'" Ante, at 2, 12. But what the Court finds so obvious somehow managed to elude every Court of Appeals to consider the question save one. [citations omitted].

That is likely because the Court's "common sense" depends on a very specific understanding of the purpose of a notice to appear. In the Court's eyes, notices to appear serve primarily as a vehicle for communicating to aliens when and where they should appear for their removal hearings. That is certainly a reasonable interpretation with some intuitive force behind it. But that is not the only possible understanding or even necessarily the best one. As the Government reasonably explains, a notice to appear can also be understood to serve primarily as a charging document. *** Indeed, much of § 1229(a)(1) reinforces that view through the informational requirements it imposes on notices to appear. *See, e.g.*, § 1229(a)(1)(A) ("nature of the proceedings"); § 1229(a)(1)(B) ("legal authority" for "the proceedings"); § 1229(a)(1)(C) ("acts or conduct alleged"); § 1229(a)(1)(D) ("charges against the alien"); *ibid.* ("statutory provisions alleged to have been violated"). Interpreted in this way, a notice to appear hardly runs afoul of "common sense" by simply omitting the date and time of a future removal proceeding.

Today's decision appears even less commonsensical once its likely consequences are taken into account. As already noted, going forward the Government will be forced to include an arbitrary date and time on every notice to appear that it issues. *** Such a system will only serve to confuse everyone involved, and the Court offers no explanation as to why it believes otherwise. Although the Court expresses surprise at the idea that its opinion will "'forc[e] the Government' to guess when and where a hearing will take place," *** it is undisputed that the Government currently lacks the capability to do anything other than speculate about the likely date and time of future removal proceedings. *** At most, we can hope that the Government develops a system in the coming years that allows it to determine likely dates and times before it sends out initial notices to appear. But nothing in either today's decision or the statute can guarantee such an outcome, so the Court is left crossing its fingers and hoping for the best. ***

***

Once the errors and false leads are stripped away, the most that remains of the Court's argument is a textually permissible interpretation consistent with the Court's view of "common sense." That is not enough to show that the Government's contrary interpretation is unreasonable. Choosing between these competing interpretations might have been difficult in the first instance. But under *Chevron*, that choice was not ours to make. Under *Chevron*, this Court was obliged to defer to the Government's interpretation.

> In recent years, several Members of this Court have questioned *Chevron*'s foundations. *See, e.g.*, *** *Michigan v. EPA*, 576 U.S. ___, ___-___, 135 S. Ct. 2699(2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). But unless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law.
>
> I respectfully dissent.

Notes and Questions:

1. **Why Chevron deference?** For many years the Supreme Court has referred to deference to the BIA's interpretations as *Chevron* deference. Technically, *Chevron* involved interpretation of regulations promulgated after notice and comment. Two weeks after *Chevron* was decided, the Supreme Court interpreted the regulations concerning the standard of proof for asylum applications and refused to apply *Chevron,* instead, as it does here in *Pereira*, applying a straight forward statutory interpretation.

Justice Kennedy retired shortly after issuing this decision. His concurrence questioned the role and scope of *Chevron* deference. Only Justice Alito disagreed with the pure statutory approach.

2. What is the Scope of the *Pereira* Decision? As of this writing, there is no definitive guidance from the EOIR or DHS. Some judges are granting motions to terminate and dismissing improperly filed Notices to Appears. Some ICE offices are bringing in people to reissue a completed Notice to Appear. For general practice guidance on *Pereira*, see American Immigration Council, Strategies and Considerations in the Wake of *Pereira v. Sessions*: Practice Advisory (July 20, 2018) available at https://americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_pereira_advisory_-_7.20.2018_-_aic_clinic.pdf.

Page 779 (§ 7.01): Add new note 4:

4. What is an aggravated felony? There continues to be substantial litigation challenging the government's characterization of convictions as "aggravated felonies" under INA § 101(a)(43); 8 U.S.C. § 1101(a)(43). In 2013 the Supreme Court rejected the government's characterization of a state conviction for possession of marijuana with intent to distribute as an aggravated felony meeting the standards of INA § 101(a)(43)(B) "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act [21 USCS § 802]), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." *Moncrieffe v Holder*, 569 U.S. 184(2013). Mr. Moncrieffe had been convicted of a Georgia statute regarding intent to distribute. The Supreme Court ruled the conviction did not meet all of the elements of the INA's definition of an aggravated felony. Do you see the significance of challenging the aggravated felony characterization? Both Tim Yang in Problem 7-1 and Mr. Moncrieffe are probably still deportable due to criminal convictions, but if an individual is deportable as an aggravated felon, they are barred from almost all forms of relief from removal.

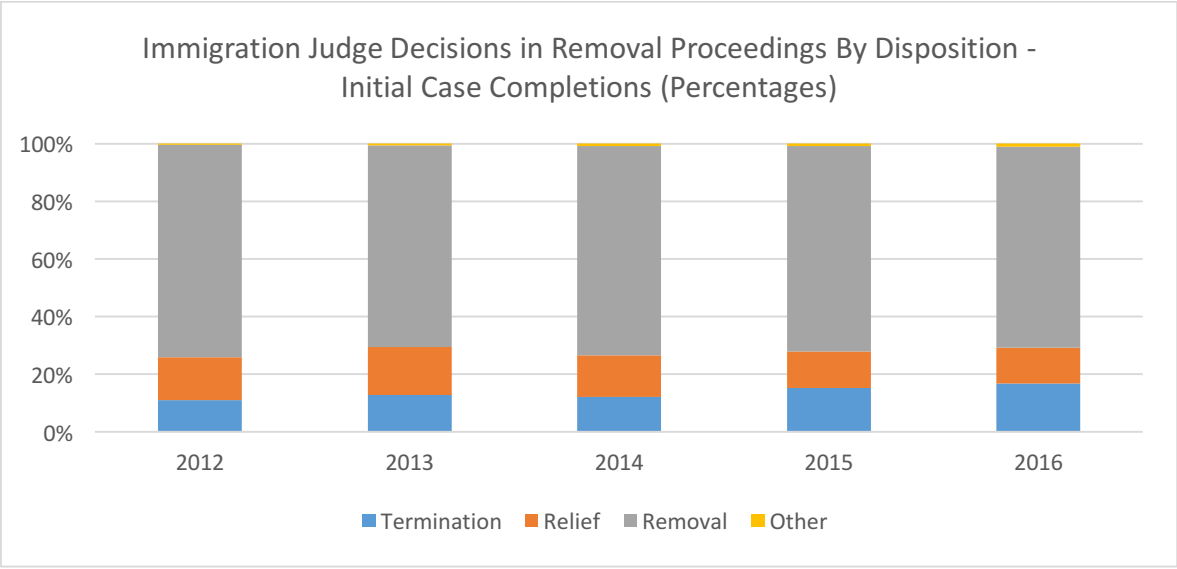
The Supreme Court continues to evaluate challenges to the "aggravated felony" charges presented by DHS. Since the original edition of this book was published in 2013, there have been at least seven Supreme Court cases contesting the DHS label of aggravated felony. One of the most recent was in the spring of 2017, when the Supreme Court rejected the aggravated felony characterization of sexual relations with a minor as categorically "sexual abuse of a minor" in the definition of aggravated felony. *Esquivel-Quintana v. Sessions*, 581 U.S. ___, 2017 U.S. LEXIS 3551 (2017). This case is discussed in the update to chapter 6 above.

In 2018 the Supreme Court ruled in *Sessions v. Dimaya*, __ U.S. __, 138 S. Ct. 1204 (2018), that the immigration ground of a "crime of violence" in INA § 101(a)(43)(F) that incorporates a federal criminal statute, 18 U.S.C. § 16, is unconstitutionally vague and cannot be used as a ground of removal. This affirmed the Ninth Circuit's approach and relied heavily on the Supreme Court's analysis in *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015), which invalidated as unconstitutionally vague a statute with identical phrasing. The DHS and DOJ had argued that Congress has greater authority to create this ground of removal and that the criminal due process protections are not legally relevant in removal.

For more on this topic see generally IMMIGRATION LAW AND PROCEDURE § 71.05[2].

Page 790 (§ 7.01[H]): A 2014 Second Circuit decision provides a new twist on relief under INA § 212(c). In *United States v. Gill*, 748 F.3d 491 (2d Cir. 2014), the court held that making noncitizens ineligible for § 212(c) relief merely because they were convicted after trial would have an impermissible retroactive effect because it would impermissibly attach new legal consequences to convictions that pre-date the repeal of § 212(c) in 1996. This case potentially opens up 212(c) relief to a larger number of noncitizens.

Page 800 (§ 7.01 Notes and Question 1.): We have gathered these charts exploring the grants of relief before the EOIR as reported in fiscal year 2016 by the agency.



Fiscal Year	Termination	Relief	Removal	Other	Total

2012	18,912	25,280	125,029	723	169,944
2013	18,406	23,531	99,459	919	142,315
2014	16,431	19,786	98,263	1,107	135,587
2015	21,086	17,512	98,776	1,036	138,410
2016	23,341	17,018	96,186	1,330	137,875
2017	Unknown	Unknown	Unknown	Unknown	Unknown

The EOIR used to issue an annual statistical yearbook. The agency appears to be no longer issuing annual reports, and instead offers periodic updates on its webpages. *See generally* https://www.justice.gov/eoir/workload-and-adjudication-statistics. While there are charts discussing several aspects of immigration cases such as pending workloads, the agency no longer appears to be releasing information about total number of removals.

Asylum Grant Rate

Fiscal Year	Grants	Denials	Grant Rate
2012	10,575	8,444	56%
2013	9,767	8,777	53%
2014	8,672	9,191	49%
2015	8,184	8,816	48%
2016	8,726	11,643	43%
2017	10,699	17,707	20.32%
2018 partial	10,042	19,219	22.17%

Immigration Court Withholding of Removal Grant Rate

Fiscal Year	Grants	Denials	Grant Rate
2012	1,527	9,144	14%
2013	1,493	9,927	13%
2014	1,453	11,016	12%
2015	1,184	10,218	10%
2016	969	13,248	7%

2017 and 2018 data not updated.

Table 16 – Grants of Relief*

Adjustment of Status; 212(c) Waivers; Suspension of Deportation; and Cancellation of Removal

	Relief Granted to Lawful Permanent Residents		Relief Granted to Non-Lawful Permanent Residents				
	Relief Granted Under Section 212(c)	Cancellation of Removal	Not Subject to Annual Cap of 4,000 Grants			Subject to Annual Cap of 4,000 Grants	
			Adjustment of Status to LPR	Suspension of Deportation	Cancellation of Removal	Suspension of Deportation	Cancellation of Removal
FY 2012	648	3,52	4,46	9	275	0	3,43
FY 2013	537	3,52	3,68	9	281	0	3,58
FY 2014	447	2,90	2,31	12	230	1	3,47
FY 2015	335	2,33	1,46	9	234	0	3,51
FY 2016	306	2,05	1,19	4	202	0	3,35

***** Grants of Relief are based on the initial case completion.

No 2017 or 2018 data reported

Page 802 (§ 7.01[H][2]): A 2014 BIA decision incorporates *Judulang v. Holder*, the 2011 Supreme Court case excerpted in the text. In *Matter of Abdelghany*, 26 I. & N. Dec. 254 (BIA 2014), the BIA held that with a few significant exceptions, a lawful permanent resident of the United States who has accrued seven consecutive years of lawful unrelinquished domicile in the United States is eligible to apply for section 212(c) relief in removal proceedings if he or she is removable by virtue of a plea or conviction entered before April 1, 1997. This BIA decision modifies Note 2 on page 813. A practice advisory about *Matter of Abdelghany* is at https://www.immigrantdefenseproject.org/bia-announces-new-policy-broadly-allows-immigrants-pre-1996-convictions-apply-waivers-deportation/.

Page 819 (§ 7.01[H][3]): additional problem to replace or supplement existing Problem 7.3

Problem 7.3.1 Detention, Bond, Cancellation of Removal

[**Authors' Note:** You may want to review Chapter 6 and § 6.05 for a general discussion of detention before a removal order. This problem helps you integrate the materials in Chapter 6 with eligibility for relief in Chapter 7, in particular § 7.01[J] Cancellation of Removal Part B at pages 819-821. This problem was adapted from a CLE on Basics of Removal defense held at New York Law School and cosponsored by the New York State Bar Association and the American Immigration Council. The authors thank the many participants in that conference. The training was recorded and contains a mock bond hearing, a master calendar and a merits determination.]

Aziz Shah is a prosecutor with ICE. He serves as an attorney in the Office of Chief Counsel in Buffalo, New York. He has been assigned to represent the government in a bond hearing in the Batavia Detention Center. Batavia is a federally run immigration detention center about 45 minutes east of Buffalo. Aziz has a memo from the head of the ICE Albany District Enforcement and Removal Operations (ERO) that is excerpted here:

> *The Respondent, Aureliano Buendia, is a 45-year-old male born in Colombia. He was arrested by the local police in Phalanx, NY under suspicion of a sexual relationship with a high school student aged 16 at Tork Prep Academy. Phalanx is a small town outside Albany, New York. Respondent is a teacher at Tork Prep. The local authorities contacted our office after the District Attorney had said she was not ready to press charges. We issued a detainer and took Respondent into custody at the Albany jail.*
>
> *The Respondent volunteered that he was born in Colombia and that he entered the United States near Nogales, Arizona with his mother when he was approximately eleven years old. He does not believe his mother had a visa and he does not have any documents showing he was inspected, admitted, or paroled into the United States. We fingerprinted the Respondent and found two prior arrests.*
>
> *In 2002 Respondent was arrested in a public park and charged with soliciting a prostitute. The Respondent pleaded guilty to loitering in a park and received a sentence of probation.*
>
> *In 2008 Respondent was arrested in a public park. The arrest notes indicate that he was in possession of five marijuana cigarettes. He was not charged in that incident.*
>
> *We checked all of our databases and cannot find any prior arrests or any indication that the Respondent has ever filed any applications with DHS.*
>
> *Respondent lives in Phalanx, New York. He refused to answer questions about his family.*
>
> *We have prepared the attached NTA alleging he is removable under INA § 212(a)(6).*
>
> *We have not set any bond amount and believe he is ineligible for a bond under INA § 236(c) as a person who has been convicted of an offense involving moral turpitude. If convicted for any activity with the minor student, Respondent could be removed as an aggravated felon and we recommend converting the removal proceeding to administrative removal pursuant to INA § 238.*

Also in the file, Aziz finds a bond motion from the respondent's counsel that provides more background information summarized below:

- Respondent is married to a woman born in Mexico who has been his spouse for over twenty years. She does not have any status in the United States. Her Name is Aura Arcadia Buendia. She recently had gastric bypass surgery and requires a special diet to preserve her health.
- Respondent has three U.S. citizen children, José (age 16), Amaranta (age 14), and Remedios (age 10).
- Respondent has been employed by Tork Prep since 1995.
- Respondent has paid income tax on income earned at Tork Prep.
- Respondent's mother, Ursula, lives with the family in Phalanx. She has no status. She depends on her son to assist her with managing her health and taking her to the doctor.
- Respondent rents his home and has had a lease for the last seventeen years.
- The youngest child has ADHD and receives educational accommodation.
- The oldest child is a National Merit Finalist and intends to attend college.
- The Respondent is a graduate of Fordham University.
- The Respondent's spouse did not complete college.
- The children do not speak or write Spanish fluently.
- There is a newspaper account that the unnamed student at Tork Prep recanted her allegations. However, the District Attorney has not confirmed whether the investigation is closed.

The attorney for Mr. Buendia states that he believes his client is prima facie eligible for cancellation of removal under INA § 240A(b) and that he has prepared form EOIR-42B, which he maintains shows eligibility for cancellation of removal for a non-lawful permanent resident and establishing the key elements:

- Ten years residence prior to the service of the NTA
- Good moral character
- Is not barred for convictions that qualify under INA §§ 212(a)(2), 237(a)(2) or 237 (a)(3).
- Exceptional and extremely unusual hardship to qualifying relatives
- A balance of equities suggests a positive exercise of discretion granting cancellation.

Counsel for Mr. Buendia has cited *Matter of* Adeniji, 22 I. & N. Dec. 1102 (BIA 1999), as the leading case. In that decision the BIA said the IJ should consider: local family ties, prior convictions, appearances at hearings, employment or lack of employment, membership in community organizations, manner of entry and length of time in the United States, immoral acts or participation in subversive activities, financial ability to post bond, and eligibility for relief from deportation. *Matter of Adeniji*, 22 I. & N. Dec. 1102, at 1111-13.

You are a law clerk working with Aziz Shah. He has asked you to prepare a memorandum addressing the following issues:

1. Is Mr. Buendia eligible for a bond? If so, what is the standard that ICE will use to persuade the Immigration Judge that Mr. Buendia should remain in custody? May ICE use the arrests that did not result in convictions as evidence in the bond hearing?

2. Is Mr. Buendia statutorily eligible for cancellation of removal under INA § 240A(b)? Review the requirements of INA § 240A(b). Consider whether any of Mr. Buendia's convictions or conduct preclude or bar his eligibility and whether Mr. Shah can argue that the Mr. Buendia is either barred from relief or unlikely to succeed in such an application.

3. Does *Pereira v. Sessions*, discussing the elements of the Notice to Appear and the stop time rule, impact whether Mr. Buendia qualifies for cancellation of removal?

3. Review the Notice to Appear and identify any areas where the government may want to amend the NTA. Is the Notice complete, as required in *Pereira?*

Essential Materials:
INA § 236
INA § 240A(b)
Matter of Guerra, 24 I. & N. Dec. 37 (2006) (below)
Matter of Monreal-Aguinaga (in text)
Matter of Recinas (in text)
Pereira v. Sessions (above in the supplement)
CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR AND RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE § 64.04

The Notice to Appear is reprinted below:

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: FINS #: File No: A 000-000-100

DOB: 05/25/1972 Event No:

In the Matter of:

Respondent: BUENDIA, Aureliano currently residing at:

1 First Street, Phalanx, New York, 10555 555-555-5555

(Number, street, city and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.

☒ 2. You are an alien present in the United States who has not been admitted or paroled.

☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of Mexico and a citizen of Mexico ;
3. You arrived in the United States at or near Nogales, Arizona on or about April 1, 1983 ;
4. You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law: INA Section 237(a)(1) to wit:
212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐8CFR 208.30(f)(2) ☐8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:
TO BE DETERMINED

(Complete Address of Immigration Court, including Room Number, if any)

on a date to be set *(Date)* at a time to be set *(Time)* to show why you should not be removed from the United States based on the charge(s) set forth above.

C.C. Smith ACTING PATROL AGENT IN CHARGE

(Signature and Title of Issuing Officer)

Date: January 12, 2017

(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07) N

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to one of the offices listed in 8 CFR 241.16(a). Specific addresses on locations for surrender can be obtained from your local DHS office or over the internet at http://www.ice.gov/about/dro/contact.htm. You must surrender within 30 days from the date the order becomes administratively final, unless you obtain an order from a Federal court, immigration court, or the Board of Immigration Appeals staying execution of the removal order. Immigration regulations at 8 CFR 241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Act.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to a 10-day period prior to appearing before an immigration judge.

Before: _____

_____
(Signature of Respondent)

_____ Date: _____
(Signature and Title of Immigration Officer)

Certificate of Service

This Notice To Appear was served on the respondent by me on _____, in the following manner and in compliance with section 239(a)(1)(F) of the Act.

[X] in person [ ] by certified mail, returned receipt requested [ ] by regular mail

[ ] Attached is a credible fear worksheet.

[X] Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the SPANISH language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

_____
(Signature of Respondent if Personally Served)

BORDER PATROL AGENT
_____
(Signature and Title of officer)

Form I-862 Page 2 (Rev. 08/01/07) N

MATTER OF JUAN FRANCISCO GUERRA, RESPONDENT
24 I. & N. Dec. 37 (2006)

Panel: BEFORE: Board Panel: Osuna, Acting Vice Chairman; Moscato, Board Member; Romig, Temporary Board Member.

OSUNA, Acting Vice Chairman:
In an order dated June 7, 2006, an Immigration judge denied the respondent's request for a change in custody status after finding that he poses a danger to the community. The respondent has appealed from that order. The respondent argues that the Immigration Judge erred in denying his request for a change in custody status based on information contained in a criminal complaint that has not resulted in a conviction. The appeal will be dismissed.

I. FACTUAL AND PROCEDURAL BACKGROUND

The respondent is a native and citizen of the Dominican Republic who was admitted to the United States in 2000 as a nonimmigrant visitor. The Department of Homeland Security ("DHS") has charged the respondent with removability for remaining in this country longer than his period of authorized stay.

The respondent seeks release from the custody of the DHS during the pendency of removal proceedings. Section 236 of the Immigration and Nationality Act, 8 U.S.C. § 1226 (2000), provides general authority for the detention of aliens pending a decision on whether they should be removed from the United States. Except for certain criminal and terrorist aliens whose detention is mandatory under section 236(c)(1) of the Act, the statute provides authority for the Attorney General to release aliens on bond "with security approved by, and containing conditions prescribed by, the Attorney General." Section 236(a)(2)(A) of the Act. The Attorney General has delegated this authority to the Immigration Judges. 8 C.F.R. §§ 1003.19, 1236.1 (2006).

In the present matter, the respondent's custody determination is governed by the provisions of section 236(a) of the Act. An alien in a custody determination under that section must establish to the satisfaction of the Immigration Judge and this Board that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight. *See Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999). An alien who presents a danger to persons or property should not be released during the pendency of removal proceedings. *See Matter of Drysdale*, 20 I. & N. Dec. 815 (BIA 1994).

The Immigration Judge concluded that the respondent poses a danger to persons in the community based on evidence in the record that the respondent is currently facing criminal charges for his involvement in an alleged controlled substance trafficking scheme. The record reflects that he has been charged with distribution and possession with intent to distribute a controlled substance, to wit, 5 kilograms

and more of mixtures and substances containing a detectable amount of cocaine, in violation of 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A) (2000). Specifically, the criminal complaint, which is signed by a Special Agent of the Drug Enforcement Administration ("DEA") and forms a part of the bond record, provides that a confidential informant, with whom the Special Agent has worked for over a year on numerous cases and who has provided reliable and accurate information in the past, informed the Special Agent that the respondent is a drug dealer.

According to the criminal complaint, on November 10, 2005, the respondent was observed during police surveillance traveling to the Bronx, New York, in a vehicle with another man named Vallejo. The car stopped and Vallejo's wife was observed getting into the vehicle. The complaint further states that the vehicle traveled to another location, where Vallejo exited the car. The respondent and Vallejo's wife drove to a gas station where they waited for 45 minutes before Vallejo arrived in a second vehicle. The complaint indicates that Vallejo got into the vehicle with the respondent, and Vallejo's wife moved into the second vehicle. Vallejo's wife drove the second vehicle to a store, where she was approached by law enforcement authorities and consented to a search of the vehicle. The complaint notes that the law enforcement authorities found six kilograms of cocaine in a bag in the vehicle. When the car containing the respondent and Vallejo was subsequently stopped by law enforcement authorities, Vallejo admitted that it was his cocaine and that he and the respondent were supposed to sell the cocaine that evening at a location known by the respondent.

The Immigration Judge concluded that in light of the large quantity and dangerous nature of the drugs involved, the respondent poses a danger to the community if released from immigration custody. In particular, the Immigration Judge noted that the criminal complaint prepared by the DEA Special Agent is specific and detailed and that the respondent failed to present any evidence or argument that tended to undermine the reliability of the information contained in the complaint. The Immigration Judge also noted that if, after a full hearing, it is determined that there is "reason to believe" that the respondent is a person who has been involved in the trafficking of drugs, he will be inadmissible to the United States and thus may have an incentive to fail to appear for his Immigration Court hearings.

On appeal, the respondent argues that he has not been convicted of any drug trafficking crimes and that the Immigration Judge should not have found that he poses a threat to the community based on the information contained in a criminal complaint that has not resulted in a conviction. The respondent notes in his appeal brief that he has pled not guilty to the criminal charges and is awaiting trial. [1]

The respondent was released from criminal custody on a $ 500,000 bond.

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[1] The respondent has conceded removability, but he asserts that he is potentially eligible for relief by virtue of a Petition for Alien Relative (Form I-130) filed by his United States citizen wife.

II. ANALYSIS

An alien in removal proceedings has no constitutional right to release on bond. *See Carlson v. Landon,* 342 U.S. 524, 534 (1952). Rather, section 236(a) of the Act merely gives the Attorney General the authority to grant bond if he concludes, in the exercise of discretion, that the alien's release on bond is warranted. The courts have consistently recognized that the Attorney General has extremely broad discretion in deciding whether or not to release an alien on bond. *See, e.g., Carlson v. Landon*, *supra*, at 540; United States ex rel. Barbour v. District Director of INS, 491 F.2d 573, 577-78 (5th Cir. 1974). Further, the Act does not limit the discretionary factors that may be considered by the Attorney General in determining whether to detain an alien pending a decision on asylum or removal. *See, e.g., Carlson v. Landon, supra*, at 534 (holding that denial of bail to an alien is within the Attorney General's lawful discretion as long as it has a "'reasonable foundation'" ****

The burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond. In general, an Immigration Judge must consider whether an alien who seeks a change in custody status is a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk. *Matter of Patel*, 15 I. & N. Dec. 666 (BIA 1976). Immigration Judges may look to a number of factors in determining whether an alien merits release from bond, as well as the amount of bond that is appropriate. These factors may include any or all of the following: (1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States. *Matter of Saelee*, 22 I. & N. Dec. 1258 (BIA 2000); *Matter of Drysdale*, *supra*, at 817; *Matter of Andrade*, 19 I. & N. Dec. 488 (BIA 1987).

An Immigration Judge has broad discretion in deciding the factors that he or she may consider in custody redeterminations. The Immigration Judge may choose to give greater weight to one factor over others, as long as the decision is reasonable. In the present matter, the Immigration Judge determined that evidence in the record of serious criminal activity, even if it had not resulted in a conviction, outweighed other factors, such that release on bond was not warranted.

In light of the broad discretion afforded under section 236(a) of the Act, we find no error in the Immigration Judge's consideration of the information regarding the respondent's alleged involvement in a drug trafficking scheme in determining whether the respondent poses a danger to the community. In the context of custody

redeterminations, Immigration Judges are not limited to considering *only* criminal convictions in assessing whether an alien is a danger to the community.[2]

Any evidence in the record that is probative and specific can be considered. Therefore, although we recognize that the respondent has not been convicted of the offenses charged in the criminal complaint, we find that unfavorable evidence of his conduct, including evidence of criminal activity, is pertinent to the Immigration Judge's analysis regarding whether the respondent poses a danger to the community. [3]

We agree with the Immigration Judge that the respondent has failed to meet his burden of establishing that he warrants release on bond. As the Immigration Judge noted, the evidence of the respondent's alleged involvement in a drug trafficking scheme contained in the criminal complaint is specific and detailed. The complaint is signed by a DEA agent. It describes the source of the information that the respondent was involved in the sale of drugs. It sets forth the events leading to the respondent's arrest, including locations, alleged accomplices, and other details. For purposes of determining bond during the pendency of removal proceedings, this was sufficient for the Immigration Judge to conclude that the respondent poses a risk to others, even in the absence of a conviction. Moreover, the Immigration Judge's decision to give this evidence considerable weight above other factors, including the respondent's marriage to a United States citizen, was reasonable given the scope and seriousness of the alleged criminal activity.

In this regard, we note that we have long recognized the dangers associated with the sale and distribution of drugs. *See Matter of Melo*, 21 I. & N. Dec. 883, 886 (BIA 1997) (noting that the scourge on society of illegal drug trafficking and the associated criminal activity it generates is, at this point, beyond dispute). Inasmuch as the respondent has failed to establish that he does not present a danger to his community, we find that he should not be released from custody during the pendency of his removal proceedings. ***

Accordingly, the appeal will be dismissed.

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[2] Bond proceedings are separate and apart from the removal hearing. 8 C.F.R. § 1003.19(d) (2006) ***In the context of removal proceedings, a criminal conviction is usually required to prove removability based on criminal grounds. Section 237(a)(2) of the Act, 8 U.S.C. § 1227(a)(2) (2000). No such requirement exists in bond proceedings.

[3] We have reached a similar conclusion in the context of determining an alien's eligibility for discretionary relief from removal. *See* Matter of Thomas, 21 I. & N. Dec. 20, 23-24 (BIA 1995) (considering convictions that were not final in determining whether the alien warranted a grant of voluntary departure in the exercise of discretion) .

Notes and Questions Following Problem 7.3.1

1. Bond Hearings are Separate from the Removal Hearing. The EOIR Practice Manual is very clear that evidence introduced in bond proceedings is separate from the regular removal hearing. Yet attorneys on both sides will frequently resubmit information in the removal hearing. For example, any convictions or admissions the Respondent makes in a bond hearing will likely be evaluated and used by ICE counsel in the regular removal hearing. Arrests that do not result in convictions would not, however, establish a ground of removal under INA § 237(a)(2). *See* the definition of conviction in INA § 101(a)(48). Admissions of the elements of a crime can create a ground of inadmissibility. *See* INA § 212(a)(2). This was discussed in chapter 5 and in *Matter of K-,* 7 I. & N. Dec. 594 (BIA 1957), discussed in the main text at page 582.

2. Burden of Proving Eligibility for Relief. In *Matter of M-B-C-*, 27 I. & N. Dec. 31 (2017), the BIA reaffirmed that the applicant for relief bears the burden of proving that no disqualifying conviction or behavior applies to their application for relief. The case concerned eligibility for other forms of relief but in the opinion the BIA cited 8 C.F.R. § 1240.8(d), which states:

> The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

3. Does an Admission in Immigration Court Establish Inadmissibility? While admissions can establish inadmissibility, there may be situations where the probative value of the admission should be challenged. In an unpublished BIA decision, a panel held that an unrepresented man's admission to use of marijuana was not sufficient to show that he was inadmissible for admitting a violation of a law relating to controlled substances. *Matter of Mario Nunez Parra,* 2012 WL 6641779 (BIA 2012). The respondent in that case was a returning lawful permanent resident placed into removal hearings by the DHS and charged with violating a controlled substance law. He was unrepresented in the hearing but had counsel for his BIA appeal. His attorney sought a dismissal or termination of the proceedings:

> On appeal, the respondent argues that the Immigration Judge erred in determining that he conceded to his inadmissibility during the underlying proceedings. Moreover, the respondent argues that the Immigration Judge failed to consider his mental competency.
>
> We disagree with the Immigration Judge's determination that the respondent is inadmissible as charged. The Department of Homeland Security ("DHS") bears the burden of proving by clear and convincing evidence that the respondent, who is a returning lawful permanent resident, is to be regarded as seeking an admission. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011). Here, the Immigration Judge based his finding of inadmissibility solely on the respondent's admissions during the underlying proceedings that he has used marijuana on several occasions in the United States and that he has carried marijuana on his person when coming to the United States from Mexico at some point in the past ***

> These admissions were prompted by questions from the Immigration Judge, who had not notified the respondent that the government had the burden of proving his inadmissibility.
>
> Unlike the Immigration Judge, we find these statements by an unrepresented alien insufficient to establish that the respondent admitted to a crime under *Matter of K-*, 7 I&N Dec. 594 (BIA 1957), such that the DHS has shown by clear and convincing evidence that the respondent is inadmissible as charged. We therefore find that termination of proceedings is warranted. Because we find that termination of proceedings is warranted for the aforementioned reasons, we need not address the mental competency issues raised by the respondent on appeal. *Id.*

In a regular removal hearing alleging removability, the government bears the burden of proving by clear, convincing and probative evidence that the person is removable under INA § 237. However, if a person makes admissions during his or her arrest by DHS or during the removal hearing, those statements can be used to meet the government's burden. In Problem 7.3.1, Mr. Buendia is charged with removal because he was inadmissible for failure to be inspected, admitted or paroled under INA § 212(a)(6)(i). His past arrests, convictions, or potential future convictions are not essential to proving his removability.

4. Good Moral Character and the Impact of Criminal Convictions. As discussed elsewhere in chapter 5 and 6, the INA does not affirmatively define "good moral character." Instead, the INA created categories of people who cannot establish good moral character. *See* INA § 101(f). A conviction for an aggravated felony as defined in INA § 101(a)(43) would preclude a finding of good moral character.
And of course, Congress has also narrowed cancellation of removal relief by precluding people with other convictions that meet the requirements of INA §§ 212(a)(2), 237(a)(2) or (a)(3).

For more, see IMMIGRATION LAW AND CRIMES at § 9.13 for a discussion of how the BIA has read this provision to bar even misdemeanor convictions that could be waived under the petty offense exception in other contexts.

See also IMMIGRATION LAW AND PROCEDURE § 64.04 (discussing cancellation of removal).

5. Regular Removal vs. Judicial and Administrative Removal under INA § 238. If Mr. Buendia is convicted of "sexual abuse of a minor" he might be charged as removable pursuant to INA § 237(a)(2)(iii), cross-referencing to INA § 101(a)(43)(A). Because the facts appear to suggest a state prosecution, the DHS would have to wait for completion of the state process. But if he is convicted, the DHS might dismiss the regular removal proceedings and seek instead to use judicial or administrative removal pursuant to INA § 238.

Attorney General Sessions has called for the U.S. Attorneys to use INA § 238(c)(5) judicial removal as part of federal convictions. In judicial removal, the defendant can stipulate to an order of removal as part of the plea bargain or the federal district court holds a removal hearing as part of the post-sentencing phase of a criminal trial. This procedure has not been used regularly in criminal prosecutions in the past in part because of the complexity of immigration law removal

grounds and potential defenses. Litigants have preferred to rely on DHS to bring the removal prosecutions rather than the U.S. attorneys' offices.

In administrative removal, found in INA § 238(b), an individual who is not a lawful permanent resident is served with a written Intent to Remove notice alleging that they have been convicted of an aggravated felony, and limiting their ability to seek immigration judge review to an application solely for "withholding of removal" or to contest limited issues such as their lack of permanent resident status. There is no place in the written Notice and Response document for an individual to contest the characterization of the conviction as an aggravated felony.

In a recent case, a man who had been removed under administrative removal and was being prosecuted for felony reentry after an order of removal was able to successfully mount a collateral attack on the validity of the removal order. *United States v. Cazares-Rodriguez*, 2017 U.S. Dist. LEXIS 76781 (S.D. Cal. May 19, 2017). Through his counsel, the defendant, Mr. Cazares-Rodriguez, argued that the forms inadequately informed him of his rights to challenge the characterization of his convictions as an aggravated felony and that he did not understand that he had a right to a hearing before an immigration judge.

Page 841 (§ 7.01[M]): Special immigrant juvenile status (SIJS) cases have received a lot of attention recently because the number of unaccompanied children crossing the U.S-Mexico border from Central America has skyrocketed.

One of the important aspects of SIJS is that the child must first obtain a finding from a family or juvenile court qualifying the child as a child who cannot be reunified with one or both parents due to abuse, neglect or abandonment and deciding that it is in the "best interests" of the child to remain in the United States. Accordingly, attorneys must research local family or juvenile law to learn the substantive and procedural requirements. You can find more resources at: www.safepassageproject.org (focus on New York) or http://www.publiccounsel.org/publications?id=0119 (focus on California). These organizations may also be able to help you find a referral in your state.

Here is a 2013 New York appellate decision reversing a family court's finding that the child did not meet the statutory elements to qualify for SIJS:

MATTER OF MARCELINA M.-G. v. ISRAEL S.
112 A.D. 3d 100 (N.Y. App. Div. 2d Dep't 2013)

> APPEAL by Marcelina M.-G., and SEPARATE APPEAL by Susy M.-G., in a child custody proceeding and related guardianship proceedings pursuant to Family Court Act article 6, as limited by their respective briefs, from so much of an order of the Family Court (David Klein, J.), entered September 13, 2011, in Westchester County, as denied, without a hearing, the motion of Susy M.-G., in which Marcelina M.-G. joined, for the issuance of an order declaring that Susy M.-G. is dependent on the Family Court and making specific findings that she is unmarried and under 21 years of age, that reunification with one or both of her parents is not viable due to parental abuse, neglect, or abandonment, and that it would not be in her best

interests to be returned to her previous country of nationality or last habitual residence, so as to enable her to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 U.S.C. § 1101(a)(27)(J).

OPINION & ORDER

ROMAN, J.

Introduction

In 1990, Congress enacted the special immigrant juvenile provisions of the Immigration and Nationality Act (*see* 8 U.S.C. § 1101[a][27][J]; Pub L 101-649, § 153, 104 US Stat 4978 [101st Cong, 2d Sess, Nov 29, 1990]), which provide a gateway for undocumented children who have been abused, neglected, or abandoned to obtain lawful permanent residency in the United States. Prior to petitioning the relevant federal agency for special immigrant juvenile status, an immigrant juvenile must obtain an order from a state juvenile court making findings that the juvenile satisfies certain criteria. Among those findings is a determination that reunification with "1 or both" of the juvenile's parents "is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" (8 U.S.C. § 1101[a][27][J][i]). The principal issue presented on this appeal is whether a juvenile may satisfy this statutory reunification requirement when the juvenile court determines that reunification is not viable with just 1, as opposed to both, of the juvenile's parents. For the reasons that follow, we conclude that the "1 or both" language requires only a finding that reunification is not viable with 1 parent.

Factual and Procedural Background

Susy M.-G. was born in November 1994, in Honduras. As recounted in Susy's affidavit in support of her motion, she lived alone with her mother, Marcelina M.-G., until she was about six years old. At that time, the mother's boyfriend "Tony" began living with them part-time. Susy indicated that Tony was "mean and violent" toward her. Her mother "threw [Tony] out of [the] house" prior to the birth of Susy's half-brother Jason in November 2001.

When Susy was about 10 years old, her mother left Honduras to work in the United States. The mother had told Susy that "[s]he was leaving in three days," and that Susy and Jason would be going to live with their aunt "Estella." Susy asserted that "[l]ife at Estella's was miserable." According to Susy, "Estella was physically violent and verbally abusive" toward her, as were Susy's cousins. "Estella would smack [Susy] with whatever she could find, for no good reason at all," and called her names, including telling Susy that she was a "whore." Estella also used the money that Susy's mother sent for Susy for Estella's own family.

Susy averred that she had never lived with her father, Israel, whose last name she did not know. According to Susy, her mother said that the father was an alcoholic and violent toward the mother, and that they were "better off without him." Susy indicated that she did not think that her father had ever supported her or her mother financially, and that her father "never was present in [her] life." Although Susy indicated that she talked to her father "on the phone sometimes," she stated that they were "not close."

In 2008, Susy arranged for herself and her younger brother to travel to the United States with the help of "coyotes" (smugglers), because "[l]ife with Estella was unbearable." When Susy told her mother about this plan, her mother was initially "not happy at all with us coming to the United States," but eventually "relented and asked her boyfriend to help pay for the trip." Susy indicated that during the "very long trip," they "traveled with different people and smugglers by bus and car," and that they "had to sleep in strange places on the way." She explained that when they arrived at the United States-Mexico border, they tried crossing, but the coyotes saw border patrol and ordered them to run away back toward Mexico. They crossed the border into the United States on their next attempt, but were pursued by the border patrol. "Everyone started running" in different directions, and Susy lost sight of Jason. When Susy heard that Jason had been picked up, she back-tracked so that he would not be alone, and she was detained by border patrol.

Susy and Jason were taken to a group home where they remained for about three days, and were then transferred to a foster home in Texas. After approximately 80 days, Susy's uncle, Francisco G., arrived, and took Susy and her brother to New York to stay with Francisco and his family. Francisco enrolled Susy and Jason in school. With respect to her living situation, Susy explained as follows:

"At first it was hard adjusting to a new place and a new language but I now feel a lot more comfortable in the United States and I have friends. It is the first time I feel safe and taken care of as a child—it is a wonderful feeling to be provided for and be part of a loving family. I see my mother who lives close by with her boyfriend and their baby daughter but my caretaker and head of family is Francisco. I am happy living with him and his family."

The Guardianship Petition and Motion for Special Findings

[Authors' note: initially, Francisco, Suzy's uncle, sought to be named Suzy's guardian and the initial application said that Suzy's mother had abandoned her. As the case progressed, Suzy's mother sought to be named as custodian.] . . .

In support of the motion, Susy alleged that she was under 21 years of age, unmarried, and dependent upon the Family Court in that the court had accepted jurisdiction over the matter of her guardianship, and her parents had effectively relinquished control over her. Additionally, Susy maintained that reunification with one or both of her parents was not viable due to neglect and abandonment.

Specifically, Susy alleged that her father had abandoned her and had not provided any financial support or parental guidance. In addition, Susy asserted that her mother had neglected her by failing to provide her with adequate food, clothing, shelter, and education in Honduras, and by allowing her to travel unaccompanied to the United States. Lastly, she alleged that her mother had abandoned her by failing to provide her with any substantial financial assistance or provisions since she arrived in the United States.

In support of her motion, Susy submitted her affidavit and birth certificate, as well as her brother's affidavit. In addition, Susy submitted an affidavit from her mother. In her affidavit, the mother averred that Susy's father, Israel, "never was responsible—he drank, used drugs, and was violent towards [the mother], even breaking [her] nose once." The mother asserted that the father had "never been involved in [Susy's] life," and had also "never shown an interest in being involved in [the child's] life, or offered to pay for her expenses in any way." The mother also indicated that her former boyfriend, Jason's father, had "beat[en]" the child.

The mother stated that when she lived in Honduras, she had relied on her sister Estella to take care of her children while she worked. She was aware that Estella had hit Susy, and that Estella would deprive the child of meals as a punishment. The mother indicated that she "continued to have Estella take care of [Susy] because [she] had no other choice."

The mother acknowledged having left her children in the care of Estella when she left Honduras and immigrated to the United States in 2004. The mother stated that after she left Honduras, "Susy related on several occasions that Estella beat her frequently and permitted her daughters to hit her as well. She also told [the mother] that Estella would frequently not feed [Susy and Jason], and only provided them with one meal a day on average." The mother indicated that she sent money to Estella to pay for room and board for the children, and to cover expenses such as medical bills for Jason and school clothes.

According to the mother, in 2008, Susy informed her that she had contacted a "coyote" about transporting her and Jason to the United States. "Although [the mother] did not want them to come to the United States," she "was afraid [Susy] otherwise would run away from home," so she "agreed to speak to the coyote and pay him to bring Jason and Susy to the United States." The mother ultimately learned from immigration authorities that the children had been arrested. The mother noted that her brother-in-law, Francisco, agreed to pick up the children in Texas and bring them back to live with him and his family. The mother asserted that she currently lived with her youngest daughter in a small apartment in the same town as Francisco, and that she did not have the resources to support Susy or Jason. She indicated that the children were "very happy" living with Francisco and his family, and that she wanted them "to stay with their Aunt and Uncle," noting that "it [was] much better for them than to be with [her]."

In further support of her motion for an order of special findings, Susy submitted a letter from a licensed clinical social worker, Maribel Rivera, dated December 9, 2009. Rivera stated that Susy was attending individual psychotherapy sessions, and had been diagnosed with post-traumatic stress disorder and "depressed mood due to multiple changes in her life." Susy also submitted a "Record of Deportable/Inadmissible Alien" document issued by the United States Department of Homeland Security, which reflected, inter alia, that Susy was apprehended on August 19, 2008, at or near Rio Grande City, Texas.

The Mother's Custody Petition

Although the mother had initially supported Francisco's application for guardianship of Susy, in May 2011, the mother filed a petition for custody of Susy. The mother indicated that she resided in Westchester County, and that it would be in Susy's best interests to have custody awarded to her because the father was not involved in the child's life, and the child "want[ed] to live with [the] mother." The mother also submitted a memorandum of law in support of Susy's motion for special findings.

The Family Court's Determination

At a court appearance on June 21, 2011, the Family Court, inter alia, granted the mother's petition for sole custody of Susy and, as a result, dismissed Francisco's petition for guardianship of the child. In addition, the court denied Susy's motion for a special findings order. Counsel for the mother argued that because Susy had been neglected by her father, she was eligible for special findings under "the new law" even though the mother obtained custody. The court responded, "I think that is a strained reading of a statute. I think that it is a bending over more than backwards in order to create an artificial citizenship, frankly, and I will not make a special finding." The court indicated that Susy was "with her natural parent," and that she "doesn't need them both." . . .

Special Immigrant Juvenile Status

On appeal, Susy and the mother contend that the Family Court erred in denying Susy's motion for an order of special findings on the basis that custody was awarded to the mother. They argue that the court's determination was contrary to the plain language of the special immigrant juvenile status (hereinafter SIJS) statute, which permits SIJS eligibility where, as here, reunification is not viable with one of the child's parents. Additionally, Susy and her mother contend that Susy satisfied the other eligibility requirements for SIJS and, therefore, Susy's motion should have been granted.

The SIJS provisions of the Immigration and Nationality Act were enacted by Congress in 1990 . . . To be eligible for SIJS, an immigrant juvenile must obtain an order from a state juvenile court making findings that the juvenile satisfies certain

criteria…Once the state court makes an SIJS predicate order, a juvenile may apply to the USCIS for SIJS using an I-360 petition, and if the juvenile is granted SIJS, he or she may be considered for adjustment to lawful permanent resident status. …

At the time of the enactment of the statute in 1990, a state court's SIJS predicate order was required to find that (i) the juvenile was dependent on a juvenile court located in the United States and had been deemed eligible for long-term foster care, and (ii) it would not be in the juvenile's best interest to be returned to the juvenile's or parent's home country. …. In 1997, Congress amended the law out of concern that juveniles entering the United States as visiting students were abusing the SIJS process. … The amendments modified the SIJS definition to include an immigrant whom a juvenile court had "legally committed to, or placed under the custody of, an agency or department of a State," and added the requirement that the finding of eligibility for long-term foster care be "due to abuse, neglect, or abandonment" (Pub L 105-119, § 113, 111 US Stat 2440, 2460 [105th Cong, 1st Sess, Nov 26, 1997]; …Immigration Law and Procedure § 35.09[1] [Matthew Bender 2013]). Congress also added consent provisions, requiring the express consent of the United States Attorney General to the dependency order, and providing that no juvenile court had jurisdiction to determine the custody status or placement of a juvenile in the actual or constructive custody of the Attorney General unless the Attorney General specifically consented to such jurisdiction …According to the House Conference Report, the modifications in the statute were made "in order to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children" (HR Rep 105-405, 105th Cong, 1st Sess at 130 [1997] …

In 2008, the requirements for SIJS were again amended, this time by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (*see* Pub L 110-457, 122 US Stat 5044 [110th Cong, 2d Sess, Dec 23, 2008]). The 2008 amendments expanded eligibility to include those immigrant children who had been placed in the custody of an individual or entity appointed by a State or juvenile court … Congress also removed the requirement that the immigrant child had to be deemed eligible for long-term foster care due to abuse, neglect, or abandonment, and replaced it with a requirement that the juvenile court find that "reunification with [1] or both of the immigrant's parents is not viable due to abuse, neglect, abandonment[,] or a similar basis found under State law" (Pub L 110-457, 122 U.S. Stat 5044, 5079…).

Thus, under the current law, a "special immigrant" is a resident alien who is under 21 years of age, unmarried, and dependent on a juvenile court located in the United States or "legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States" (8 U.S.C. § 1101[a][27][J][i]; *see* 8 CFR 204.11; …Additionally, the court must find that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law," and "that it would not be in the alien's best interest to

be returned to the alien's or parent's previous country of nationality or country of last habitual residence" (8 U.S.C. § 1101[a][27][J][i], [ii] …

By making these preliminary factual findings, the juvenile court is not rendering an immigration determination … Rather, "the final decision regarding [SIJS] rests with the federal government, and, as shown, the child must apply to that authority." …

Analysis

In the present case, we find that the Family Court erred in denying Susy's motion for the issuance of an order making a declaration and specific findings that would allow her to apply to the USCIS for SIJS. The record establishes that Susy is under 21 years of age and unmarried (*see* 8 CFR 204.11[c][1], [2]). Additionally, since the Family Court placed Susy in the custody of her mother, she has been "legally committed to, or placed under the custody of . . . an individual . . . appointed by a State or juvenile court located in the United States." …

With respect to the nonviability of reunification with one or both parents, the record reveals that Susy was abandoned by her father. Susy averred in her affidavit that she never lived with her father, and that she did not think he ever provided financial support. Although Susy indicated that she talked to her father "on the phone sometimes," she asserted that he had never been present in her life. Susy's mother confirmed in her affidavit that the father was never involved in Susy's life. According to the mother, the father "never was responsible—he drank, used drugs, and was violent towards [her]," and "had never shown an interest in being involved in Susy's life, or offered to pay for her expenses in any way." Thus, Susy established that reunification with her father was not viable due to abandonment. … The Family Court, as evidenced by its comments at the hearing, denied Susy's application for a special findings order on the ground that the viability of reunification with Susy's mother rendered Susy ineligible for SIJS. However, we disagree with the Family Court's interpretation of the reunification component of the statute.

… Under the plain language of the statute, to be eligible for SIJS, a court must find that "reunification with *1 or both* of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" (8 U.S.C. § 1101[a][27][J][i] [emphasis added]). We interpret the "1 or both" language to provide SIJS eligibility where reunification with just one parent is not viable as a result of abuse, neglect, abandonment, or a similar State law basis. …Thus, contrary to the Family Court's determination, the fact that the mother was available as a custodial resource for Susy does not, by itself, preclude the issuance of special findings under the SIJS statute. …

The legislative history of the SIJS statute supports this interpretation of the reunification requirement. …As set forth above, prior to the 2008 amendments, the statute required a determination that the child was eligible for long-term foster care.

…. The phrase "[e]ligible for long-term foster care" meant a determination "by the juvenile court that family reunification is no longer a viable option" (8 CFR 204.11[a]). Thus, under the former version of the statute, "SIJS was only available when reunification with *both* parents was not possible." …"[B]y eliminating the long-term foster-care requirement and instead requiring only a finding that reunification with 1 or both' parents is not viable," the statute, as amended in 2008, "requires only a finding that reunification is not viable with one of the child's parents." …

We note while we find a literal reading of the phrase "1 or both" to be supported by the plain language of the statute, the Supreme Court of Nebraska has declined to adopt a literal reading of the phrase (*see In Re Erick M*., 284 Neb 340, 352, 820 NW2d 639, 648). In *Erick M.*, the court found the phrase "1 or both" to be ambiguous because it can reasonably be interpreted "to mean that a juvenile court must find, depending on the circumstances, that *either* reunification with one parent is not feasible *or* reunification with both parents is not feasible" (*In Re Erick M*., 284 Neb at 345, 820 NW2d at 644 [emphasis in original]). After holding that courts "should generally consider whether reunification with either parent is feasible," the *Erick M.* court determined that the petitioner therein was not eligible for SIJS predicate findings because reunification with his mother was feasible. …

Initially, to the extent the language of the statute can indeed be viewed as ambiguous, it has been held that "ambiguities in immigration statutes must be read in favor of the immigrant."… In any event, for the reasons discussed, we decline to adopt the Nebraska Supreme Court's interpretation of the statute. Absent a grant of special findings in this case, Susy might face deportation to Honduras where her father has abandoned her and there appear to be no other fit relatives to care for her, essentially rendering the fact that the child has a fit parent in the United States immaterial. We believe this would be contrary to the purpose of the SIJS statute. "Indeed, the very reason for the existence of special immigrant juvenile status is to protect the applicant from further abuse or maltreatment by preventing him or her from being returned to a place where he or she is likely to suffer further abuse or neglect." . . .

Moreover, and indeed significantly, the findings by the state juvenile court "do not bestow any immigration status on SIJS applicants" … but, instead, are prerequisites to applying for SIJS classification with the USCIS. … In sum, we find that Susy has satisfied the statute's reunification requirement by demonstrating that reunification with her father was not viable.

Turning to the best interests component, as discussed, the record shows that the father, who apparently continues to live in Honduras, abandoned Susy. Additionally, Susy's aunt, Estella, with whom she previously lived in Honduras, was neglectful and abusive toward her. The mother stated that she had left Susy with Estella because she had no other alternative, which indicates that there are no other relatives available to care for Susy in Honduras. The record also reveals that

> the child has suffered psychological distress. By contrast, the record demonstrates that in the United States, Susy is attending school, has made friends, and has family members to care for her, including her mother, as well as her uncle and aunt. Under these circumstances, the record demonstrates that it would not be in the best interests of the child to return to Honduras. …
>
> Accordingly, the order is reversed insofar as appealed from, on the law and the facts, the motion is granted, it is declared that Susy is dependent on the Family Court, and it is found that she is unmarried and under 21 years of age, that reunification with one or both of her parents is not viable due to parental abuse, neglect, and abandonment, and that it would not be in Susy's best interests to return to Honduras, her previous country of nationality and last habitual residence.
>
> Under New York law the family court has jurisdiction until the child is twenty-one for guardianship proceedings. New York courts have affirmed that a parent can petition for a child via a guardianship proceeding. *See also Maria P.E.A. v. Sergio A.G.*, 111 A.D. 3d 619 (N.Y. App. Div. 2d Dep't 2013) (single parent SIJS granted as part of guardianship).

More Updates Related to Special Immigrant Juveniles

In 2016 the State Department announced that for several countries, the country cap would limit the number of children who could adjust to status as permanent residents using Special Immigrant Juvenile Status. Congress has allocated this category to the quota for the "Employment Based Fourth Preference." *See* INA § 201. The allocation in the special immigrant category is 7.1% of the total allocation for the employment-based preferences. Out of 140,000 total, that means that approximately 9,600 visas are allocated to this category. The country cap limits visa issuance to any one country at 7% of the allocation. Thus, children in El Salvador, Honduras, or Guatemala now find they are waiting in a queue for the allocation of permanent status. See the Chapter 4 update for more details. Technically, the relief is not a grant of a visa but a grant of status.

Children from Mexico and India also have experienced periodic delays. For the current backlogs, see the Visa Bulletin posted at: https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html.

The significance for young people in removal is that the waiting period has meant that some ICE trial attorneys are asking Immigration Judges to refuse to terminate removal proceedings because special immigrant juvenile status is not immediately available. In some parts of the country, the IJ will administratively close the case upon the approval of the I-360 petition qualifying the young person for SIJS. In others, the IJ may only grant a continuance. This may become an area of greater litigation in the upcoming years.

In the spring of 2018, the Third Circuit found that children who were in expedited removal and detention with their mothers could use habeas review to challenge the adequacy of the due process protections used in expedited removal. Each of the children were represented by pro bono counsel and those attorneys had secured special immigrant juvenile status findings in state court. *Osorio-*

Martinez v. AG United States, 893 F.3d 153 (3d Cir. 2018). The advocates argue that the children cannot be safely repatriated due to abuse, neglect, or abandonment of a parent and that a state court has found it is in the best interests of the children to remain in the United States. The case distinguished prior litigation that had found neither statutory nor constitutional access to judicial review for the mothers of the children. See the discussion in the update to Chapter 2 and the *Castro* case excerpted there.

On June 25, 2015, the USCIS issued a policy memorandum entitled Updated Implementation of the Special Immigrant Juvenile *Perez-Olano* Settlement Agreement regarding the settlement agreement in *Perez-Olano v. Holder*, No. CV 05-3604 (C.D. Cal. 2005). The memorandum (PM-602-0117) is at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0624_Perez-Olano_Settlement_Agreement_PM_Effective.pdf. The *Perez-Olano* settlement agreement benefits all juveniles "including but not limited to: SIJ applicants, who, on or after May 13, 2005, apply or applied for SIJ status or SIJ-based adjustment of status based on their alleged SIJ eligibility."

In July 2014, the USCIS and the plaintiffs entered into a stipulation relating to petitions or applications for adjustment of status based on special immigrant juvenile status that were denied because the court dependency order had expired at the time of filing. By stipulation, the USCIS will not deny a special immigrant juvenile petition if the class member was under twenty-one years old, unmarried, and otherwise eligible and the class member is the subject of a valid dependency order or was the subject of a valid dependency order that terminated based on age before filing the petition. The USCIS will reopen SIJ petitions and adjustments based on SIJ that it denied, revoked, or terminated on or after December 15, 2010 based on age if the class member was under twenty-one and unmarried when the I-360 was submitted to the USCIS. The policy memorandum provides information regarding who qualifies and how class members can request that their cases be reopened. Class members may file motions to reopen pursuant to the stipulation on or before June 15, 2018.

In November 2016, the USCIS issued new guidance documents related to qualifying for Special Immigrant Juvenile Status. While the guidance documents instruct USCIS adjudicators not to look behind the family court or state court order, practitioners noted a dramatic increase in requests for evidence for I-360 petitions filed for immigrant youth. Some states reacted by altering their form orders relating to Special Immigrant Juveniles in an attempt to meet the higher burdens imposed by these guidance documents. See the USCIS Policy Manual at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ.html.

These guidance documents were issued even though proposed regulations amending 8 C.F.R. § 204.11 have not yet been formally adopted and have been pending since 2011. See https://www.federalregister.gov/documents/2011/09/06/2011-22625/special-immigrant-juvenile-petitions. The guidance documents may violate the Administrative Procedure Act.

Several lawsuits are challenging USCIS denials or rescissions of approved SIJS petitions due to reliance on the guidance documents. As of July 2018, there are no decisions in these cases.

Page 847 (§ 7.02[A]): This section summarizes the legal memoranda authorizing DHS to use prosecutorial discretion in low priority removal proceedings. According to a 2014 study, however, DHS rarely exercises prosecutorial discretion. *See* Transactional Records Access Clearinghouse, Syracuse University, *ICE Rarely Uses Prosecutorial Discretion to Close Immigration Cases* (Apr. 24, 2014), http://trac.syr.edu/whatsnew/email.140424.html (finding that ICE exercises prosecutorial discretion to close cases in immigration court only about 6.7 percent of the time).

As discussed in updates of Chapter 1 and 6, on November 20, 2014, Department of Homeland Security Secretary Jeh Johnson issued a memo regarding the prosecutorial discretion directives in implementing President Obama's 2014 executive actions on immigration enforcement and removal policy. The memo is at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. The 2014 executive actions provide guidance on using prosecutorial discretion to focus immigration enforcement resources on noncitizens whose removal from the United States is a higher priority. The executive actions also expand the eligibility for deferred action to more potential applicants.

DHS uses prosecutorial discretion to decide which noncitizens should be put into or taken out of removal proceedings. DHS Secretary Johnson's memo provides information on policies to be used by ICE, CBP and USCIS to apprehend, detain, and remove foreign nationals who are threats to national security, public safety and border security. Except as noted in the memo, the November 20, 2014, DHS memo rescinds and supersedes the 2011 Morton memos on civil immigration enforcement and prosecutorial discretion as well as previous memos regading case-by-case review, civil immigration enforcement and detainers, and the National Fugitive Operations Program (November 17, 2011; December 21, 2012 and December 8, 2009, respectively).

On May 4, 2015, the DHS Inspector General issued a report entitled "DHS Missing Data Needed to Strengthen Its Immigration Enforcement Efforts" (DHS OIG-15-85), available at https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-85_May15.pdf. The report states that in fiscal years 2013 and 2014, CBP, ICE and USCIS (the three DHS components with primary immigration enforcement roles) "received collectively, on average annually, about $21 billion." The report states that "DHS does not collect and analyze data on the use of prosecutorial discretion" to fully assess its current immigration enforcement activities and to develop future policies.

The report summarizes the type of data that USCIS, ICE and CBP collect. It states that "as of September 30, 2014, USCIS reported that it had approved 632,855 DACA requests," and that the Office of the Border Patrol "reported that it released 650 DACA-eligible individuals." The report also states that ICE did not have information regarding how many DACA-eligible foreign nationals were released. The report notes that in fiscal year 2014, ICE recorded 12,757 instances in which an ICE officer released a noncitizen pursuant to prosecutorial discretion after determining that the individual was not an enforcement priority. ICE also stated that "the prosecutorial discretion data may not always be accurate and complete." The DHS OIG report recommends that DHS collect data on its use of prosecutorial discretion.

On June 17, 2015, ICE issued FAQs on Prosecutorial Discretion and Enforcement Priorities. The FAQs are at http://www.ice.gov/immigrationAction/faqs. The FAQs include information for persons in ICE custody or in removal proceedings who wish to argue they are not an enforcement priority or that they are eligible for the exercise of prosecutorial discretion.

In the statistical yearbook issued by the EOIR, it appears that prosecutorial discretion increased dramatically to as many as 39% of cases decided that fiscal year. See discussion of the need for more prosecutorial discretion in Lenni B. Benson, *Immigration Adjudication: The Missing "Rule of Law,"* available at http://cmsny.org/publications/jmhs-immigration-adjudication/. The essay reviews the workload of the EOIR and the high rate of administrative closure and suggests that DHS should exercise greater discretion *before* lodging charging documents. The essay also notes that over 84% of all removal proceedings actually occur outside the courts altogether and provide few opportunities for individuals to seek relief.

The Trump administration withdrew all of the prior prosecutorial priorities memoranda. There are news reports across the United States that even cases closed in the past years are being reviewed and some are being re-calendared. See the priorities memorandum reprinted in the Chapter two update above.

There are no official statistics issued by either ICE or EOIR on the grant of prosecutorial discretion.

Page 849 (§ 7.02[B]): Add the following as new Notes 4-7:

4. DACA Renewals.
President Trump purported to end the DACA program in January of 2017. However, his action was enjoined by litigation. There are multiple suits proceeding through the courts with potentially conflicting nationwide injunctions.

The old USCIS renewal instructions have been updated pursuant to the litigation: https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction. These instructions state that people who received DACA before 2017 may continue to file for renewal, but no new applications are currently accepted. However, litigation may allow new DACA applications if the plaintiffs are successful in establishing that rescission of the program was motivated by racial animus or improperly rescinded under the Administrative Procedure Act.

For a document summarizing the status of the rescission and litigation, see Center for Immigrant Rights Clinic at Penn State University Law School, updated July 24, 2018, at https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/DACA%20Litigation%20July%2024%202018.pdf.

5. DACA and Traveling. DACA is a form of temporary relief. It is not an immigration status. An individual granted DACA may request advance parole for international travel for humanitarian, educational or employment purposes. A DACA recipient should not leave the United States unless both DACA and the advance parole have been granted. Individuals with unexecuted deportation

or removal orders, in immigration proceedings or who have other inadmissibility issues should consult with an immigration attorney before traveling outside the United States.

With the Trump administration's rescission of the DACA program in 2017, the agency ended the practice of issuing advance parole for DACA recipients.

6. DACA and Unlawful Presence. Noncitizens with unlawful presence have been able to depart and return to the United States pursuant to advance parole under *Matter of Arrabally and Yerrabelly*, discussed in Chapter 4. In *Arrabally*, the Board found that international travel with advance parole was not a departure triggering the 10-year bar to admission. Also, remember that unlawful presence does not begin to accrue until an individual turns 18 (Chapter 5).

Many individuals with DACA may have entered the United States without inspection and therefore are not eligible to apply to adjust status to become permanent residents in the United States even if an immigrant visa is available for them. However, those with DACA and advance parole who travel internationally and are then paroled into the United States may qualify for adjustment of status pursuant to an immediate relative petition (avoiding consular processing and the I-601A waiver process). Individuals with temporary protected status using advance parole also would be able to adjust status this way. Individuals subject to other grounds of inadmissibility would be ineligible for adjustment of status.

7. DACA and Driver's Licenses. While DACA recipients can obtain employment authorization, in many places it is logistically difficult to work if you can't legally drive. Most states permit DACA recipients to obtain driver's licenses. Arizona initially prevented DACA recipients from obtaining driver's licenses. In July 2014, however, the Ninth Circuit struck down the state restriction, finding that there was no rational basis to distinguish between these temporarily authorized noncitizens and others. *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014). *See* Michael Musial, *Court Blocks Arizona on Immigrant Driver's Licenses, Dreamers Rejoice*, Los Angeles Times, July 7, 2014, http://www.latimes.com/nation/nationnow/la-na-nn-arizona-drivers-licenses-immigrants-20140707-story.html. On December 17, 2014, the U.S. Supreme Court issued an order denying Arizona's application for a stay. The U.S. District Court for the District of Arizona issued an order and permanent injunction in January 2015, requiring the Arizona Department of Transportation to consider employment authorization cards issued to DACA recipients as valid proof of eligibility for a driver's license. *Ariz. Dream Act Coalition v. Brewer*, 81 F. Supp. 3d 795 (D. Ariz. 2015). The Ninth Circuit affirmed the injunction and the grant of summary judgment, holding that DACA work authorization documents and the authority of the federal government to issue identity documents preempted the state of Arizona's determination to reject the documents. 855 F.3d. 957 (9th Cir. 2017). The state filed a petition for certiorari on March 29, 2017.

In June 2017, the DHS announced a formal repeal of the proposed expansion of deferred action benefits to the parents of U.S. citizens. The memorandum is at https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf. The memorandum appeared to suggest that individuals with DACA would be able to continue to renew their work authorization documents. The administration said that the President is still considering how to handle existing grants of deferred action status. See DHS Press Release (June 15, 2017),

available at https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful.

Page 849: Add the following new subsection, just before § 7.03:

§ 7.02[C] Immigration Accountability Executive Actions and Pending Litigation

As noted above, President Trump and DHS Secretary Kelly repealed the expansion noted in this section.

As background, President Obama introduced several immigration-related executive actions on November 20, 2014. The measures included an expanded deferred action program for undocumented persons within the United States, revised border security and enforcement policies, and family- and employment-based immigration reforms.

General information on these executive actions:

- President Obama's address: https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.
- The White House, Fact Sheet: Immigration Accountability Executive Action, https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action.
- Department of Homeland Security, Fixing Our Broken Immigration System Through Executive Action –Key Facts (Nov. 21, 2014), http://www.dhs.gov/immigration-action,
- Kate M. Manuel, Congressional Research Service, The Obama Administration's November 2014 Immigration Initiatives: Questions and Answers (Nov. 24, 2014), https://www.fas.org/sgp/crs/homesec/R43798.pdf.

As noted in the update to Chapter 1, the Secure Communities program had ended and was replaced with the Priority Enforcement Program (PEP). Enforcement priorities for ICE and CBP are discussed in Chapter 1. Reforms relating to employment-based immigration are discussed in updates to Chapters 3 and 4. An expansion of the provisional waiver program is included in the update to Chapter 7.

The President holds the power to grant deferred action under the Immigration and Nationality Act and the regulations promulgated thereunder and the principle of prosecutorial discretion. As explained earlier in Chapter 7, deferred action is not a legal immigration status. It is a temporary status that permits employment authorization.

One of the November 2014 executive actions created a new Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) for unauthorized individuals who are the parents of U.S. citizen or lawful permanent resident children born on or before November 20, 2014. The parents must have lived in the United States continuously since before January 1, 2010, and must be able to substantiate that they were present in the United States on November 20, 2014 and on the date they apply for deferred action. Deferred action would have been granted for three years.

President Obama also expanded the existing Deferred Action for Childhood Arrivals (DACA) is available. Noncitizens who entered the United States before January 1, 2010, who can demonstrate physical presence in the United State since that time, and who were under age sixteen when they entered the United States would be eligible. Although the initial DACA relief required that DACA applicants to under the age of thirty-one when applying, the expanded DACA program had no age limit. Deferred action would be granted for three years. However, the DHS repealed this expansion in June 2017. See https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf.

In December 2014 over two dozen states challenged the executive actions concerning the expanded DACA program and the new DAPA program. *Texas v. United States* is excerpted at the end of the Chapter One update above. In essence President Obama and Secretary Johnson's expansion was enjoined for failure to comply with the Administrative Procedure Act. Litigation continues in several competing class actions. Some cases challenge the legitimacy of DACA; others challenge the manner and motivation of rescission.

The link before Notes and Questions should be https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca.

Page 849 (§ 7.03[A][1]): Add the following concerning U and T nonimmigrant visas:

Eligibility for protection as a victim of crime or trafficking is a form of relief in immigration court as well. While many people refer to these protections as "visas," it is technically a grant of status.

For general information about the T status for victims of Trafficking visit https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status. In 2016 the USCIS received 953 applications for T status and approved 750. This category also protects derivative family members. In 2015, the numbers were 1062 applications and 610 approved. See https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t_visastatistics_fy2016_qtr4.pdf.

U visa statistics can be found at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2016_qtr4.pdf.

Year	Filed	approved	denied	pending
FY 2015	30,106	10,026	2,715	63,762
FY 2016	35,044	10,046	1,843	86,980
FY 2017	61,686	17,726	1,362	190,361

Again, this category provides derivative family members with relief. As Congress has capped U grants to 10,000 a year, the continued high demand has created a multi-year wait for. U status. Nevertheless, if a respondent can identify eligibility for U or T status, ICE will often agree to an administrative closure of the case pending full adjudication of the relief.

In the spring of 2018, Attorney General Sessions certified to himself a case concerning whether an immigration judge has the authority to grant a continuance to allow an individual to seek "collateral" adjudication, such as a visa petition. The case is *Matter of L-A-B-R*, 27 I. & N. Dec. 245 (A.G. 2018). As of the end of July the case is still pending. If the Attorney General finds that an immigration judge cannot grant a continuance because a person is awaiting a U or T visa (or other form of visa petition), it is likely that respondents will have to either secure DHS consent to an administrative closure or may face removal orders and then have to seek post-removal order discretion to be allowed to wait in the United States. for the final adjudication by USCIS of their applications. Will ICE agree to such post removal order discretion?

Earlier in the spring of 2018, Attorney General Sessions ruled that an immigration judge may not use administrative closure to suspend the adjudication of a case unless the DHS consents to that temporary closure. *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018). The decision ends all administrative closures without DHS consent, but the particular facts involved the use of administrative closure for a pro se teenager who failed to appear at his removal hearing; the Immigration Judge had questioned the adequacy of notice).

Page 851 (§ 7.03[4]): Add to the end of the TPS section, just before subsection [5]:

In June 2015, temporary protected status existed for qualifying nationals of the following countries: El Salvador, Guinea, Haiti, Honduras, Liberia, Nepal, Nicaragua, Sierra Leone, Somalia, Sudan, and Syria. Eligibility requirements and registration and re-registration dates differ by country. More information can be found at www.uscis.gov/humanitariantemporary-protected-status-deferred-enforced-departure/temporary-protected status.

As of June 2017, Temporary Protected Status had ended for the nations struck by the Ebola virus. The President extended TPS for Haiti until January of 2018 and then again to July 22, 2019.

The Trump administration has set ending dates for El Salvador and Honduras, two countries that are in the top five most dangerous in the world. Some people from those countries have held TPS status since 1999.

Here is a table created at the end of July in 2018 with current countries and expiration dates:

El Salvador	Ends 9/09/2019
Haiti	Ends 7/22/2019
Honduras	Ends 1/05/2019
Nepal	Ends 6/24/2019
Nicaragua	Ends 1/05/2019
Somalia	Ends 3/17/2020
Sudan	Ends 11/02/2018
S. Sudan	Ends 05/02/2019
Syria	Ends 09/30/2019
Yemen	Ends 03/03/2020

To read the full list, visit https://www.uscis.gov/humanitarian/temporary-protected-status#Countries%20Currently%20Designated%20for%20TPS. Altogether, about 300,000 people will lose TPS status. Litigation is pending against some of the TPS terminations.

Page 851 (§ 7.03[5]): Add to the end of the Cuban Adjustment Act subsection, just before subsection [6]:

In January 2017, President Obama repealed the special parole authorization for Cubans who arrived without inspection or formal admission. For the memorandum repealing the special parole treatment visit https://www.dhs.gov/publication/changes-parole-and-expedited-removal-policies-affecting-cuban-nationals. In essence, if a Cuban does not arrive with a visa after January 12, 2017, he or she may be ineligible to adjust status pursuant to this special statute.

In late June 2017, President Trump reimposed some sanctions against Cuba that President Obama had lifted. However, as of June 27, 2017 the end of parole has not been altered.

On June 19, 2015, USCIS issued an interim policy memorandum (PM-602-0110) providing guidance concerning the Violence against Women Act (VAWA) amendments to the Cuban Adjustment Act. The memorandum is available at http://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/PED-VAWA_CAA-Amendments-PM-602-0110.pdf.

VAWA 2000 and VAWA 2005 amended the CAA to ameliorate the application for adjustment of status requirements under section 1 of the CAA for battered or abused spouses or children of qualifying Cuban principals.

Page 853 (§ 7.03 [B]) The link for *Deportation Without Due Process: The U.S. Has Used Its "Stipulated Removal" Program to Deport More than 160,000 Noncitizens Without Hearings Before Immigration Judges* is now:
https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf**.**

Page 854 (§ 7.03[B]): Add the following to the end of Chapter 7:

Parole-in-Place is a type of relief that can enable an individual who was not inspected or admitted to apply for adjustment of status within the United States. Although this is not a new form of relief, in the past few years its use has increased for spouses, children and parents of members of the U.S. armed forces on active duty, the selected reserve of the ready reserve, and former members of the U.S. armed forces or the selected reserve of the ready reserve. Parole-in-place provides relief to those U.S. military family members subject to the ground of inadmissibility in INA § 212(a) (6) (A) (I).

Those qualifying relatives may qualify for the grant of a parole while physically present in the United States without inspection or admission under INA § 212(d) (5) (A). This section of the INA permits the discretion to grant a parole to "any alien applying for admission to the United States." The applicant may be physically present in the United States pursuant to INA § 235(a) (1). The

parole-in-place request is submitted to the local USCIS office. If parole-in-place is granted, the individual may apply for adjustment of status with an immigrant petition in the immediate relative category. Parole-in-place does not excuse other inadmissibility issues. More information may be found in a November 15, 2013, USCIS Policy Memorandum at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf. The memorandum was updated in 2016. See https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2016/PIP-DA_Military_Final_112316.pdf.

The November 20, 2014 executive actions include a provision to expand parole-in-place to include families of individuals in the process of enlisting in the U.S. military.

There have been leaked draft memoranda that suggest that the Trump Administration may repeal this parole-in-place program.

Chapter 8: Asylum and Relief for People Seeking Refuge

Page 855 (§ 8.01: Introduction): add after paragraph 1:

By the end of 2015, UNHCR estimated that the number of forcibly displaced persons had risen to 65.3 million. Of those, 40.8 million are internally displaced people. *See* UNHCR, Global Trends: Forced Displacement in 2015 (2016), *available at* https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf.

Page 861 (§ 8.01[A][2]): Add the following immediately after "Different President, Different Refugee Admission Numbers?"

President Obama consistently increased the number of refugee admissions, from 70,000 in fiscal year (FY) 2015, to 85,000 in FY 2016, to a proposed 110,000 in FY 2017. In an Executive Order dated March 6, 2017, President Trump ordered a 90-day freeze on immigration from six Muslim-majority countries. He also ordered a 120-day halt to refugee admissions. The Fourth and Ninth Circuits stayed the Executive Order from taking effect. On June 26, 2017, however, the Supreme Court lifted part of the injunctions, allowing the travel ban to go forward. The Supreme Court's order is excerpted in the Chapter 2 update.

The Temporary Refugee Admission Ban
In the update to Chapter Two above, we explored the President's Executive Order announcing a 120-day ban on the admission of refugees and the resulting litigation that resulted in temporary injunctions on his proposal. The Supreme Court partially lifted this temporary injunction, and implementation resumed on June 29, 2017. The Supreme Court's order is excerpted in the Chapter 2 update.

Despite the stay on the refugee admission ban, President Trump has stated his desire to lower the number of refugee admissions. In September 2017, President Trump authorized a refugee admission cap of 45,000 in FY2018. Presidential Determination No. 2017–13, 82 Fed. Reg. 49,083 (Sept. 29, 2017). The administration has also increased the amount of information a refugee must provide during the application process, ordered more vetting for refugees from "high-risk" countries, revetted refugees who had already been screened, and diverted 100 of its 215 refugee case officers to conduct asylum interviews instead. Thus, even with the admissions cap set to its lowest since 1980, it is estimated that only 20,000 refugees will enter the United States by the end of fiscal year 2018. Liz Robbins & Miriam Jordan, *Apartments Are Stocked, Toys Donated. Only the Refugees Are Missing.*, N.Y. TIMES, May 16, 2018, *at* https://www.nytimes.com/2018/05/16/us/refugee-admissions.html.

Page 868 (§ 8.01[A][2]): Add the following immediately before Notes and Questions:

For a good article explaining the difference between refugee admissions and asylum, see Jie Zong & Jeanne Batalova, *Refugees and Asylees in the United States*, Migration Information Source, Oct. 28, 2015, http://www.migrationpolicy.org/article/refugees-and-asylees-united-states. The article

also contains many useful statistics. This material was updated in 2017 at http://www.migrationpolicy.org/article/refugees-and-asylees-united-states.

In 2017 the Center for Migration Studies commissioned a series of essays exploring the issues of refugee admissions and asylum processing. *See generally* Karen Musalo & Eunice Lee, "Seeking a Rational Approach to a Regional Refugee Crisis: Lessons from the Summer 2014 "Surge" of Central American Women and Children at the US-Mexico Border," *available at* http://cmsny.org/publications/jmhs-seeking-rational-approach-regional-refugee-crisis/; Todd Scriber, "You are Not Welcome Here Anymore: Restoring Support for Refugee Resettlement in the Age of Trump," *available at* http://cmsny.org/publications/jmhs-not-welcome-anymore/.

Page 872 (§ 8.02[A]): Add the following before [2]:

In the spring and summer of 2014, thousands of Central Americans, mostly unaccompanied children and women traveling with very small children, arrived at the U.S. southern border. While the numbers of unaccompanied minors from Central America had been rising for several years, they tripled in 2014. Part of the federal government's response was to announce a new and limited form of in-country processing for up to 4,000 children from three nations: El Salvador, Guatemala, and Honduras. The procedure allows a parent resident in the United States to apply to sponsor the child as a refugee. The parent must have some form of legal status in the United States: permanent residence, asylee, or temporary protected status. (Children with U.S. citizen parents or stepparents could qualify for a different overseas priority processing or for direct immediate relative sponsorship.) The child must be unmarried and under the age of 21. The parent must provide DNA testing evidence to prove the family relationship. If the child does not meet the full definition of a refugee found in INA § 101(a)(42); 8 U.S.C. § 1101(a)(42), USCIS will consider allowing the child and potentially an accompanying parent to enter the United States on humanitarian parole. To learn more, see http://www.uscis.gov/humanitarian/refugees-asylum/refugees/country-refugeeparole-processing-minors-honduras-el-salvador-and-guatemala-central-american-minors-cam.

In November 2014, the State Department announced the Central American Minors (CAM) Refugee/Parole Program, which provides "certain qualified children in El Salvador, Guatemala and Honduras a safe, legal, and orderly alternative to the dangerous journey that some children are currently undertaking to the United States." Children qualify to participate in CAM if their parent is residing lawfully in the United States in Legal Permanent Resident Status, Temporary Protected Status, has received withholding of removal or deferred action, or has been paroled into the United States. The children must independently qualify as refugees via an unusual in-country assessment. However, USCIS Ombudsman office reports that "[a]s of March 28, 2016, only 144 individual beneficiaries—46 refugees and 98 parolees—had arrived in the United States through the CAM program. Of those, 93 arrived from El Salvador, 46 from Honduras and 5 from Guatemala." Correspondence with Professor Benson dated June 20, 2016.

The government expanded the CAM program in 2016 to include children, regardless of age or marital status, of qualifying parents residing in the United States. The program's expansion now also includes adult caretakers of qualifying children (the biological parent of a qualifying child, even if that parent is not legally married to the child's parent in the United States, and an adult

caregiver of the qualifying child who is either related to the qualifying child or to the U.S.-based parent).

In May 2017, the Department of Homeland Security again extended TPS for Haitians affected by the 2010 earthquake. This extension lasts until January 22, 2018. However, the Secretary of Homeland Security John Kelly has indicated that Haitian TPS may not be extended again, saying: "I believe there are indications that Haiti — if its recovery from the 2010 earthquake continues at pace — may not warrant further. . . extension past January 2018." Maria Sacchetti, *For Haitians Who Came to U.S. After Earthquake, Another Deportation Reprieve*, Washington Post, May 22, 2017, https://www.washingtonpost.com/local/social-issues/federal-officials-dhs-to-extend-temporary-protected-status-to-haitians/2017/05/22/d2796824-3ef5-11e7-8c25-44d09ff5a4a8_story.html?utm_term=.5bc0f4d3c1be.

The Status of the Central American Minor Refugee and Parole Program in 2017
As noted in the Chapter Two update, President Trump's Executive Order sought to suspend **all** refugee admissions. This included a special program created by the Obama administration to allow some "in-country" processing of children in El Salvador, Honduras or Guatemala who had a parent or grandparent in lawful status within the United States. This program was designed to help prevent children taking the dangerous journey in the hopes of reunification with parents. It particularly benefited those people who had a lawful status like Temporary Protected Status that does not allow family reunification petitions. For more information about the CAM refugee/parole program, see https://www.uscis.gov/humanitarian/humanitarian-parole/central-american-minors-cam-refugeeparole-program-information-conditionally-approved-applicants. For an article about the effects of President Trump's executive decision on refugees, see https://www.theguardian.com/us-news/2017/feb/02/central-america-young-refugees-cam-trump-travel-ban.

Page 873 (§ 8.02): Comparing Asylum and Withholding of Removal:

Add the following sentence on page 873 in the first paragraph, immediately following the sentence "These cases are always heard by an immigration judge.":

But see Daniel Duane, *City of Exiles*, CAL. SUNDAY MAGAZINE (May 30, 2018), https://story.californiasunday.com/tijuana-city-of-exiles (alleging that people are being illegally denied the opportunity to apply for asylum when they arrive at the U.S. border at Tijuana).

Page 890 (§ 8.02[A]): Add new Note 3, just before Problem 8-3:

3. Mothers and Children at the Border. In the spring and summer of 2014, a large number of El Salvadoran, Honduran, and Guatemalan women carrying small children began to arrive at the southern border of the United States. If the women articulated a fear of return or if they could not be immediately returned to Mexico, the women and children were sometimes released into the interior of the United States and placed in removal proceedings. ICE has very limited family detention facilities. As the press began to cover the story and the numbers of women and children continued to increase, the Obama administration convened a special task force.

The White House characterized the situation as a "humanitarian crisis." By June 2014, CBP reported that more than 52,000 unaccompanied minors had been apprehended since October 2013 and that the number of women with small children arriving from Central America was continuing to increase. As of the end of June, President Obama said that the administration would increase family detention.

For a report documenting the fact that many children fleeing Central America have viable claims for protection, see UN High Commissioner for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (Mar. 13, 2014), *available at* http://www.refworld.org/docid/532180c24.html.

Is Marta's situation distinct from the women and children arriving from Honduras, El Salvador and Guatemala? How? Why do numbers make such a difference in procedures?

You can find resources about unaccompanied children at www.safepassageproject.org. This nonprofit organization trains and mentors attorneys representing immigrant children. The resources focus on New York law. However, new resources are posted that refer to other organizations with resources in other states.

Page 900 (§ 8.02[B][1]): Insert the following before the paragraph beginning with "The landmark case…":

In the summer of 2014, the BIA adopted its first clear precedent decision establishing asylum eligibility for married women in Guatemala who could not find effective protection from domestic violence. We have included the case at the end of this section. Here we discuss the evolution of the theory.

Page 902 (§ 8.02[B][2]): Add the following new paragraphs at the bottom of the page:

In August 2014, the BIA issued an opinion describing victims of domestic violence as a viable social group in *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), after the DHS conceded that the respondent established that she suffered past persecution on account of being a member of a particular social group comprised of "married women in Guatemala who are unable to leave their relationship." However, the decision was overruled in June 2018 when Attorney General Sessions referred a case called *Matter of A-B-* to himself for review and articulated the standard for establishing membership in a particular social group:

> First, the applicant must demonstrate membership in a group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question. And second, the applicant's membership in that group must be a central reason for her persecution. When, as here, the alleged persecutor is someone unaffiliated with the government, the applicant must show that flight from her country is necessary because her home government is unwilling or unable to protect her.

> Although there may be exceptional circumstances when victims of private criminal activity could meet these requirements, they must satisfy established standards when seeking asylum.

Matter of A-B-, 27 I. & N. Dec. 316, 317 (Att'y Gen. 2018).

In vacating the BIA's earlier, unpublished decision in *Matter of A-B-*, Attorney General Sessions found that the BIA made only a cursory analysis of the applicant's social group, consisting entirely of a citation to *Matter of A-R-C-G-*. He found that the analysis in *Matter of A-R-C-G-* "lacked rigor" and noted that the DHS "conceded almost all of the legal requirements necessary for a victim of private crime to qualify for asylum based on persecution on account of membership in a particular social group." *Id.* at 333.

In laying out the standard for particular social group membership, Attorney General Sessions reiterated decisions from prior BIA cases *M-E-V-G-* and *W-G-R-* and emphasized that "the key thread running through the particular social group framework is that social groups must be classes recognizable by society at large." *Id.* at 336 (citing Matter of W-G-R-, 26 I. & N. Dec. 208, 224 (B.I.A. 2014)). That is, "there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *Id.* He noted, however, that the fact an applicant is a member of a particular social group does not necessarily mean that she experienced persecution because of that membership:

> When private actors inflict violence based on a personal relationship with a victim, then the victim's membership in a larger group may well not be "one central reason" for the abuse. A criminal gang may target people because they have money or property within the area where the gang operates, or simply because the gang inflicts violence on those who are nearby. That does not make the gang's victims persons who have been targeted "on account of" their membership in any social group.

Id. at 338–39 (citations omitted).

For a practice advisory on the impact of *Matter of A-B-*, see Center for Gender & Refugee Studies, Matter of A-B-, CGRS Practice Advisory (July 6, 2018), https://uchastings.app.box.com/s/57k2hk6rpyjh7bbmebld4195r2wsdzt0/file/302956088950.

Page 905 (§ 8.02[B][5]): Add the following to the end of Note 2:

In February 2014, the BIA rephrased this requirement of visibility to be one of social distinction by the society at large. The opinions appear to suggest that LGBT individuals seeking protection from persecution can meet the social distinction requirement. *See Matter of W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014) and *Matter of M-E-V-G-, 26* I. & N. Dec. 227 (B.I.A. 2014). These cases are excerpted below in the materials following Problem 8.3.1.

Page 906 (§ 8.02[B]): Just before subsection [C], add the following new subsections [6] and [7] and Problem 8-3.1:

[6] Social Group and the Social Distinction Requirement – The Impact for Children Fleeing Gang Violence

As mentioned above, the BIA had required that an asylum applicant identify a "social group" that was already a visible, particular group in society. On February 7, 2014, the Board issued two precedent decisions that affect asylum claims on account of membership in a particular social group: *Matter of W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014), and *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014). In both cases, the BIA clarified its requirement of "social visibility." Under the new test, an asylum application must show that a social group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) "socially distinct within the society in question."

In earlier cases, the BIA had rejected some asylum claims, holding that a proposed social group of young men fearing gang retribution or persecution did not meet the statutory definition because the social group was not one that was socially "visible." Several federal courts criticized this requirement and the BIA revisited the issue.

According to the 2014 BIA decisions, social visibility does not signify literal or ocular visibility. The BIA intended the term to mean that society as a whole must perceive or recognize the social group as distinct. To make this point clear, the BIA renamed the element, now calling it "social distinction" instead of "social visibility."

The 2014 cases also require an individual to prove that the social group is recognized by society in general, not just by the persecutors. The BIA held that the fact persecution did not itself create a social group. The BIA reaffirmed the distinctions in cases involving persecution of homosexuality or of individuals subjected to female genital mutilation. The cases state that what qualifies as "social distinction" will continue to be decided on a case-by-case basis.

For a thoughtful critique of these new decisions, see National Immigrant Justice Center, *Applying for Asylum After* Matter of M-E-V-G- *and* Matter of W-G-R- (Mar. 4, 2014), *available at* https://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20PSG%20Practice%20Advisory_Final_3.4.14.pdf.

[7] Family as a Particular Social Group

Kinship ties or family membership have long been recognized as a particular social group. *See, e.g.*, *Matter of C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006) ("Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups;") *Matter of Acosta*, 19 I. &. N. Dec. 211 (B.I.A. (1985); *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. (1987). *Matter of M-E-V-G*, 26 I. & N. Dec. 227 (B.I.A. 2014) (reprinted below) qualified particular social group (PSG) analysis to make clear that the inquiry into whether a proposed group is in fact a PSG is fact-based and circumstance-

specific, and requires the applicant to show that the proposed social group is "immutable," "particular," and "socially distinct" in the society in question.

In May 2017, the Board decided *Matter of L-E-A-*, 27 I. & N. Dec. 40 (B.I.A. 2017). The Board emphasized that the "determination of whether a social group is cognizable is a fact-based inquiry made on a case-by-case basis," and that "[n]ot all social groups that involve family members meet the requirements of particularity and social distinction."

Here is an excerpt from the case describing the facts as presented to the BIA:

> The respondent is a native and citizen of Mexico who entered the United States for the first time in 1998 and departed under a grant of voluntary departure in May 2011. That same month, the respondent returned to his parents' home in Mexico City, Mexico. Previously, members of La Familia Michoacana, a criminal cartel, had approached the respondent's father, who owned a store that sold groceries and general merchandise in the neighborhood. The cartel members asked if they could sell drugs in the store, which the cartel viewed as a favorable distribution location. The respondent's father refused to allow the cartel to sell drugs in his store.
>
> About a week after the respondent returned to Mexico, he was running an errand with his cousin and a nephew when they heard gunshots coming from inside a car. A week later, the respondent was approached by the same car. Its four occupants identified themselves as members of La Familia Michoacana. They asked if he would sell drugs for them at his father's store because they liked the store's location. The respondent declined, and the cartel members indicated that he should reconsider.
>
> The following week, the respondent was again approached by the car. The four occupants, who were wearing masks, tried to grab him and put him in the car, but he was able to get away. Soon after, the respondent left for the border and was ultimately successful in crossing into the United States. Members of La Familia Michoacana contacted the respondent's father and claimed to have kidnapped the respondent, which his father was able to confirm was untrue. The respondent's father still operated the store, but he began paying ""rent" to La Familia Michoacana, which made it no longer profitable. The respondent's family members who live in Mexico, including his parents, have not been subjected to additional incidents of harm.
>
> The respondent believes that he was targeted by members of La Familia Michoacana because of his membership in the particular social group comprised of his father's family members, and he asserted a fear of persecution in the future on this basis. The Immigration Judge found the respondent credible, but she concluded that La Familia Michoacana was interested in distributing illegal drugs at the store and increasing its profits, rather than being motivated to harm his father's family members based on their membership in the family itself. In particular, the Immigration Judge found that the persecutor's motive related to ownership of the

> store and, notably, that if the store were to be sold, they would target the new owner. On appeal, the respondent argues that he experienced harm rising to the level of persecution based on his membership in the particular social group of his father's family and that he has a well-founded fear of harm on this basis in the future if returned to Mexico.
>
> We requested supplemental briefing in this case, and the respondent, the Department of Homeland Security ("DHS"), and amici curiae responded. Both parties agree that the immediate family unit of the respondent's father qualifies as a cognizable particular social group. They also agree that if family membership is a central reason for persecuting an asylum applicant, nexus may be established. In addition, the respondent argues that the Immigration Judge did not make complete findings of fact with regard to his application for protection under the Convention Against Torture. The amici curiae generally support the arguments of the respondent.

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The Board agreed that the respondent's proposed PSG (family members of the respondent's father) met the immutability, particularity and social visibility requirements. However, the Board denied the respondent's asylum claim because it found that the respondent's persecution was not on account of his membership in the PSG. "A persecution claim cannot be established if there is no proof that the applicant or other members of the family were targeted *because of* the family relationship…if the persecutor would have treated the applicant the same if the protected characteristic of the family did not exist, then the applicant has not established a claim on this ground." *Matter of L-E-A-*, 27 I. & N. Dec. at 43-44. Further emphasizing the fact-based nature of PSG claims based on family, the Board noted that "the question of a persecutor's motive will involve a particularized evaluation of the specific facts and evidence in an individual claim." *Id.* at 44. The BIA acknowledged that the Fourth Circuit did not require a showing of a protected ground for the original persecution of the family member who suffered harm. "*See, e.g.*, Cruz v. Sessions, 853 F.3d 122, 129-30 (4th Cir. 2017); Hernandez-Avalos v. Lynch, 784 F.3d 944, 949-50 (4th Cir. 2015). While it is not clear how the Fourth Circuit would apply that precedent to the facts here, this case does not arise in the Fourth Circuit." *Id.* at n.4.

Matter of L-E-A- emphasizes the importance of developing the record because of the fact-based, individualized nature of PSG inquiries, and also the respondent's responsibility to show that his proposed PSG is "one central reason" for his persecution.

We summarize below some recent social group cases to illustrate the wide range of approaches among the circuits and the types of claims that have been accepted and rejected:

Cantillano Cruz v. Sessions, 853 F.3d 122 (4th Cir. 2017). The court granted the petition for review and remanded, concluding that the petitioner's familial relationship with her husband, whom she suspected had been murdered by his employer, was one central reason for the claimed past persecution and fear of future persecution, thereby meeting the statutory "nexus requirement" for asylum provided in INA § 208(b)(1)(B)(i).

Flores-Rios v. Lynch¸ 807 F.3d 1123 (9th Cir. 2015). The court held that, in the face of the Guatemalan petitioner's social group claim and the evidence that gang members killed his father and cousin and threatened his sister, the BIA erred in failing to address the family aspect of his social group claim

Aldana-Ramos v. Holder, 757 F.3d 9 (1st Cir. 2014). The court remanded, finding that the factual record did not preclude and would even allow the BIA to find that petitioners were members of a particular social group by virtue of their family relationship, without any need to show a further protected ground.

Cambara-Cambara v. Lynch, 837 F.3d 822 (8th Cir. 2016). The court upheld the BIA's finding that the petitioners' family was no different from any other Guatemalan family who experienced gang violence. Nor was there any evidence that their mistreatment was associated with membership in a social group.

Martinez v. Holder, 740 F.3d 902 (4th Cir. 2014). The court reversed the BIA and held that the particular social group of former MS-13 members who have renounced their gang membership is immutable for withholding of removal purposes.

Musa v. Lynch, 813 F.3d 1019 (7th Cir. 2016). The court found that substantial evidence failed to support the BIA's conclusion the petitioner would not likely be subjected to female genital mutilation (FGM) if removed to Botswana, especially in light of her testimony that her family practiced FGM.

Njie v. Lynch, 808 F.3d 380 (8th Cir. 2015). The court found that the BIA did not abuse its discretion in denying petitioners' motions to remand, finding that evidence regarding female genital mutilation (FGM) was not previously unavailable and was insufficient to establish prima facie eligibility for asylum.

Cece v. Holder, 733 F.3d 662 (7th Cir. 2013). The court granted the petition for review and remanded, finding that the BIA erred in its relocation assessment as well as its social group analysis of young women targeted for prostitution by traffickers in Albania.

Seck v. U.S. Att'y Gen, 663 F.3d 1356 (11th Cir. 2011). The court found that the BIA failed to give reasoned consideration to the petitioner's claim when it found she could relocate within Senegal to avoid being beaten or killed for attempting to protect her U.S. citizen daughter from FGM.

Bringas-Rodriguez v. Sessions, 850 F.3d 1051 (9th Cir. 2017). The en banc court granted the petition for review of the BIA's denial of asylum, withholding of removal, and protection under the Convention Against Torture (CAT) to a homosexual, HIV-positive citizen of Mexico who asserted that Mexican officials were unable or unwilling to protect him from harm by private individuals on account of his sexual orientation. The court concluded that the petitioner suffered past persecution that the Mexican government was unable or unwilling to control. The court also concluded the petitioner was entitled to a presumption of future persecution, and remanded for the BIA to consider whether the presumption was rebutted and to consider the petitioner's claims for

withholding of removal and CAT protection, taking into account new evidence of the petitioner's HIV diagnosis.

Granada-Rubio v. Lynch, 814 F.3d 35 (1st Cir. 2016). The court upheld the BIA's finding that the petitioner failed to present evidence that her proposed particular social group ("women with children whose husbands live and work in the U.S.") was socially distinct.

Rivera v. Lynch, 845 F.3d 864 (7th Cir. 2017). The court affirmed the BIA's denial of asylum, finding the petitioner failed to present evidence supporting his argument that, as a long-time resident of the United States, he would be perceived in El Salvador as wealthy and consequently face persecution by gangs if removed there.

Gonzalez-Soto, v. Lynch 841 F.3d 682 (5th Cir. 2016). The court held that persons perceived to be wealthy following their return home from the United States fail to constitute a sufficiently particular social group to support an application for withholding of removal.

Urbina-Dore v. Holder, 735 F.3d 952 (7th Cir. 2013). The court upheld the BIA's conclusions that the squatters, known as "campesinos," did not act on account of petitioners' status as landowners and that Honduras is both willing and able to protect landowners from campesinos.

Ordonez-Quino v. Holder, 760 F.3d 80 (1st Cir. 2014). The court vacated and remanded the asylum denial, finding that the petitioner showed his Mayan Quiché identity was at least one central reason why he and his community were targeted by the Guatemalan army.

de Carvalho-Frois v. Holder, 667 F.3d 69 (1st Cir. 2012). The court found that the petitioner's social group of witnesses to a serious crime whom the government is unable or unwilling to protect was not sufficiently "socially visible" to establish a particular social group

Gashi v. Holder, 702 F.3d 130 (2d Cir. 2012). The court vacated the BIA's order denying asylum, held that a group of potential witnesses against a KLA leader constituted a particular social group, and remanded the case for further consideration.

Garcia v. Att'y Gen., 665 F.3d 496 (3d Cir. 2011). Although the Guatemalan government was willing to protect the petitioner in exchange for her testimony in a murder trial, the fact that it relocated her to Mexico is an admission that it could not actually protect her.

Problem 8-3.1 Developing Social Group Theory for a Child Fleeing Gang Violence

Jasmeet Anaadi, a New York attorney, has agreed to take on the pro bono representation of a teenager, Julio Reyes, in removal proceedings. Jasmeet believes that Julio, a citizen of Honduras, may have a claim for asylum. He has agreed to help Julio file an application for asylum before the USCIS Asylum Office. Jasmeet notes that although Julio was placed into removal proceedings, when he was arrested he met the definition of an unaccompanied alien child and therefore, the application for asylum can be made before the USCIS Asylum Office and the removal proceeding can be administratively closed pending the outcome of the asylum application. Jasmeet wants you to prepare a legal memorandum supporting Julio's asylum application. He wants you to summarize

Julio's eligibility for asylum protection. If time is short, Jasmeet will accept a detailed outline of the legal elements.

Jasmeet has done some research about articulating the nexus between Julio's fears of harm in Honduras and establishing that his claim is based on one of the protected grounds. He is particularly concerned about arguing that the February 7, 2014 BIA cases *Matter of M-E-V-G-* and *Matter of W-G-R-* (see below) do not preclude Julio's claim for asylum. In your legal memorandum he wants to articulate the prima facie case for Julio, explaining how Julio qualifies for asylum protection and applying the relevant case law to support the grant of his application.

Jasmeet will prepare the relevant form I-589 asylum application and Julio's affidavit in support of the application after he has read your summary of the facts to develop the legal argument in the brief. He has suggested that you note for him in that brief where you would attach exhibits of supporting materials. For example, if you are going to cite the Honduras Country Condition Report prepared by the State Department (see below), you would note in your brief that you would quote the report.

FACTUAL BACKGROUND:
Julio was born in Marcala, Honduras in May of 2000. He attended school until the sixth grade (2011) but that year his father, Ernesto, left the family and his mother said there were no more funds for school fees. Ernesto entered the U.S. without inspection and is now married to a U.S. citizen named Ruth.

Julio is the oldest of three children. He has a little sister who is 12 and a little brother who is 10. Julio went to work on the family's small coffee fields farms in the highlands. Julio's mother is named Sylvia; she is 36 years old. She lives in Honduras and has never lived anywhere else. Sylvia told Julio that Ernesto had traveled to the United States to earn money for the family.

Julio turned 12 in 2012. It was the coffee harvest season in midwinter and he was working in the small family field when a group of local teenage boys surrounded him and told him that the land was forfeited to the Mara. The Mara members told Julio that he could pay a "rent" of $250 or he could give the land to the gang. (The "Maras" is a generic term for gang. There are several well-known gangs operating in Honduras.)

The family did not have the money demanded by the gang and Julio said he would give up the land. A few days later one of Julio's uncles went to work on the land. When he did not return at nightfall Julio went to look for him. Julio found his uncle's dead body in the coffee fields. Julio said his uncle died from multiple stab wounds. Julio went to the Marcala police and filed a report. The coroner issued a death certificate that stated the cause of death was "murder." The family waited to be interviewed further by the local police or prosecutor. No call came. Julio went to the police department to make a complaint and was told by the desk sergeant that there was no witness to the murder, so nothing could be done. The next day Julio's mother found a note that said they would all be dead if they went to the police again. Julio told his mother Sylvia that he had not told anyone he was going to visit the police. Sylvia told Julio that he should travel to the United States to try to find his father. She told him that he had to earn money to replace the family's lost income.

Julio began his journey to the United States the next week. He rode the bus from Honduras through Guatemala to the Mexican border. He successfully evaded the border authorities in Mexico and traveled by train to Northern Mexico. He hired a smuggler and was brought by foot into the Arizona desert. After walking for hours a truck picked them up and was driving them to Tucson. He said the truck was pulled over right at the city limits by Tucson city police. Julio said he heard the police officer tell the driver, in Spanish, that he pulled him over because, "This looks like a car of illegals to me. I'm going to call CBP." Customs and Border Patrol Agents (CBP) arrived about thirty minutes later and arrested everyone in the truck. Julio never saw any of them again and did not know any of their full names. (Jasmeet says he does not need you to focus on any motion to suppress the arrest. He is considering that option separately.)

CBP turned Julio over to ICE, where he was placed in a juvenile detention facility. Julio stayed there one month, until he was told he was going to be released to his father, Ernesto. The government had located Ernesto in Yonkers and his father paid for Julio to be flown to New York. Julio is now living with Ernesto and his stepmother Ruth. As stated above, Ruth is a U.S. citizen.

ICE put Julio in removal proceedings. He is charged with being an alien and a citizen of Honduras. The Notice to Appear says that he was arrested in or near Tucson, Arizona and that he is removable as an illegal entrant pursuant to INA § 212(a)(6)(A).

Jasmeet ended his memorandum to you with this note: "I am worried about Julio. He appears very withdrawn and nervous around his father. I asked him if he is afraid to go home. He did not answer for a long time. He finally said, "I can't go back. My family is trapped between the gangs and the police force that the gangs control. I have to stay here and work and help them as best I can."

Jasmeet found some information about Honduras that is attached to his memo to you. He tells you that you should not do any more research about the country at this time but to work with the materials he attached.

Jasmeet has interviewed Julio several more times and has learned a few more facts about his life in Marcala. Julio believes the gang that attacked him was the MS-18 because he saw the number 18 tattooed on two of the boys and he knows they are in the area. Jasmeet found a video from last summer in another region of Honduras at http://www.youtube.com/watch?v=R3cO89t54jU. The video has some very graphic images.

Julio told Jasmeet that at least three boys he knows have been killed by gang members. He thinks it is because the boys would not help the gang. Two girls he knows in Marcala told him they were going to live with relatives because the gangs constantly threatened them and they were afraid of being kidnapped. Julio doesn't know where those girls are now.

Jasmeet talked to Sylvia on the phone. He asked her if she would put her testimony about the gangs into a notarized affidavit. Sylvia said she was too afraid to get a letter signed by any official because she was sure the word would get out that she was talking about the gangs. She told Jasmeet that Julio had made enough trouble for the family by going to the police. She does not have an email account. Jasmeet reached her by calling a store in town and arranging a time to talk with Sylvia. The store does have a fax machine.

Jasmeet says he is aware that another way for Julio to immigrate is through his stepmother Ruth or perhaps via Special Immigrant Juvenile status but he would like to pursue asylum at this time because Julio is a minor and because Julio is very worried about his mother Sylvia and his siblings left behind. Julio told Jasmeet that he cannot sleep because he worries his family is not safe.

ESSENTIAL MATERIALS FOR PROBLEM 8-3.1

Matter of M-E-V-G-, 26 I. & N. Dec. 227 (B.I.A. 2014) [below]

U.S. Dep't of State, 2013 Honduras State Department Country Report, *at* http://www.state.gov/documents/organization/220663.pdf. Portions of that report discuss gang activity, police corruption, labor laws, and other topics relevant to human rights in Honduras.

Carmen Stella Van den Heuvel, *Honduran Maras Gangs: Destroying Everything in Their Path*, Washington Times, Mar. 16, 2013, *at* http://communities.washingtontimes.com/neighborhood/world-view/2013/mar/16/honduran-maras-gangs-human-marabuntas/#ixzz2mG7ldkPG.

Women's Refugee Commission, *Forced From Home: The Lost Boys and Girls of Central America* (Oct. 2012), *at* https://www.google.com/search?client=safari&rls=en&q=Women%E2%80%99s+Refugee+Commission,+Forced+From+Home:+The+Lost+Boys+and+Girls+of+Central+America&ie=UTF-8&oe=UTF-8.

Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, Immigration Law and Procedure § 33.04[4][c].

Matter of M-E-V-G-

26 I. & N. Dec. 227 (B.I.A. 2014)

This case is before us on remand from the United States Court of Appeals for the Third Circuit for further consideration of the respondent's applications for asylum and withholding of removal. The court declined to afford deference to our conclusion that a grant of asylum or withholding of removal under the "particular social group" ground of persecution requires the applicant to establish the elements of "particularity" and "social visibility. "

Upon further consideration of the record and the arguments presented by the parties and amici curiae, we will clarify our interpretation of the phrase "particular social group." We adhere to our prior interpretations of the phrase but emphasize that literal or "ocular" visibility is not required, and we rename the "social visibility" element as "social distinction." . . .

I. FACTUAL AND PROCEDURAL HISTORY

Prior decisions of the Board and Third Circuit have set forth the underlying facts of this case in detail. In short, the respondent claims that he suffered past persecution and has a well-founded fear of future persecution in his native

Honduras because members of the Mara Salvatrucha gang beat him, kidnaped and assaulted him and his family while they were traveling in Guatemala, and threatened to kill him if he did not join the gang. In addition, the respondent testified that the gang members would shoot at him and throw rocks and spears at him about two to three times per week. The respondent asserts that he was persecuted "on account of his membership in a particular social group, namely Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs. "

The Immigration Judge issued a decision on June 15, 2005, denying the respondent's applications for asylum, withholding of removal, and protection under [CAT] We summarily affirmed the Immigration Judge on February 27, 2006...

On remand, we issued a decision on October 22, 2008, which again denied the respondent's applications for asylum and withholding of removal. We held that the respondent did not establish past persecution "on account of a protected ground" and applied our intervening decisions in *Matter of S-E-G-, 24 I. & N. Dec. 579 (BIA* 2008), and *Matter of E-A-G-, 24 I. & N. Dec. 591 (BIA* 2008), in concluding that the respondent did not show that his proposed particular socia*l* group possessed the required elements of "particularity" and "social visibility."

The case is now before us following a second remand from the Third Circuit. …The court found that our requirement that a particular social group must possess the elements of "particularity" and "social visibility" is inconsistent with prior Board decisions, that we have not announced a "principled reason" for our adoption of that inconsistent requirement, and that our interpretation is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).* …Nevertheless, the court advised that "an agency can change or adopt its policies" and recognized that the Board may add new requirements to, or even change, its definition of a "particular **s**ocial group." *Id*. . . .

II. ISSUE

The question before us is whether the respondent qualifies as a "refugee" as a result of his past mistreatment, and his fear of future persecution, at the hands of gangs in Honduras. Specifically, we address whether the respondent has established an asylum claim based on his membership in a particular social group.

III. PARTICULAR SOCIAL GROUP

A. Origins

An applicant for asylum has the burden of establishing that he or she is a refugee within the meaning of section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2012). This requires the applicant

to demonstrate that he or she suffered past persecution or has a well-founded fear of future persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion." *Id.; see also INS v. Elias-Zacarias, 502 U.S. 478, 483*--84 (1992); *INS v. Cardoza-Fonseca, 480 U.S. 421, 436*--37 (1987) (recognizing that one of Congress' primary purposes in passing the Refugee Act of 1980…, was to implement the principles agreed to in the United Nations Protocol Relating to the Status of Refugees. . . .).

The phrase "membership in a particular social group, " which is not defined in the Act, the Convention, or the Protocol, is ambiguous and difficult to define. *Matter*

of Acosta, 19 I. & N. Dec. 211, 232--33 (BIA 1985); *see also, e.g., Valdiviezo-Galdamez* II, 663 F.3d at 594 ("The concept is even more elusive because there is no clear evidence of legislative intent."); *Fatin v. INS, 12 F.3d 1233, 1238 (3d Cir. 1993)* ("Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a 'particular social group. '").

Congress has assigned the Attorney General the primary responsibility of construing ambiguous provisions in the immigration laws, and this responsibility has been delegated to the Board. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424--25 (1999); *see also* section 103(a)(1) of the Act, 8 U.S.C. § 1103(a)(1) (2012) (providing that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). The Board's reasonable construction of an ambiguous term in the Act, such as "membership in a particular social group, " is entitled to deference. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. at 844.

We first interpreted the phrase "membership in a particular social group" in *Matter of Acosta*. We found the doctrine of "ejusdem generis" helpful in defining the phrase, which we held should be interpreted on the same order as the other grounds of persecution in the Act. Matter of Acosta, 19 I. & N. Dec. at 233--34. . . . The phrase "persecution on account of membership in a particular social group" was interpreted to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." *Matter of Acosta*, 19 I. & N. Dec. at 233. The common characteristic that defines the group must be one "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.*

B. Evolution of the Board's Analysis of Social Group Claims

Matter of Acosta was decided based on whether a common immutable characteristic existed. *Matter of Acosta*, 19 I. & N. Dec. at 233. We rejected the applicant's claim that a Salvadoran cooperative organization of taxi drivers was a particular social group, because members could change jobs and working in their job of choice was not a "fundamental" characteristic. *Id. at 234* ("[T]he internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice."). Because there was no common immutable characteristic in *Matter of Acosta*, we did not reach the question whether there should be additional requirements on group composition.

At the time we issued *Matter of Acosta*, only 5 years after enactment of the Refugee Act of 1980, relatively few particular social group claims had been presented to the Board. Given the ambiguity and the potential breadth of the phrase "particular *social* group, " we favored a case-by-case determination of the particular kind of group characteristics that would qualify under the Act… .This flexible approach enabled courts to apply the particular social group definition within a wide array of fact-specific asylum claims.

Now, close to three decades after *Acosta*, claims based on social group membership are numerous and varied. The generality permitted by the *Acosta* standard provided

flexibility in the adjudication of asylum claims. However, it also led to confusion and a lack of consistency as adjudicators struggled with various possible social groups, some of which appeared to be created exclusively for asylum purposes. . . .

Matter of R-A-, 22 I. & N. Dec. 906, 919 (BIA 1999; A.G. 2001), we cautioned that "the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown." [20]

Over the years there were calls for the Board to state with more clarity its framework for analyzing social group claims. ...To provide clarification and address the evolving nature of the claims presented by asylum applicants, we refined the particular social group interpretation first discussed in *Matter of Acosta* to provide the additional analysis required once an applicant demonstrated membership based on a common immutable characteristic.

In a series of cases, we applied the concepts of "social visibility" and "particularity" as important considerations in the particular social group analysis, and we ultimately deemed them to be requirements. ...Although we expanded the particular social group analysis beyond the *Acosta* test, the common immutable characteristic requirement set forth there has been, and continues to be, an essential component of the analysis.

In *Matter of C-A-*, we recognized "particularity" as a requirement in the particular social group analysis and held that the "social visibility" of the members of a claimed social group is "an important element in identifying the existence of a particular social group. " *Matter of C-A-, 23 I. & N. Dec. 951, 957, 959*-61 (BIA 2006) (holding that "noncriminal informants working against the Cali drug cartel" in Colombia were not a particular social group) , *aff'd sub nom. Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006),cert. denied*, *549 U.S. 1115 (2007).*

We subsequently determined that a "particular social group" cannot be defined exclusively by the claimed persecution, that it must be "recognizable" as a discrete group by others in the society, and that it must have well-defined boundaries. *Matter of A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 74*--76 (BIA 2007) (holding that "wealthy" Guatemalans were not shown to be a particular social group within the meaning of the "refugee" description), *aff'd sub nom. Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007).*

Finally, in 2008, we issued *Matter of S-E-G-* and *Matter of E-A-G-*, in which we held that--in addition to the common immutable characteristic requirement set forth in *Acosta*--the previously introduced concepts of "particularity" and "social visibility" were distinct requirements for the "membership in a particular social group" ground of persecution. In *Matter of S-E-G-, 24* I. & N. Dec. at 582, we stated that we were seeking to provide "greater specificity to the definition of a social

[20] [N. 7] Although our decision in *Matter of R-A-* was vacated by the Attorney General in 2001 and was explicitly limited to the facts of that case, its role in the progression of particular social group claims analysis remains relevant. [Authors' Note: see the recent development in protecting women in violent marriages in *Matter of A-R-C-G* above].

group" outlined in Acosta by requiring an applicant to establish "particularity" and "social visibility, " consistent with our prior decisions. In *Matter of E-A-G-,* we noted that "we have issued a line of cases reaffirming the particular social group formula set forth in Matter of Acosta . . . and providing further clarification regarding its proper application." *Matter of E-A-G-,* 24 I. & N. Dec. at 594 (reaffirming the requirements of *Acosta* and the additional requirements of "particularity" and "social visibility").

…

C. Positions of the Parties

On appeal, the respondent and amici curiae argue that the Board should disavow the requirements of "social visibility" and "particularity" and should restore *Matter of Acosta* as the sole standard for determining a particular social group. 8 The Department of Homeland Security ("DHS") argues that "social visibility" and "particularity" are valid refinements to the particular social group interpretation but that the two concepts should be clarified and streamlined into a single requirement.

IV. ANALYSIS

We take this opportunity to clarify our interpretation of the phrase "membership in a particular social group. " In doing so, we adhere to the social group requirements announced in *Matter of S-E-G-* and *Matter of E-A-G-*, as further explained here and *in Matter of W-G-R-,* 26 I. & N. Dec. 208 *(*BIA 2014), a decision published as a companion to this case. 9 We believe that these requirements provide guidance to courts and those seeking asylum based on "membership in a particular social group, " are necessary to address the evolving nature of claims asserted on this ground of persecution, and are essential to ensuring the consistent nationwide adjudication of asylum claims. *See Matter of R-A-*, 24 I. & N. Dec. 629, 631 (A.G. 2008) ("Providing a consistent, authoritative, nationwide interpretation of ambiguous provisions of the immigration laws is one of the key duties of the Board."); *see also FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515-16 (2009); 8 C.F.R. § 1003.1(d)(1) (2013). In this regard, we clarify that the **"**social visibility" test was never intended to, and does not require, literal or "ocular" visibility.

A. Protection Within the Refugee Context

The interpretation of the phrase "membership in a particular social group" does not occur in a contextual vacuum. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996) (stating that although analysis of a statute begins with its text, interpretation of the statutory language does not occur in a contextual vacuum). Consistent with the interpretive canon "ejusdem generis," the proper interpretation of the phrase can only be achieved when it is compared with the other enumerated grounds of persecution (race, religion, nationality, and political opinion), and when it is considered within the overall framework of refugee protection.

…The limited nature of the protection offered by refugee law is highlighted by the fact that it does not cover those fleeing from natural or economic disaster, civil strife, or war. *See Matter of Sosa Ventura, 25 I. & N. Dec. 391, 394 (BIA* 2010) (explaining that Congress created the alternative relief of Temporary Protected

Status because individuals fleeing from life-threatening natural disasters or a generalized state of violence within a country are not entitled to asylum) . Similarly, asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions. *See Konan v. Att'y Gen. of U.S.,* 432 F.3d 497, 506 (3d Cir. 2005)*;Abdille v. Ashcroft*, 242 F.3d 477, 494 (3d Cir. 2001) ("[O]rdinary criminal activity does not rise to the level of persecution necessary to establish eligibility for asylum. "); *Singh v. INS, 134 F.3d 962, 967 (*3d Cir. 1998*)* ("Mere generalized lawlessness and violence between diverse populations, of the sort which abounds in numerous countries and inflicts misery upon millions of innocent people daily around the world, generally is not sufficient to permit the Attorney General to grant asylum . . . .") .

Unless an applicant has been targeted on a protected basis, he or she cannot establish a claim for asylum. . . .

The "membership in a particular social group" ground of persecution was not initially included in the refugee definition proposed by the committee that drafted the U.N. Convention; it was added later without discussion. *Matter of Acosta*, 19 I. & N. Dec. at 232. The guidelines to the Protocol issued by the United Nations High Commissioner for Refugees ("UNHCR ") clearly state that the particular social group category was not meant to be "a 'catch all' that applies to all persons fearing persecution. " UNHCR, Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, at 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), *available at* http://www.unhcr.org/3d58de2da.html ("UNHCR Guidelines").

Societies use a variety of means to distinguish individuals based on race, religion, nationality, and political opinion. The distinctions may be based on characteristics that are overt and visible to the naked eye or on those that are subtle and only discernible by people familiar with the particular culture. The characteristics are sometimes not literally visible. Some distinctions are based on beliefs and characteristics that are largely internal, such as religious or political beliefs. Individuals with certain religious or political beliefs may only be treated differently within society if their beliefs were made known or acted upon by the individual. The members of these factions generally understand their own affiliation with the grouping, and other people in the particular society understand that such a distinct group exists.

Therefore these enumerated grounds of persecution have more in common than simply describing persecution aimed at an immutable characteristic. They have an external perception component within a given society, which need not involve literal or "ocular" visibility. Considering the refugee context in which they arise, we find that the enumerated grounds all describe persecution aimed at an immutable characteristic that separates various factions within a particular society.

B. Particular Social Group

Given the suggestions that further explanation of our interpretation of the phrase "particular social group" is warranted, we now provide such clarification based on the analysis set forth above. …

The primary source of disagreement with, or confusion about, our prior interpretation of the term "particular social group" relates to the social visibility requirement. *See Umana-Ramos v. Holder*, 724 F.3d at 672--73; *Henriquez-Rivas v. Holder*, 707 F.3d at 1087;*Valdiviezo-Galdamez* II, 663 F.3d at 603--09. Contrary to our intent, the term "social visibility" has led some to believe that literal, that is, "ocular" or "on-sight," visibility is required to make a particular social group cognizable under the Act. See *Valdiviezo-Galdamez* II, 663 F.3d at 606--07. Because of that misconception, we now rename the "social visibility" requirement as "social distinction." [21] This new name more accurately describes the function of the requirement. Thus, we clarify that an applicant for asylum or withholding of removal seeking relief based on "membership in a particular social group" must establish that the group is

(1) composed of members who share a common immutable characteristic,

(2) defined with particularity, and

(3) socially distinct within the society in question.

1. Overview of Criteria

. …

The "particularity" requirement relates to the group's boundaries or, as earlier court decisions described it, the need to put "outer limits" on the definition of a "particular social group. " … The particular social group analysis does not occur in isolation, but rather in the context of the society out of which the claim for asylum arises. Thus, the "social distinction" requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. A viable particular social group should be perceived within the given society as a sufficiently distinct group. The members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society. [22]

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[21] [N. 11] The term "social distinction" was proposed by the DHS on appeal. It argued for the combination of the "social visibility" and "particularity" requirements into a single "social distinction" requirement because of the close relationship between the two concepts. While we acknowledge that there is some degree of overlap, combining the requirements is not warranted because they serve distinct purposes. Thus, while we adopt the term "social distinction," our use of the term differs from that proposed by the DHS on appeal and at oral argument. In addition, we recognize that the DHS's proposed test also included a separate requirement that the social group must exist independently of the fact of persecution. However, this criterion is well established in our prior precedents and is already a part of the social group analysis. *See* Matter of A-M-E- & J-G-U-, 24 I. & N. Dec. at 74; *see also* Lukwago v. Ashcroft, 329 F.3d 157, 172 (3d Cir. 2003) ("[A] 'particular social group' must exist independently of the persecution suffered by the applicant for asylum. ").

[22] [N. 12] Although members of a particular social group will generally understand their own affiliation with the group, such self-awareness is not a requirement for the group's existence. *See, e.g.,* Henriquez-Rivas v. Holder, 707 F.3d at 1089 ("[F]or example, an infant may not be aware of

Literal or "ocular" visibility is not, and never has been, a prerequisite for a viable particular social group. … An immutable characteristic may be visible to the naked eye, and it is possible that a particular social group could be set apart within a given society based on such visible characteristics. However, our use of the term "social visibility" was not intended to limit relief solely to those with outwardly observable characteristics. Such a literal interpretation would be inconsistent with the principles of refugee protection underlying the Act and the Protocol.

Our interpretation of the phrase "membership in a particular social group" incorporates the common immutable characteristic standard set forth in *Matter of Acosta,* 19 I. & N. Dec. at 233, because members of a particular social group would suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to do so or because the basis of affiliation is fundamental to the members' identities or consciences. Our interpretation also encompasses the underlying rationale of both the "particularity" and "social distinction" tests.

2. "Particularity"

While we addressed the immutability requirement in *Acosta*, the term "particularity" is included in the plain language of the Act and is consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined. [23] …

A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group. *Matter of A-M-E- & J-G-U-,* 24 I. & N. Dec. at 76 (holding that wealthy Guatemalans lack the requisite particularity to be a particular social group). It is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part. *Id.* (observing that the concept of wealth is too subjective to provide an adequate benchmark for defining a particular social group).

The group must also be discrete and have definable boundaries--it must not be amorphous, overbroad, diffuse, or subjective. … The particularity requirement clarifies the point, at least implicit in earlier case law, that not every "immutable characteristic" is sufficiently precise to define a particular social group. *See, e.g., Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005) (finding the characteristics of poverty, homelessness, and youth to be "too vague and all encompassing" to set perimeters for a protected group within the scope of the Act).

3. "Social Distinction"

Our definition of "social visibility" has emphasized the importance of "perception" or "recognition" in the concept of "particular social group. " *See Matter of H-, 21 I.*

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race, sex, or religion. "). Nevertheless, as a practical matter, this point is of little import because the applicants in removal proceedings are generally professing their membership in these groups in the process of seeking asylum.

[23] [N. 13] However, there is a critical difference between a political opinion or religious belief, which may in theory be entirely personal and idiosyncratic, and membership in a particular social group, which requires that others in the society share the characteristics that define the group.

*& N. Dec. 337, 342 (*BIA 1996) (stating that in Somali society, clan membership is a "highly recognizable" characteristic that is "inextricably linked to family ties"). The term was never meant to be read literally. The renamed requirement "social distinction" clarifies that social visibility does not mean "ocular" visibility --either of the group as a whole or of individuals within the group--any more than a person holding a protected religious or political belief must be "ocularly" visible to others in society. *See, e.g.*, *Henriquez-Rivas v. Holder*, 707 F.3d at 1087--89. ***Social*** distinction refers to social recognition, taking as its basis the plain language of the Act--in this case, the word "social." To be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society. *Matter of C-A-*, 23 I. & N. Dec. at 956--57 (citing UNHCR Guidelines, *supra*). Society can consider persons to comprise a group without being able to identify the group's members on sight.

The examples in *Matter of Kasinga, Matter of Toboso-Alfonso*, and *Matter of Fuentes*, illustrate this point. It may not be easy or possible to identify who is opposed to FGM, who is homosexual, or who is a former member of the national police. These immutable characteristics are certainly not ocularly visible. Nonetheless, a society could still perceive young women who oppose the practice of FGM, homosexuals, or former members of the national police to comprise a particular social group for a host of reasons, such as sociopolitical or cultural conditions in the country. For this reason, the fact that members of a particular social group may make efforts to hide their membership in the group to avoid persecution does not deprive the group of its protected status as a particular social group. ….

The Third Circuit has indicated that it was "hard-pressed to discern any difference between the requirement of 'particularity' and the discredited requirement of 'social visibility. '" *Valdiviezo-Galdamez* II, 663 F.3d at 608. We respectfully disagree. As recognized by other courts, there is considerable overlap between the "social distinction" and "particularity" requirements, which has resulted in confusion. . . .

The "social distinction" and "particularity" requirements each emphasize a different aspect of a particular social group. They overlap because the overall definition is applied in the fact-specific context of an applicant's claim for relief. While "particularity" chiefly addresses the "outer limits" of a group's boundaries and is definitional in nature,… this question necessarily occurs in the context of the society in which the claim for asylum arises, *see Matter of S-E-G-,* 24 I. & N. Dec. at 584 (inquiring whether the group can be described in sufficiently distinct terms that it "would be recognized, in the society in question, as a discrete class of persons"). Societal considerations have a significant impact on whether a proposed group describes a collection of people with appropriately defined boundaries and is sufficiently "particular." Similarly, societal considerations influence whether the people of a given society would perceive a proposed group as sufficiently separate or distinct to meet the "social distinction" test.

For example, in an underdeveloped, oligarchical society, "landowners" may be a sufficiently discrete class to meet the criterion of particularity, and the society may view landowners as a discrete group, sufficient to meet the social distinction test. However, such a group would likely be far too amorphous to meet the particularity

requirement in Canada, and Canadian society may not view landowners as sufficiently distinct from the rest of society to satisfy the social distinction test. In analyzing whether either of these hypothetical claims would establish a particular social group under the Act, an Immigration Judge should make findings whether "landowners" share a common immutable characteristic, whether the group is discrete or amorphous, and whether the society in question considers "landowners" as a significantly distinct group within the society. Thus, the concepts may overlap in application, but each serves a separate purpose.

4. Society's Perception

The Ninth Circuit has recently observed that neither it nor the Board "has clearly specified whose perspectives are most indicative of society's perception of a particular social group. " *Henriquez-Rivas v. Holder*, 707 F.3d at 1089 (suggesting that "the perception of the persecutors may matter the most" in determining a society's perception of a particular social group) ; *see also Rivera-Barrientos v. Holder*, 666 F.3d at 650--51 (referencing the relevant society as both "citizens of the applicant's country" and "the applicant's community"). Interpreting "membership in a particular social group" consistently with the other statutory grounds within the context of refugee protection, we clarify that a group's recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.

Defining a social group based on the perception of the persecutor is problematic for two significant reasons. First, it is important to distinguish between the inquiry into whether a group is a "particular social group" and the question whether a person is persecuted "on account of" membership in a particular social group. In other words, we must separate the assessment whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and particular social group) from the issue of nexus. The structure of the Act supports preserving this distinction, which should not be blurred by defining a social group based solely on the perception of the persecutor.

Second, defining a particular social group from the perspective of the persecutor is in conflict with our prior holding that "a social group cannot be defined exclusively by the fact that its members have been subjected to harm." *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74. The perception of the applicant's persecutors may be relevant, because it can be indicative of whether society views the group as distinct. However, the persecutors' perception is not itself enough to make a group socially distinct, and persecutory conduct alone cannot define the group. *Id.; see also, e.g., Henriquez-Rivas v. Holder*, 707 F.3d at 1102 (Kozinski, C.J., dissenting) ("Defining a social group in terms of the perception of the persecutor risks finding that a group exists consisting of a persecutor's enemies list."); *Mendez-Barrera v. Holder*, 602 F.3d at 27 ("The relevant inquiry is whether the social group is visible in the society, not whether the alien herself is visible to the alleged persecutors. "). For example, a proposed social group composed of former employees of a country's attorney general may not be valid for asylum purposes. Although such a shared past experience is immutable and the group is sufficiently discrete, the employees may not consider themselves a separate group within the society, and the society may not consider these employees to be meaningfully distinct within society in general.

Nevertheless, such a social group determination must be made on a case-by-case basis, because it is possible that under certain circumstances, the society would make such a distinction and consider the shared past experience to be a basis for distinction within that society.

The former employees of the attorney general may not be considered a group by themselves or by society unless and until the government begins persecuting them. Upon their maltreatment, it is possible that these people would experience a sense of "group," and society would discern that this group of individuals, who share a common immutable characteristic, is distinct in some significant way. …The act of persecution by the government may be the catalyst that causes the society to distinguish the former employees in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution.

The persecutor's actions or perceptions may also be relevant in cases involving persecution on account of "imputed" grounds, such as where one is erroneously thought to hold particular political opinions or mistakenly believed to be a member of a particular social group. … For example, an individual may present a valid asylum claim if he is incorrectly identified as a homosexual by a government that registers and maintains files on homosexuals --in a society that considers homosexuals a distinct group united by a common immutable characteristic. In such a case, the social group exists independent of the persecution, and the perception of the persecutor is relevant to the issue of nexus (whether the persecution was or would be on account of the applicant's imputed homosexuality).

Persecution limited to a remote region of a country may invite an inquiry into a more limited subset of the country's society, such as in *Matter of Kasinga,* 21 I. & N. Dec. at 366, where we considered a particular social group within a tribe. *Cf. Henriquez-Rivas v. Holder*, 707 F.3d at 1089 ("Society in general may also not be aware of a particular religious sect in a remote region."). However, the refugee analysis must still consider whether government protection is available, internal relocation is possible, and persecution extends countrywide. Section 101(a)(42) of the Act; *Gambashidze v. Ashcroft, 381 F.3d 187, 192*--94 (3d Cir. 2004); Abdille v. Ashcroft, 242 F.3d at 496; *Matter of C-A-L-, 21 I. & N. Dec. 754, 757*--58 (BIA 1997). Only when the inquiry involves the perception of the society in question will the "membership in a particular social group" ground of persecution be equivalent to the other enumerated grounds of persecution.

C. Evidentiary Burdens [omitted]

Our interpretation of the phrase "membership in a particular ***social*** group" originated with the immutable characteristics test in *Matter of Acosta*. In response to the evolution of social group claims presented, we announced the addition of the "particularity" and "social visibility" requirements in *Matter of S-E-G-* and *Matter of E-A-G-*. Our transition to the term "social distinction" is intended to clarify the requirements announced in those cases; it does not mark a departure from established principles. We would reach the same result in *Matter of S-E-G-* and *Matter of E-A-G-* if we were to apply the term "social distinction" rather than "social visibility. " Therefore, we need not revisit cases where we used the term "social visibility. " *See INS v. Abudu*, 485 U.S. 94, 107 (1998); *Matter of S-Y-G-,*

24 I. & N. Dec. 247, 257 (BIA 2007) (explaining that an incremental or incidental change does not meet the requirements for untimely motions to reopen and that even a change in law is insufficient absent evidence that the prior version was meaningfully different); *Matter of G-D-*, 22 I. & N. Dec. 1132, 1135 (BIA 1999) (stating that an incremental development in case law does not warrant sua sponte reopening).

E. International Interpretations …

While the views of the UNHCR are a useful interpretative aid, they are "not binding on the Attorney General, the BIA, or United States courts." *INS v. Aguirre-Aguirre*, 526 U.S. at 427. Indeed, the UNHCR has disclaimed that its views have such force and has taken the position that the determination of "refugee" status is left to each contracting State. …

We believe that our interpretation in *Matter of S-E-G-* and *Matter of E-A-G*, as clarified, more accurately captures the concepts underlying the United States' obligations under the Protocol and will ensure greater consistency in the adjudication of asylum claims under the Act. …Unlike the UNHCR's alternative approach, we conclude that a particular social group must satisfy both the "protected characteristic" and "social perception" approaches, in addition to the particularity requirement, as described above.

V. APPLICATION TO THE RESPONDENT

In our prior decision in this case, we rejected the respondent's gang-related claim based on the reasoning set forth in *Matter of S-E-G-* and *Matter of E-A-G-*. In *Matter of S-E-G-,* 24 I. & N. Dec. at 582, we denied a gang-related asylum claim asserting a proposed social group of "Salvadoran youths who have resisted gang recruitment, or family members of such Salvadoran youth." The applicant's membership in a particular social group was not established because he did not show that the proposed group was sufficiently particular or socially distinct, that is, recognized in the society in question as a discrete class of persons…. His fear was based on his individual response to the gang's efforts to increase its ranks, not on persecution aimed at his membership in a group. *See INS v. Elias-Zacaria*s, 502 U.S. at 483 (rejecting a guerrilla recruitment claim where the applicant failed to establish that the persecutor had a motive other than increasing the size of its forces). Similarly, the applicant in *Matter of E-A-G-* did not establish that the proposed group, "persons resistant to gang membership, " was a particular social group. *Matter of E-A-G-,* 24 I. & N. Dec. at 594--95 ("The focus is not with statistical or actuarial groups, or with artificial group definitions. Rather, the focus is on the existence and visibility of the group in the society in question and on the importance of the pertinent group characteristic to the members of the group.").[24]

[24] [N. 16] We also rejected the applicant's second proposed social group of "young persons who are perceived to be affiliated with gangs." *Matter of E-A-G-*, 24 I. & N. Dec. at 593. We held that membership, or perceived membership, in a criminal gang cannot constitute a particular social group because "[t]reating affiliation with a criminal organization as being protected membership in a social group is inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior." *Id*. at 596; *see also* Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007).

While there is no universal definition of a "gang," it is generally understood to be "a criminal enterprise having an organizational structure, acting as a continuing criminal conspiracy, which employs violence and any other criminal activity to sustain the enterprise." UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* 1 n.3 (Mar. 31, 2010), *available at*http://www.unhcr.org/refworld/docid/4bb21fa02.html (quoting the Federal Bureau of Investigation's definition of a gang).

The UNHCR has recognized that "[g]ang-related violence may be widespread and affect large segments of society, in particular where the rule of law is weak. Ordinary people may be exposed to gang-violence simply because of being residents of areas controlled by gangs. " *Id.* para. 10, at 4. Although the UNHCR indicates that certain marginalized social groups may be specifically targeted by gangs, it also noted that "a key function of gangs is criminal activity. Extortion, robbery, murder, prostitution, kidnapping, smuggling and trafficking in people, drugs and arms are common practices employed by gangs to raise funds and to maintain control over their respective territories." *Id.* para. 8, at 3.

In *Matter of S-E-G-,* 24 I. & N. Dec. at 588, we also noted that the evidence of record indicated that El Salvador suffered from widespread gang violence, stating that "victims of gang violence come from all segments of society, and it is difficult to conclude that any 'group,' as actually perceived by the criminal gangs, is much narrower than the general population of El Salvador." Although this evidence of indiscriminate gang violence and civil strife was largely dispositive of the applicant's ability to establish the proposed group's existence in the society in question, it also undermined his attempt to establish a nexus between any past or feared harm and a protected ground under the Act.

Against the backdrop of widespread gang violence affecting vast segments of the country's population, the applicant in *Matter of S-E-G-* could not establish that he had been targeted on a protected basis.... Although he was subjected to one of the many different criminal activities that the gang used to sustain its criminal enterprise, he did not demonstrate that he was more likely to be persecuted by the gang on account of a protected ground than was any other member of the society. *Matter of S-E-G-*, 24 I. & N. Dec. at 587 ("[G]angs have directed harm against anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises and territorial power.").

The prevalence of gang violence in many countries is a large societal problem. The gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping, trafficking in drugs and people, and other crimes. Although certain segments of a population may be more susceptible to one type of criminal activity than another, the residents all generally suffer from the gang's criminal efforts to sustain its enterprise in the area. A national community may struggle with significant societal problems resulting from gangs, but not all societal problems are bases for asylum. ...*see also Matter of Sosa Ventura*, 25 I. & N. Dec. at 394 (discussing the history of Temporary Protected Status and the fact that individuals fleeing life-threatening natural disasters or a generalized state of violence were not entitled to either asylum or withholding of removal). Congress may choose to provide relief to those suffering from difficult situations not covered

by asylum and withholding of removal. *See, e.g.*, section 244(a)(1) of the Act, 8 U.S.C. § 1254a(a)(1) (2012); Ruth Ellen Wasem & Karma Ester, Cong. Research Serv., RS 20844, *Temporary Protected Status: Current Immigration Policy and Issues* 2 (2010), *available at* http://fpc.state.gov/documents/organization/137267.pdf.

Nevertheless, we emphasize that our holdings in *Matter of S-E-G-* and *Matter of E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs. *Matter of S-E-G-*, 24 I. & N. Dec. at 587 (recognizing that the evidence of record did not "indicate that Salvadoran youth who are recruited by gangs but refuse to join (or their family members) would be 'perceived as a group' by society, or that these individuals suffer from a higher incidence of crime than the rest of the population"). Social group determinations are made on a case-by-case basis. *Matter of Acosta*, 19 I. & N. Dec. at 233. For example, a factual scenario in which gangs are targeting homosexuals may support a particular social group claim. While persecution on account of a protected ground cannot be inferred merely from acts of random violence and the existence of civil strife, it is clear that persecution on account of a protected ground may occur during periods of civil strife if the victim is targeted on account of a protected ground. …

VI. CONCLUSION

We interpret the "particular social group" ground of persecution in a manner consistent with the other enumerated grounds of persecution in the Act and clarify that our interpretation of the phrase "membership in a particular social group" requires an applicant for asylum or withholding of removal to establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. Not every "immutable characteristic" is sufficiently precise to define a particular social group. The additional requirements of "particularity" and "social distinction" are necessary to ensure that the proposed social group is perceived as a distinct and discrete group by society. We further clarify that a particular social group does not require literal or "ocular" visibility.

…

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Notes and Questions

1. Is "Family" a Particular Social Group? Note that the BIA did not deny the case but remanded to determine if in Honduras, the social group could meet the social distinction standard. One other approach based on Julio's facts is to claim that his persecution is based on his family. *See Aldana-Ramos v. Holder*, 757 F.3d 9 (1st Cir. 2014) (family targeted by gangs could be social group and child does not need to prove nexus to a protected ground other than membership in the family) and *Padilla v. Holder*, 2013 U.S. App. LEXIS 18128 (2d Cir. Aug. 30, 2013) (kinship ties and family membership can constitute social group persecution); *Reyes-Mendez v Lynch*, 2015 U.S. App. LEXIS 19259 (7th Cir. Nov. 4, 2015) (persecution for being in a family is sufficient even if family members are not being persecuted due to a protected ground.) *But cf*. Quinteros v. Holder, 707 F.3d 1006 (8th Cir. 2013) (threat to parent from gang was insufficient). Can Julio structure his

claim to be persecution based on his membership in a family? How else might you structure his social group claim?

2. How Do Children Manifest Political Opinions? In the facts we are told that Julio went to the authorities in his region of Honduras. Could these acts of a twelve-year-old child be seen as political acts? Cases for children have been approved where the persecution is on account of his political actions and opinion or the opinion that gangs or the government might impute based on his behavior. *See also* Pirir-Boc v. Holder, 750 F.3d 1077 (9th Cir. 2014) (El Salvadoran persons taking concrete steps to oppose gang membership and gang authority could constitute a social group; case involved an adult and questions the recent BIA decisions about social group distinction); Henriquez-Rivas v. Holder, 707 F.3d 1081, 1083 (9th Cir. 2013) (en banc) ("witnesses who testify against gang members" may be cognizable as a particular social group for the purposes of asylum).

3. Procedural Challenges? Consider whether Jasmeet, the attorney for Julio, should be making any procedural challenges to the Notice to Appear. Julio was apprehended within 100 miles of the U.S.-Mexico border. He was not placed in expedited removal. The old Immigration and Naturalization Service had a policy memorandum that stated it is **not** appropriate to use expedited removals with unaccompanied juveniles. *See* Memorandum from Paul Virtue, INS General Counsel, *Unaccompanied Minors Subject to Expedited Removal* (Aug. 21, 1997) (AILA InfoNet Document No. 97082191), *available at* http://www.aila.org/content/default.aspx?docid=19758. The Trafficking Victims Reauthorization Act of 2008 also precludes the use of expedited removal with unaccompanied children apprehended at the border.

Members of Congress have introduced legislation that would allow forms of expedited removal for unaccompanied minors. See, e.g., H.R. 495, the "Protection of Children Act 2017." would allow the Secretary of State to negotiate expedited return policies with sending nations. The bill would also require detention of unaccompanied minors. This bill has cleared the House Judiciary Committee. The text of the bill is at https://www.congress.gov/bill/115th-congress/house-bill/495/text?q=%7B%22search%22%3A%5B%22%5C%22expedited+removal%5C%22%22%5D%7D&r=1.

You may want to review the material in Chapter Two that discussed statutory and regulatory limits to expedited removal.

Assuming that the case remains in regular removal, could Jasmeet move to suppress the statements Julio might have made before he was represented? See Chapter 6 removal procedures for a brief discussion of suppression in removal.

4. Other Remedies for Julio? While the main focus of this problem is social group persecution, could Julio possibly qualify for a family-based petition filed by his U.S. citizen stepmother Ruth? *See* INA § 201; 8 U.S.C. § 1151 and the definition of a child found in INA § 101(b); 8 U.S.C. § 1101(b). Review Chapter 4 on stepchildren and sponsorship under the legal immigration system.

Could Julio qualify for Special Immigrant Juvenile Status? Review INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J). If Ruth were to seek to become Julio's legal guardian and the family or juvenile

court accepts jurisdiction over Julio, the court would need to consider whether Julio was abandoned, abused, or neglected by one or both of his parents and that reunification with such parent and return to Honduras was not in Julio's best interest. See Chapter 7 for a further discussion of Special Immigrant Juvenile Status.

Consider whether any of these remedies is less difficult and traumatizing for Julio. He has told Jasmeet he worries about his family in Honduras. How can a twelve-year-old help his family in another country? Remember the discussion earlier in this chapter that there are not automatic derivative claims for parents or siblings based on persecution of a child.

5. Right to Appointed Counsel. Julio is fortunate because Jasmeet Anaadi has agreed to represent him on a pro bono basis. Do children in removal proceedings have a right to appointed counsel at government expense? The current statute, case law, and regulations do not require the government to appoint counsel. This means that only one-third of children were able to gain access to legal counsel. This affects the outcome of their cases substantially. According to one report, children without legal counsel were deported in over 80% of cases, while children with access to legal counsel were only deported in about 20% of cases. Transactional Records Access Clearinghouse, *Representation for Unaccompanied Children in Immigration Court* (Nov. 25, 2014), http://trac.syr.edu/immigration/reports/371/.

In June 2016, a federal district court granted class certification for children under 18 residing within the Ninth Circuit who were put into removal proceedings as aliens seeking admission on or before July 9, 2014. The suit seeks to establish a Fifth Amendment right to counsel for children in removal proceedings. The case was originally filed as J-E-F-M- v. Holder; it is now named F.L.B. v. Lynch, C14-1026 TSZ (W.D. Washington). On September 20, 2016, the Ninth Circuit held that the Western District of Washington did not have jurisdiction to hear either the constitutional or the statutory claims involved. The Plaintiffs filed a motion for rehearing with the Ninth Circuit on December 5, 2016. Materials about the litigation can be found at https://www.americanimmigrationcouncil.org/litigation/right-appointed-counsel-children-immigration-proceedings.

In a deposition taken in the case, an immigration judge stated that he had helped children as young as three or four understand their immigration proceedings without counsel. This statement triggered a great deal of press and some very creative videos of young children trying to defend themselves in hypothetical simulated deportation proceedings. See coverage in major papers: http://www.latimes.com/nation/immigration/la-na-immigration-judge-20160306-story.html and https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html. For videos see https://youtu.be/BN9t7LUf6RQ.

Page 931 (§ 8.02[D]): Credibility

In the second paragraph of subsection D, which starts with "For asylum claims…", add the following at the end of that paragraph:

For a discussion of the impact of an applicant's trauma on credibility determinations and suggestions for reform, see Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457 (2016) *at* https://digitalcommons.law.scu.edu/lawreview/vol56/iss3/1/.

Page 952 (§ 8.03[A]): Add the following to the end of Note 7:

The BIA revisited all of the issues in *Negusie* such as the scope of the persecutor bar. But in a June 2016 case, *Matter of M-H-Z-*, 26 I. & N. Dec. 757 (B.I.A. 2016), the BIA discussed a similar issue of whether a person could be barred from relief for providing "material support" to a terrorist organization. The BIA expressly found that there was no implied exception for material support provided under duress. In *M-H-Z-,* the applicant was forced to provide food, money, and space at her hotel for members of the Colombian revolutionary movement known as the FARC (Revolutionary Armed Forces of Colombia.).

In some recent federal cases, the courts have struggled with whether a duress exception to the persecutor bar is possible. *Compare Annachamy v. Holder*, 733 F.3d 254 (9th Cir. 2013) (no duress exception even if argued that actions were legitimate political activity) *overruled on other grounds, Abdisalan v. Holder*, 774 F.3d 517, 526 (9th Cir. 2014) *with Ay v. Holder*, 743 F.3d 317 (2d Cir. 2014) (remanding to BIA to determine if support provided under duress was a bar). The Second Circuit eventually joined other circuits in holding that there is no duress exception to the material support bar. Hernandez v. Sessions, 884 F.3d 107 (2d Cir. 2018).

The scope of *M-H-Z-* could be wide ranging. For people who are forced to provide support to their persecutors before fleeing to seek asylum, a rigid application of the bar to eligibility could disqualify those individuals from protection and negate mandatory protection under the duty of nonrefoulement. However, the BIA expressly rejected this assertion in the case, stating that an individual who is barred due to the provision of material support can still seek an individual waiver under INA § 212(d)(3)(B)(i). The BIA explained in a footnote how an individual must seek this waiver, which cannot be granted by the Immigration Judge:

> The Immigration Judges and the Board do not have the authority to adjudicate this discretionary waiver, which was accorded to the Secretary of State to exercise prior to the initiation of removal proceedings and to the Secretary of Homeland Security to exercise at any time, but only upon consultation with the Attorney General. The United States Citizenship and Immigration Services ("USCIS") issued a fact sheet describing the process by which the Secretary of Homeland Security exercises the authority to grant a waiver. *See* USCIS Fact Sheet, "Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal" (Oct. 23, 2008), https://www.uscis.gov/sites/default/files/USCIS/News/Pre-2010%20-%20Archives/2008%20Press%20Releases/Oct%2008/DHS_implements_exempt_auth_certain_terrorist_inadmissibility.pdf. This guidance indicates that the Secretary has given the USCIS authority, in consultation with U.S. Immigration

> and Customs Enforcement, to grant such waivers on a case-by-case basis to aliens who fall within particular categories of cases.

Matter of M-H-Z-, 26 I. & N. Dec. at 762 n.5.

USCIS issued two policy memoranda that created limited exceptions, but which use an approach of measuring the limited amount or insignificance of the support. USCIS, Policy Memorandum PM-602-0112, *Implementation of the Discretionary Exemption Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Certain Limited Material Support* (May 8, 2015), http://www.uscis.gov/sites/default/files/files/nativedocuments/2015-0508_Certain_Limited_Material_Support_PM_Effective.pdf; USCIS, Policy Memorandum PM-602-0113, *Implementation of the Discretionary Exemption Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Insignificant Material Support* (May 8, 2015), http://www.uscis.gov/sites/default/files/files/nativedocuments/2015-0508_Insignificant_Material_Support_PM_Effective.pdf.

Nevertheless, the BIA recently held that even an insignificant degree of support, such as forced cooking and cleaning, still constitutes support. The Board reasoned that "if providing merely an 'insignificant' amount of support did not constitute 'material support,' the DHS would not have found a need for [the individual] wavier [authorized by INA § 212(d)(3)(B)(i)]." Matter of A-C-M-, 27 I. & N. Dec. 303, 309 (B.I.A. 2018); Tal Kopan, *Woman's Forced Labor for Salvadoran Guerrillas Means She Must Leave US, Court Rules*, CNN (June 7, 2018), https://www.cnn.com/2018/06/06/politics/woman-el-salvador-guerillas-ruling/index.html.

On May 5, 2017, the BIA decided *Matter of J.M. Alvarado,* 27 I. & N. Dec. 27 (B.I.A. 2017), which confirmed that the noncitizen's personal motivation for assisting superiors in persecutory actions is irrelevant. In this case, the respondent was a member of the Salvadoran National Guard during El Salvador's civil war. He was ordered to guard a room, inside of which his superiors tortured a political dissident. The BIA held that although the respondent himself did not persecute anyone on the basis of their race, religion, nationality, membership in a particular social group, or political opinion, this did not preclude application of INA 241(b)(3)(B)(i)'s persecutor bar.

Page 954 (§ 8.03[E]): Add at the end of subsection E, just before § 8.04:

Children who enter the United States under the age of 18 and who are traveling without a parent or guardian are statutorily exempt from the normal one-year deadline to apply for asylum. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044. The TVPRA created a new provision, INA § 208(a)(2)(E); 8 U.S.C. § 1158(a)(2)(E), that eliminates the one-year bar for these juveniles. Even if the child is over 18 at the time of application, the agency maintains that the bar does not apply. Memorandum from Ted Kim, Acting USCIS Chief Asylum Division, *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (May 28, 2013), http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf.

This memo also allows children in removal to have their claim for asylum heard first by the USCIS Asylum Office. In most courts, an immigration judge will grant administrative closure while the case is adjudicated at the USCIS Asylum Office. The Chief Immigration Judge reiterated the power of immigration judges to administratively close cases in a memorandum issued April 6, 2015. See http://www.justice.gov/eoir/pages/attachments/2015/04/07/15-01.pdf.

In 2017, DHS Secretary Kelly issued a memorandum that instructed the Asylum Office to evaluate with ICE whether some children who are reunited with a parent or parents should be classified as Unaccompanied Minor Children and entitled to these special procedures. As of June 2017, no changes have been adopted. In anticipation of a reclassification of children, the Catholic Immigration Legal Network issued a practice advisory on preserving the beneficial classification for such youth. See https://cliniclegal.org/resources/practice-advisory-strategies-combat-government-efforts-terminate-unaccompanied-children.

In June 2016, a class action suit was filed on behalf of four asylum seekers challenging DHS's failure to advise them of the one-year deadline for filing their asylum applications. The government opposed the class certification and subject matter jurisdiction. The District Court granted the class and denied the government's motion. *Mendez Rojas v. Johnson*, No. C16-1024RSM, 2017 U.S. Dist. LEXIS 73262 (W.D. Wash. Jan. 10, 2017). The suit alleges that DHS and EOIR policies unlawfully interfere with the ability of asylum applicants to meet the one-year deadline. The complaint alleges that DHS frequently does not lodge the Notice to Appear with the Immigration Court after apprehension and the individual does not have the ability to file affirmatively with the USCIS Asylum Office because the database shows that they are in the process of being put into removal. EOIR does not allow filings at the court windows; they must be made before an Immigration Judge. Backlogs and delays may mean that the individual does not get notice of the one-year deadline until it is nearing or, in some cases, only after the deadline has passed.

Page 973 (§ 8.05):

Add the following as a new section D, at the bottom of page 973:

D. Continuances

Immigration judges frequently use continuances. For example, in 2012, the DOJ Inspector General found that over half of all immigration cases surveyed had one or more continuances. Memorandum from Chief Immigration Judge MaryBeth Keller (July 31, 2017), https://www.justice.gov/opa/press-release/file/1015996/download. In line with policies to promote efficiency he outlined in a December 2017 memo, on March 22, 2018, Attorney General Sessions directed the BIA to refer cases involving continuances to him for review. Matter of L-A-B-R-, 27 I. & N. Dec. 245 (Att'y Gen. 2018); Memorandum from Attorney General Jeff Sessions to the Executive Office for Immigration Review (Dec. 5, 2017), https://www.justice.gov/opa/press-release/file/1015996/download ("The timely and efficient conclusion of [immigration] cases serves the national interest. Unwarranted delays and delayed decision making do not.").

Chapter 9: U.S. Citizenship and Naturalization

Page 978 (§ 9.01[B][6]): Add the following to the end of subsection [6], just before subsection [7]:

This discussion continues today. The next presidential election will be in November 2016. One of the candidates is Senator Ted Cruz, the junior Republican senator from Texas. Senator Cruz was born in Calgary, Canada in 1970. His father, who became a naturalized U.S. citizen in 2005, was born in Cuba. His mother was born in Delaware. https://en.wikipedia.org/wiki/Ted_Cruz. Is Senator Cruz a "natural born citizen"?

Page 979 (§ 9.01): Add the following new subsection C, just before § 9.02:

C. Why Not Become a U.S. Citizen?

Not everyone who becomes a lawful permanent resident becomes a U.S. citizen. *See* Kirk Semple, *Making Choice to Halt at Door of Citizenship*, N.Y. Times, Aug. 26, 2013, *at* http://www.nytimes.com/2013/08/26/nyregion/making-choice-to-halt-at-door-of-citizenship.html. According to Semple, only about 60% of the foreign nationals who become lawful permanent residents become U.S. citizens. Compare Miriam Jordan, *Citizenship Agency Faulted Over Delays for Muslim Applicants*, Wall St. Journal, Aug. 21, 2013, *at* http://online.wsj.com/article/SB10001424127887323423804579023250536841912.html. In her article, Jordan describes a formerly secret USCIS program called Controlled Application Review and Resolution Program (CARRP) that uses information kept by law enforcement agencies, including the Federal Bureau of Investigation, to determine whether an individual is a national security risk. As a result of this program, some naturalization applicants - including many Muslim applicants - have had their applications for U.S. citizenship delayed for years or denied.

How do we encourage permanent residents who do not apply for naturalization to become U.S. citizens while keeping those permanent residents who may find their applications delayed or denied from becoming discouraged? What do these two articles tell us about becoming a U.S. citizen?

Page 980 (§ 9.02): Add the following at the end of Note 2:

Compare *Tuaua v. United States*, 951 F. Supp. 2d 88 (D.D.C. 2013) (holding that "unincorporated territories" like American Samoa are not within the United States for purposes of granting U.S. citizenship at birth). Although American Samoa has been part of the United States for more than 100 years, persons born there have no right to vote, bear arms, or hold jobs that require U.S. citizenship. Persons born in American Samoa are classified as "noncitizen nationals." They are the only Americans so classified by federal law.

The plaintiffs in *Tuaua* argued that not granting U.S. citizenship to individuals born in American Samoa violates the Citizenship Clause of the 14th Amendment, which guarantees that everyone born in the United States is a citizen. Amicus briefs in support of the plaintiffs by citizenship and constitutional law scholars have been filed. At the time of this writing, the case is on appeal in the

D.C. Circuit.

Page 986 (§ 9.02): Add the following to Note 4 after Problem 9-5:

See also Julia Preston, *New Test Asks: What Does 'American' Mean?*, N.Y. Times, Sept. 28, 2007, *at* http://www.nytimes.com/2007/09/28/washington/28citizen.html. This article describes the revised civics test that applicants must take as part of the naturalization process. USCIS claims that the revised test incorporates more ideas about the workings of democracy and the diversity of the population that has contributed to our country's history, i.e., Native Americans, African-Americans and women. Naturalization applicants no long have to know who said "Give me liberty or give me death," or who wrote "The Star-Spangled Banner." Now they are expected to know the contributions made by Susan B. Anthony and the identity and role of the speaker of the House of Representatives.

You may also want to review the following article about the new examination: Dafna Linzer, *The Problem With Question 36: Why Are So Many of the Answers on the U.S. Citizenship Test Wrong?,* Slate, Feb. 23, 2011, *at* http://www.slate.com/id/2286258/.

You can also search for Craig Ferguson Takes the Citizenship Test at https://www.youtube.com/watch?v=ROuyKYF8Yjo. In this video, Craig Ferguson, the former late night talk show host and now U.S. citizen, describes taking the naturalization examination.

If most native-born U.S. citizens would not be able to pass this exam, should it be kept as part of the naturalization application process? What purpose does the exam serve?

Page 989 (§ 9.03): In the paragraph starting with "Look at *Fiallo v. Bell*…", delete the sentence "In United States v. Flores-Villar, excerpted below…" through the end of the excerpt on page 992 and insert the following instead:

In *United States v. Flores Villar*, 536 F.3d 990 (9th Cir. 2008), the Ninth Circuit upheld as constitutional a five-year residence requirement, after the age of 14, on U.S. citizen fathers—but not on U.S. citizen mothers—before they may transmit citizenship to a child born out of wedlock abroad to a noncitizen. The Supreme Court granted certiorari but affirmed the Ninth Circuit's decision in a divided (4–4) vote. Flores-Villar v. United States, 564 U.S. 210 (2011). Six years later, the Court considered the matter anew in *Sessions v. Morales-Santana* and held that the gender-based distinction violates equal protection. The Court held that all parents must meet the longer five-year requirement. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017). Thus, until Congress makes a uniform prescription, INA § 301(g) applies to women as well as men.

Page 997 (§ 9.03[B][1]): Add the following just before Problems 9-6 through 9-12:

Note: A copy of the charts created by immigration attorney Robert Mautino can be found in the Course Materials folder at https://webcourses.lexisnexis.com for Chapter 9.

As you review these charts, do you notice a different standard being applied to the requirements for derivative U.S. citizenship, depending on whether the U.S. parent is the mother or the father?

Should claiming citizenship through your father be more difficult than through your mother? A recent case held no. *Morales-Santana v. Lynch*, 792 F.3d 256 (2d Cir. 2015). Morales-Santana was born outside the United States in 1962 to unwed parents. At the time his father satisfied the one-year physical presence requirement for transmitting citizenship that applied to unwed U.S. citizen mothers, but did not satisfy the more stringent five-year requirement that applied to unwed citizen fathers. The Second Circuit held that Morales-Santana derived citizenship through his father and that to deny him that benefit would violate equal protection; the same benefits that extended to unwed mothers should extend to unwed fathers. The Supreme Court affirmed in part and reversed in part. *Sessions v. Morales-Santana*, 198 L. Ed. 2d 150 (2017). The Court held that the same rule should apply to both mothers and fathers, but that the physical presence requirement should be five years for both, not one year.

Page 1018 (§ 9.04[2]): Add the following at the top of the page, immediately after end of the excerpt from *Kungys v. United States* and before § 9.05:

In June 2017, the Supreme Court addressed materiality again in *Maslenjak v. United States*, 137 S. Ct. 1918 (2017). The facts were as follows: During an interview under oath while seeking refugee status, Petitioner Maslenjak stated that her husband had evaded service in the Bosnian Serb Army by absconding to Serbia, for which she feared persecution by Serbs. Her refugee status was granted. Years later, Petitioner applied for U.S. citizenship. During the process, she swore that she had never given false information to a government official while applying for an immigration benefit or lied to an official to gain entry into the United States. However, Petitioner knew that her husband was actually serving as an officer in the Bosnian Serb Army, not hiding from service in Serbia. The Government charged Petitioner with violating 18 USC § 1425(a) (making it a crime to knowingly procure, "contrary to law," naturalization) and § 1015(a) (making it a crime to knowingly make false statements under oath in any proceeding related to naturalization). The District Court instructed the jury that to secure a conviction under Section 1425(a), the government only had to show that the false statements existed, not that they were material to or influential to the decision to approve her citizenship application. Petitioner was convicted and stripped of citizenship under Section 1451(e). The Sixth Circuit affirmed and created a circuit split, holding that if "[Petitioner] made false statements violating §1015(a) and she procured naturalization, then she also violated §1425(a)—irrespective of whether the false statements played any role in her obtaining citizenship." *Id.* at 1924.

The Supreme Court vacated the Sixth Circuit's decision. The Court interpreted the applicable laws to find that if the Government's definition of "good moral character" (a requirement for naturalization under Section 1427) in this context was allowed to stand, "some legal violations that do not justify denying citizenship under that definition would nonetheless justify revoking it later," and that "most naturally read, [Section 1451] strips a person of citizenship not when she committed any illegal act during the naturalization process, but only when that act played some role in her naturalization." *Id.* at 1926–27.

The Court clarified the proper inquiry courts must make to judge whether an applicant's act had a causal relationship to her naturalization:

> To decide whether a defendant acquired citizenship by means of a lie, a jury must evaluate how knowledge of the real facts would have affected a reasonable government official properly applying naturalization law.
>
> If the facts the defendant misrepresented are themselves disqualifying, the jury can make quick work of that inquiry. In such a case, there is an obvious causal link between the defendant's lie and her procurement of citizenship.
>
> . . .
>
> But that is not the only time a jury can find that a defendant's lie had the requisite bearing on a naturalization decision. . . . [A] person whose lies throw investigators off a trail leading to disqualifying facts gets her citizenship by means of those lies—no less than if she had denied the damning facts at the very end of the trail.
>
> When relying on such an investigation-based theory, the Government must make a two-part showing to meet its burden. As an initial matter, the Government has to prove that the misrepresented fact was sufficiently relevant to one or another naturalization criterion that it would have prompted reasonable officials, "seeking only evidence concerning citizenship qualifications," to undertake further investigation. If that much is true, the inquiry turns to the prospect that such an investigation would have borne disqualifying fruit. As to that second link in the causal chain, the Government need not show definitively that its investigation would have unearthed a disqualifying fact (though, of course, it may). Rather, the Government need only establish that the investigation "would predictably have disclosed" some legal disqualification. If that is so, the defendant's misrepresentation contributed to the citizenship award in the way we think §1425(a) requires.

Id. at 1928–29 (citations omitted).

Additionally, the Court articulated a defense, reasoning that "Section 1425(a) is not a tool for denaturalizing people who, the available evidence indicates, were actually qualified for the citizenship they obtained." *Id.* at 1930. Notwithstanding evidence that a defendant may have thwarted an investigation, "qualification for citizenship is a complete defense to a prosecution brought under §1425(a)." *Id.*

However, a naturalized person must still meet certain requirements even being approved: they may also lose U.S. citizenship if the government determines that, within five years following naturalization, that person became a member of or affiliated with any organization which would have precluded them from naturalization at the time they received citizenship. 8 U.S.C. § 1451(c); *see, e.g.*, Robert Chesney, *DOJ Sues to Revoke the Citizenship of Convicted al Qaeda Operative Iyman Faris (A Naturalized Citizen)*, LAWFARE (Mar. 20, 2017, 6:24 PM), https://www.lawfareblog.com/doj-sues-revoke-citizenship-convicted-al-qaeda-operative-iyman-faris-naturalized-citizen (invoking both "concealment of material evidence" and "membership in certain organizations" provisions of Section 1451 in a complaint filed in March 2017). Such

affiliation is considered prima facie evidence that the applicant was not "attached to the principles of the Constitution" at the time of naturalization. Absent countervailing evidence, that is enough to authorize the revocation of citizenship, effective as of the original date of the order of citizenship. 8 U.S.C. § 1451(c).