Summer 2023 Supplement

Immigration and Nationality Law: Problems and Strategies

(Carolina Academic Press 2019)

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Last Update: July 26, 2023

This summer supplement is to be used with the full text of **IMMIGRATION AND NATIONALITY LAW: PROBLEMS AND STRATEGIES (CAROLINA ACADEMIC PRESS 2019)**.

Faculty adopting this text are invited to join a private website hosted on Canvas at Cornell Law School. Write to Professor Stephen Yale-Loehr to request access: Stephen Yale-Loehr swy1@cornell.edu

Professor Shoba Sivaprasad Wadhia, is on leave from Penn State University and is serving as a Presidential appointee as a Civil Rights and Civil Liberties Officer (CRCL) in the Department of Homeland Security.

Professor Lenni B. Benson prepared this summer supplement. If you have corrections, questions, or suggestions she welcomes your comments. Write to her at: Lenni.Benson@nyls.edu.

Editors' Note: In this text and supplement we do our best to avoid the term "alien" although it is used within the statutes and regulations. Instead, we will use the term "noncitizen" or "foreign national." At times we will use the plural pronouns "they or their" instead of using alternatives to reflect he, she, they, etc.

Photo Credit: Rex Chen, used with permission.
Authors of the text at the 2022 Annual AILA Conference.
Left: Shoba Sivaprasad Wadhia
Center: Stephen Yale-Loehr
Right: Lenni B. Benson

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Chapter 1: Immigration Law: Introductions, Foundations of Constitutional Power, and Immigration Federalism

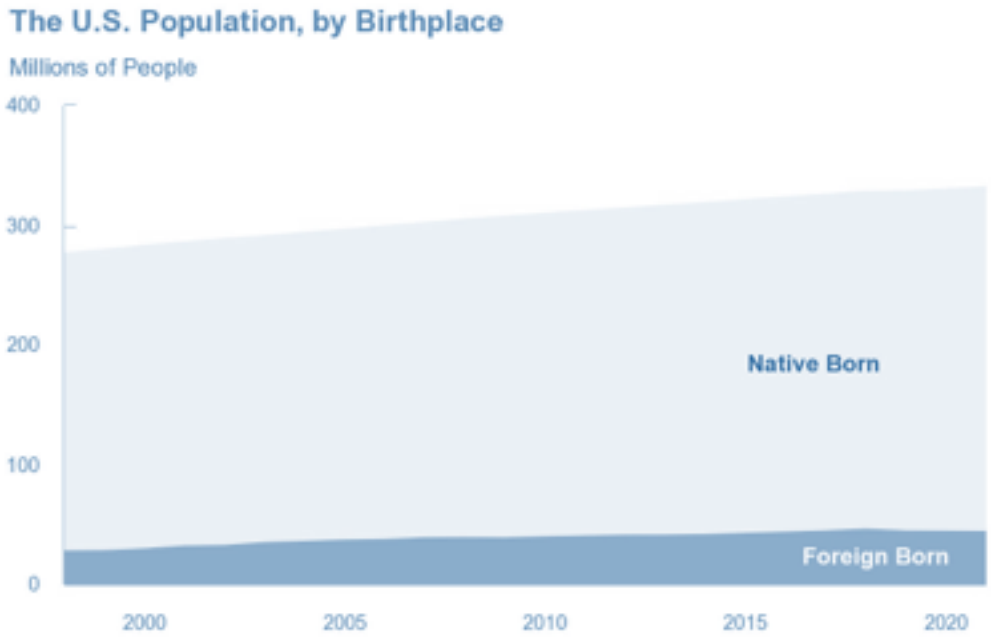
What's New in this Chapter:

One of the goals of the chapter is to introduce the field of immigration law and how it intersects with many other areas of law. The chapter also provides some demographic and statistical context for some of the legal and policy issues. Accordingly, many of these updates are to provide the reader with currently

Updates begin next page

Page 3, ¶ 2 (§ 1.01 Welcome to Immigration Law [A] What is Immigration Law)

- The current population estimate (June 2023) is that there are 44.7 million foreign-born people in the United States, representing 13.6% of the population.
- https://data.census.gov/table?q=foreign+born&tid=ACSDP1Y2021.DP02



- Congressional Budget Office, The Foreign-Born Population, the U.S. Economy, and the Federal Budget (April 5, 2023).

Page 3, ¶ 4 (§ 1.01 Welcome to Immigration Law [A] What is Immigration Law)

Updated Link: https://www.migrationpolicy.org/programs/migration-data-hub

Page 4, ¶ 1 (§ 1.01 Welcome to Immigration Law [A] What is Immigration Law)

As noted in the text, estimating how many people reside in the United States without legal status is complex. The Department of Homeland Security (DHS) has not published an estimate beyond fiscal year 2018. The DHS estimated that there were 11.4 million unauthorized migrants residing in the United States in 2018, about the same number as in 2015. The DHS uses a methodology similar to that of the Center for Migration Studies. You can visit the website and find an interactive map to see the estimates for your state: https://cmsny.org/cms-initiatives/democratizingdata/statedatatool/

"Recent estimates from authoritative sources within the last five years vary, but generally place the authorized population between approximately 10 million and 11 million individuals" Congressional Research Serv., R472118, Unauthorized Immigrants: Frequently Asked Questions, at 2 (August 10, 2022).

Table 1. Estimates of the Unauthorized Population from Various Sources

Estimate Source	Estimate	Year	Data Source(s)
Center for Immigration Studies	11.35 million	2022	Current Population Survey (CPS); DHS and other administrative data
Center for Migration Studies New York	10.3 million	2019	ACS; DHS administrative data
Congressional Budget Office	11.0 million	2018	CPS; DHS administrative data
Migration Policy Institute	11.0 million	2019	ACS; Survey of Income Participation; DHS administrative data
Pew Research Center	10.5 million	2017	ACS; DHS administrative data
U.S. Department of Homeland Security	11.4 million	2018	ACS; DHS and other administrative data

Id.

Here are some key findings from their data:

Based on the 2019 Migration Policy Institute "Profile of the Unauthorized Population", there are an estimated 11 million unauthorized immigrants in the United States. Link: https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US

Of the 10.3 million unauthorized migrants, 6% are Black people. The top five countries of birth of unauthorized migrants, in descending order, are Mexico, El Salvador, Guatemala, India, and Honduras. Several scholars and organizations are trying to draw attention to the underappreciated intersection of race and lack of immigration status. One prominent organization is UndocuBlack. Visit www.undocublack.org

As of 2019, estimates of states with the largest unauthorized immigrant populations included California, Texas, New York, Florida, New Jersey, and Illinois. Cong. Rsch. Serv., R472118, Unauthorized Immigrants: Frequently Asked Questions, at 5 (August 10, 2022). Estimates from 2019 show that 41% of married unauthorized immigrants had a legal permanent resident or U.S. citizen spouse. About 41% of unauthorized immigrants 15 and older lived with at least one child under 18, and 81% of those migrants lived with at least one child who was a U.S. citizen. *Id.* "An analysis of unauthorized migration from 2010 to 2017 found that the majority of individuals who became unauthorized during that period were overstays. An estimated 46% of the total unauthorized population in 2017 were overstays." *Id.* at 4.

Link: https://crsreports.congress.gov/product/pdf/R/R47218

Residence Years	2010	% Dist.	2019	% Dist.
Total	11,725,000	100.0%	10,348,884	100.0%
Less than 5 years	2,469,292	21.1%	2,542,548	24.6%
5 to 9 years	3,423,521	29.2%	1,800,498	17.4%
10 to 14 years	2,879,170	24.6%	1,610,682	15.6%
15 to 19 years	1,397,352	11.9%	1,985,777	19.2%
20 or more years	1,555,658	13.3%	2,409,373	23.3%

ARRIVED BEFORE AGE 16	2019
All who entered at below 16 years of age	2,687,930
Arrived between 2010 and 2017	1,016,750
Arrived between 2000 and 2009	857,679
Arrived between 1990 and 1999	512,244
Arrived before 1990	202,547

Source: www.cmsny.org

Page 4 (§ 1.01[A]) What is Immigration Law?:
Replace the first full paragraph on page 4 with the following:

Part of the challenge of counting is that the United States does not have a required national identification card. Several decades ago, the Census Bureau stopped asking about citizenship status to avoid frightening immigrants from participating in the national census. However, in March 2018, then-Commerce Secretary Wilbur Ross sought to include a citizenship question on the 2020 census, supposedly to improve enforcement of the Voters Rights Act. In *Department of Commerce v. New York*, 588 U.S. ___, 139 S. Ct. 2551 (2019), the U.S. Supreme Court struck down the inclusion of the question on the 2020 census, holding the Commerce

Department's stated reasoning for adding the question to be merely pretextual. However, Chief Justice Roberts left open the possibility of the inclusion of such a question if the administration could produce an acceptable rationale. The Trump Administration made further attempts to include the question on the census. Before the printing of the 2020 census, three federal courts – in New York, California, and Maryland – found the Commerce Department violated federal procedural law and called the Commerce Department's rationale, to improve enforcement of the voting rights act, a cover for another motive.

Page 4, ¶ 4

Updating the information about Global Families

The global pandemic severely restricted access to visa processing and the patterns of migration shifted from overseas migration to greater numbers of people obtaining status inside the United States through family or employment-based sponsorship. Chapter 4 discusses these pathways in more depth. Nevertheless, family reunification remains at the heart of many immigration matters, and attorneys involved in family law should be aware of the complexity that borders and immigration processes can generate in marriage, adoption, and divorce matters.

- 28% of Lawful Permanent Residents in FY 2022 Q4 obtained status as immediate relatives of U.S. Citizens
- 16% of Lawful Permanent Residents in FY 2022 Q4 obtained status as family-sponsored preferences
- https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration

Page 5, ¶ 4

- Statistic Correction: The text estimates 18 million children but the estimate is 18 million children with at least one immigrant parent in 2021.
- https://www.migrationpolicy.org/programs/data-hub/charts/children-immigrant-families

Update to the discussion on Migrant Children

Page 7 (§ 1.01[A][1]) Family Law:

Replace the chart reported by the Customs and Border Protection (CBP) discussing the apprehensions of unaccompanied children with the following:

Country	FY 16	FY 17	FY 18	FY 19	FY 20	FY 21	FY 22	FY 23
El Salvador	17,512	9,143	4,949	12,021	2,189	15,530	16,434	7,387
Guatemala	18,913	14,827	22,327	30,329	8,390	58,783	60,789	33,124
Honduras	10,468	7,784	10,913	20,398	4,454	39,906	37,375	21,446
Mexico	11,926	8,877	10,136	10,487	14,359	25,745	28,031	19,174
Total:	58,819	40,631	48,325	73,235	32,099	139,964	142,629	91,842

*FY 23 YTD May 2023

The extraordinary increase in FY 2021 was partially due to the impacts of the pandemic and the use of Title 42 health expulsions against families but not when a child was traveling with a parent or legal guardian.

Children from other countries are also arriving in greater numbers at the Southwest border. See chart below.

The interactive statistical tool is found at: https://www.cbp.gov/newsroom/stats/nationwide-encounters?language_content_entity=en

This chart was produced from that CBP apprehension data:

Unaccompanied Children Country of Nationality	Apprehensions in FY 2023(May) Number	
Guatemala	33,124	
Honduras	21,446	
Mexico	19,174	Mexican youth may be returned if not a victim of severe trafficking
El Salvador	7,387	
Ecuador	2,497	
Nicaragua	1,724	
Venezuela	1,262	
Cuba	1,217	
Colombia	1,039	
Peru	449	
Haiti	274	
Turkey	183	
Philippines	86	
Brazil	83	
Canada	64	
Russia	63	
China	46	
Romania	39	

Ukraine	16
Myanmar	1
TOTAL	90,174
No country named	1,668

Page 7 (§ 1.01[A][1]): Replace the chart for unaccompanied migrant children referred by DHS for federal custody with the following:

FY 2022	FY 2021	FY 2020	FY 2019	FY 2018	FY 2017	FY 2016	FY 2015
128,904	122,731	15,381	69,488	49,100	40,810	59,170	33, 726

As of June 2, 2023, there are 7,002 unaccompanied children in HHS' care. *Fact Sheet Unaccompanied Children (UC) Program*, U.S. Dep't of Health and Human Services, 2 (June 2, 2023).

These charts were generated by using the tools at the DHS website. It shows the location of apprehensions and the demographic characteristics of single adults, family units, and unaccompanied children. In 2021, people from countries other than Mexico, El Salvador, Guatemala, and Honduras surpassed the number of apprehensions from those traditional sources of migration on the Southwest Border.

This text explores the treatment of unaccompanied children in several problems and chapters. See Chapter 4 discussion of Special Immigrant Juvenil Status and the Visa quota allocation problems and Chapter 7 relief from removal for children.

Page 8, ¶ 5 Updates for 2023

The federal government tracks foreign direct investment in the United States. A recent report indicated that while investments to purchase, create, or expand businesses in the United States had decreased, the total investment was over $259 billion in 2017. "Expenditures were down 37.7 percent from $312.5 billion (revised) in 2018 and below the annual average of $333.0 billion for 2014–2018. As in previous years, acquisitions of existing businesses accounted for a large majority of total expenditures." Bureau of Economic Analysis, New Foreign Direct Investment in the United States (July 1, 2021), https://www.bea.gov/data/intl-trade-investment/new-foreign-direct-investment-united-states. Immigration attorneys work with corporate and trade attorneys to structure such investments and to advise about the ability of an investor to live and work in the United States.

- New Investment by Foreign Direct Investors in 2021: $333.6 billion
- "Expenditures by foreign direct investors to acquire, establish, or expand U.S. businesses totaled $333.6 billion (preliminary) in 2021. Expenditures increased $192.2 billion from $141.4 billion (revised) in 2020 and were above the annual average of $289.7 billion for 2014-2020. As in previous years, acquisitions of existing businesses accounted for a large majority of total expenditures."

- News Release, Bureau of Economic Analysis, New Foreign Direct Investment in the United States, 2021 (July 6, 2022), https://www.bea.gov/news/2022/new-foreign-direct-investment-united-states-2021
- Bureau of Economic Analysis, New Foreign Direct Investment in the United States (July 6, 2022), https://www.bea.gov/data/intl-trade-investment/new-foreign-direct-investment-united-states

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Page 10, ¶ 2 Update to Data about Refugee Admissions

U.S. Refugee Admissions

2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
58,238	69,926	69,987	69,933	84,994	53,716	22,589	30,000	11,814	11,411	25,465

- U.S. refugee admissions as of March 31, 2023: 18,429
  https://www.migrationpolicy.org/programs/data-hub/charts/us-refugee-resettlement

  In Chapter 4 we also discuss forms of temporary protection, e.g., Temporary Protected Status. Admission under "parole" is not a refugee admission. See discussion in Chapter 3 in the supplement of the parole authority under INA § 212(d)(5).

Page 10, ¶ 7 Update to Data about Educational Institutions

- https://www.nafsa.org/sites/default/files/media/document/isev_EconValue2020_2021.pdf
  https://opendoorsdata.org/wpcontent/uploads/2022/11/Open-Doors-2022
- 2021-2022: Students from China (30%), India (21%), and South Korea (4.3%) account for about 56% of international students
- Increase in economic contributions to $33.8 billion in the 2021-2022 school year
  - Increase to 335,423 jobs created or supported in the 2021-2022 school year

Page 11, ¶ 1 Continued update about foreign students

- ~948,519 international students enrolled in the U.S. in the 2021/22 School Year
  - ~34,424 increase from 2020/21 School Year
- https://www.migrationpolicy.org/article/international-students-united-states-2020#enrollment_numbers_trends
- https://opendoorsdata.org/wp-content/uploads/2022/11/Open-Doors-2022_Fast-Facts.pdf
- In April of 2023, ICE published "SEVIS by the Numbers" the report has details about total numbers of students, sending countries, fields of study, and location of study in the United States. https://opendoorsdata.org/wp-content/uploads/2022/11/Open-Doors-2022_Fast-Facts.pdf

This chart was compiled from data in the SEVIS 2023 report:

Top Ten Countries Sending International Students

Country	**Number of Students**
China	324,196
India	297,151
Rep. of Korea	62,617
Canada	41,392
Brazil	37,904
Vietnam	29,742
Japan	26,519
Taiwan	26,225
Saudi Arabia	24,485
Nigeria	22,935

Page 11 (§ 1.01[A][4] Representation of Educational Institutions:
Add the following to the end of subsection [4], just before [5]:

The global pandemic greatly reduced the entry of foreign students in 2020. The National Association of Foreign Student Advisors (NAFSA) reported that "…U.S. higher education overall has potentially lost nearly $1 billion due to shortened or canceled study abroad programs and spent approximately $638 million in financial support for international students, scholars, faculty, and staff who remained on campus when courses moved online. …U.S. higher education will lose at least $3 billion due to anticipated international student enrollment declines for fall 2020." NAFSA, Survey: Financial Impact of COVID-19 on International Education (May 2020), https://www.nafsa.org/policy-and-advocacy/policy-resources/survey-financial-impact-covid-19-international-education. For a detailed map and tool that estimates the contribution of foreign students by state, see https://www.nafsa.org/policy-and-advocacy/policy-resources/nafsa-international-student-economic-value-tool-v2.

Page 11, ¶ 3 Update about unauthorized or undocumented people attending university.

Currently, seventeen states and D.C. offer in-state tuition and some state financial aid or scholarships for undocumented students

Six states offer in-state tuition but no state financial aid (AZ., FL., KS., KN., NE., OK.,) https://www.higheredimmigrationportal.org/states/

Seven state university systems offer in-state tuition for undocumented students where the state legislature has not adopted any action to that affect:

- University of Hawaii Board of Regents
- Kentucky Council on Postsecondary Education
- University of Maine Board of Trustees
- University of Michigan Board of Regents
- Ohio Board of Regents
- Oklahoma State Regents for Higher Education
- Rhode Island's Board of Governors for Higher Education

https://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx

Page 12, ¶ 1Updated Criminal Immigration Charges brought in U.S. District Courts

2017	2018	2019	2020	2021	2022
20,438	29,445	32,766	19,526	18,726	19,566

https://www.uscourts.gov/statistics/table/d-2/statistical-tables-federal-judiciary/2022/12/31

Page 12 (§ 1.01[A][5]) Criminal Prosecution and Defense: Add the following to the end of subsection [5], just before [6]:

Recently, many states have passed laws decriminalizing or even legalizing possession and use of marijuana. Although marijuana is still illegal under federal law, New York's Marihuana Regulation and Taxation Act ("MRTA") includes a provision to expunge prior convictions related to marijuana. 2021 N.Y. Ch. 92, 2021 N.Y. SB 854. Unfortunately, under current immigration law, drug crimes cannot be forgiven through a waiver of inadmissibility. This concept is explored and developed further in chapter 6. For more information about how the changing law on immigration may impact a noncitizen, see the Immigrant Defense Project's Guidance and FAQ section: https://www.immigrantdefenseproject.org/wp-content/uploads/2020/10/Community-FAQ_-Marijuana-Legalization-English.pdf. To review the MRTA, visit https://www.nysenate.gov/legislation/bills/2021/S854.

Page 12, ¶ 5 (§1.01 Welcome to Immmigration Law, [A] What is Immigration Law [5] Criminal Prosecution and Defense)

Broken link to DHS website; New link: https://www.dhs.gov/office-general-counsel

The number of employees in the DHS General Counsel office has increased to over 3,000.

Page 13, (1.01 Welcome to Immigration Law, [A]What is Immigration Law [6] Controlling Migration)

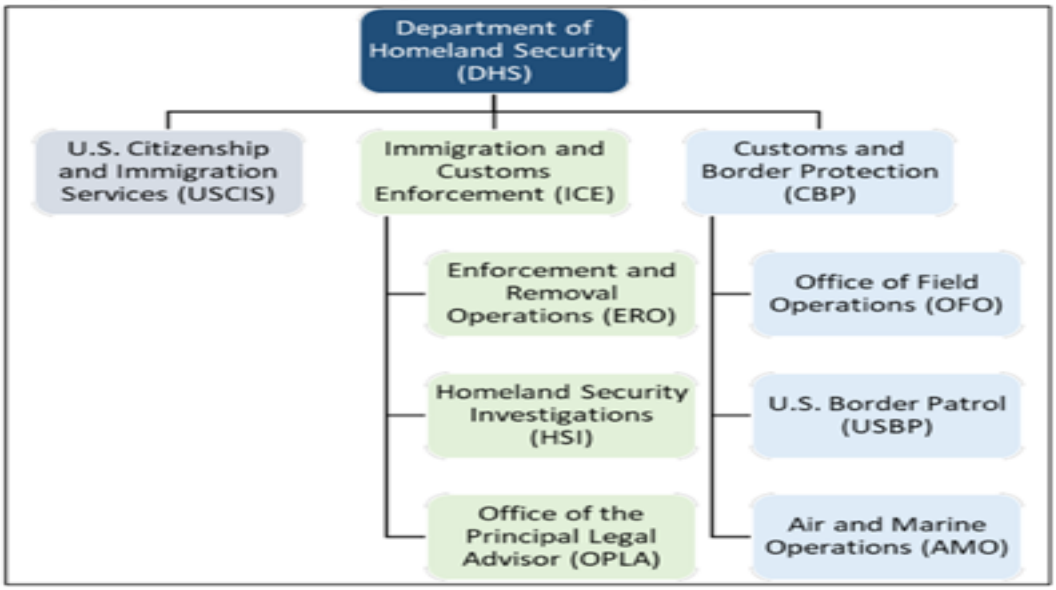
Add to **Filling Labor Needs**

"Foreign-born workers' share of the U.S. labor force rose last year to the highest level in 27 years of records, as labor demand surged and the pandemic faded." Foreign-born works made up 18.1% of overall labor force and increased 5% from 2019 to 2022 while native-born people in labor force declined 0.5%. Even with a slowdown in immigration during the pandemic, foreign-born people increased their share of the workforce. Rosie Ettenheim, *Immigrants' Share of The U.S. Labor Force Grows to a New High,* (May 22, 2023), https://www.wsj.com/articles/immigrants-share-of-the-u-s-labor-force-grows-to-a-new-high-67805c45

"The stream of international nurses coming to work in the United State could soon slow…because of a backlog of green card petitions at the State Department". The May bulletin moved the cut-off date to June 1, 2022, leaving thousands of nurses who filed a green card petition in the past year unable to proceed with their applications. A reduction in foreign visas for nurses could affect nursing homes, emergency rooms, assisted living facilities, etc… because of the shortage in staff aftert the Covid-19 pandemic. International nurses are useful in combating those staffing shortages. "The State Department's freeze is a result of higher-than-anticipated demand for employment-based visas in the EB-3 category". The quotas for green cards limited in the INA haven't been updated since 1990 despite growing backlog and demand. Kelly Hopper, *How a Green Card Freeze Will Exacerbate the Nursing Crisis*, (May 14, 2023), https://www.politico.com/news/2023/05/14/green-card-nurse-shortage-00096777.

Page 15, (§1.01 Welcome to Immmigration Law, [A] What is Immigration Law [7] Who Are the Attorneys) Image showing structure of DHS with key components:

Figure 1. DHS Immigration Components



Source: CRS.

Page 16, Table 1

Immigration Cases in the Federal Docket by Year

YEAR	2016	2017	2018	2019	2020	2021	2022
Total Appeals	60,357	50,506	49,276	48,486	48,190	44,546	41,839
BIA Appeals	5,215	5,210	5,158	5,112	6,067	5,510	4,399
% of Total	8.6%	10.3%	10.5%	10.5%	12.6%	12.4%	10.5%

https://www.uscourts.gov/sites/default/files/data_tables/jb_b3_0930.2022.pdf

Page 16, Table 2

The Federal Judiciary reported a significant drop in work due to fewer appeals from the BIA. "Appeals of administrative agency decisions fell 24 percent to 5,695, mostly due to a reduction in appeals of decisions by the Board of Immigration Appeals (BIA). BIA appeals accounted for 87 percent of administrative agency appeals and constituted the largest category of administrative agency appeals filed in each circuit except the DC Circuit." https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022

We created the chart on the next page by comparing the total number of petitions for review from the BIA to the total workload of the Circuit. These are listed in order of the highest percentage to the lower.
Data from Federal Circuit Court of Appeals Workload Table B-2 FY 2022 https://www.uscourts.gov/file/61226/download

CIRCUITS **FY 2022**	**TOTAL CASE WORKLOAD OF CIRCUIT**	**BIA APPEALS In CIRCUIT**	**PERCENTAGE OF TOTAL WORKLOAD**	**Increase or Decrease from prior year**
ALL CIRCUITS	41,839	4,399	10.5	-1.8
Ninth Circuit	8,559	2,451	28.6%	+.8
Second Circuit	3,816	609	16%	-2
Third Circuit	2,487	165	6.6%	-4.6
First Circuit	1,042	65	6.2%	-2.4
Fifth Circuit	5,905	354	6%	-5
Tenth Circuit	1,593	90	5.6%	-1
Fourth Circuit	3,930	199	5.1%	-.5
Sixth Circuit	3,602	169	4.7%	-1.5
Eleventh Circuit	4,662	174	3.7%	-1.9
Eighth Circuit	2,822	73	2.6%	-1.3
Seventh Circuit	2,425	49	2%	-.9

Questions:

What factors might contribute to the lower rates of appeal to the federal circuits?
In some states, the DHS closed detention facilities. In other states, there are fewer immigration attorneys.
Few states provide free legal representation to noncitizens seeking judicial review.

States with the highest proportion of noncitizen residents are in descending order:

California (9th Cir)
Texas (5th Cir.)
Florida (11th Cir)
New York (2d Cir).

Page 19 Learn More About Careers in Immigration Law

AILA Marketplace Study 2022

AILA Marketplace Study 2022, AILA (Nov. 11, 2022), https://anywhere.aila.org/files/o-files/view-file/74E63D19-F00D-45B0-9779-4ECB6B18B6E1/Marketplace-Study-2022.pdf

This survey by AILA gives details on salaries, work conditions, workload, satisfaction, stressors, and any new trends in the field of Immigration Law. Salary: "The annual incomes of respondents have risen across almost all segments of the market." At 17. "Salaries for business immigration associates continue to outpace those of family and asylum associates." At 23. Work Conditions: "The pandemic caused many firms to adopt new technologies, accelerate their virtual work capabilities, and find ways to [work] with clients remotely. But whether these changes would be merely temporary or become a permanent fixture…remains a question." At 3.

The Immigration Section of the Federal Bar Association now waives membership dues for students. https://www.fedbar.org/immigration-law-section/#:~:text=The%20Immigration%20Law%20Section%20is,diverse%20voices%20to%20come%20together.
This is also the policy for AILA. https://www.aila.org/membership/join/eligibility

Page 31 – Last Paragraph §1.01[B][1] Introduction to the Problem Method

DHS removed the PDF versions of the DS-160 form at the linked website. DHS now uses an online version of the form and has posted an example of the online version here: https://travel.state.gov/content/dam/visas/PDF-other/DS-160-Example_11-19-2020.pdf

Page 61 (§ 1.02[B][1] Sanctions to Control Migration—Civil or Criminal?
Correct citation to read INA § 276; 8 U.S.C. § 1326 Reentry of Removed Aliens

Page 63 add new paragraph before subsection [2] **Controlling Immigration through Employer Sanctions**

At the end of the 2022-2023 term of the U.S. Supreme Court, the Court reversed a ruling by the Ninth Circuit Court of Appeals that had found that INA § 274; 8 U.S.C. § 1324 had a chilling impact on the speech of people who advised noncitizens about their right to enter or remain in the United States. *See United States v. Hansen*, 599 U.S. __, 143 S.Ct. 1932 (2023). Eight of the Justices found that the facial overbreadth challenge brought by Mr. Hansen failed and that a narrow interpretation of the immigration criminal provision did not interfere with the free speech of attorneys or advocates for noncitizens.

Here is a brief excerpt from the main opinion authored by Justice Barrett:

> A federal law prohibits "encourag[ing] or induc[ing]" illegal immigration. 8 U.S.C. § 1324(a)(1)(A)(iv). After concluding that this statute criminalizes immigration advocacy and other protected speech, the Ninth Circuit held it unconstitutionally overbroad under the First Amendment. That was error. Properly interpreted, this provision forbids only the intentional solicitation or facilitation of certain unlawful acts. It does not "prohibi[t] a substantial amount of protected speech"—let alone enough to justify throwing out the law's "plainly legitimate sweep." United States v. Williams, 553 U.S. 285, 292, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). We reverse.
>
> I
>
> In 2014, Mana Nailati, a citizen of Fiji, heard that he could become a U. S. citizen through an "adult adoption" program run by Helaman Hansen. Eager for citizenship, Nailati flew to California to pursue the program. Hansen's wife told Nailati that adult adoption was the "quickest and easiest way to get citizenship here in America." … For $4,500, Hansen's organization would arrange Nailati's adoption, and he could then inherit U. S. citizenship from his new parent. Nailati signed up.
>
> It was too good to be true. There is no path to citizenship through "adult adoption," so Nailati waited for months with nothing to show for it. Faced with the expiration of his visa, he asked Hansen what to do. Hansen advised him to stay: "[O]nce you're in the program," Hansen explained, "you're safe. Immigration cannot touch you." …Believing that citizenship was around the corner, Nailati took Hansen's advice and remained in the country unlawfully.
>
> Hansen peddled his scam to other noncitizens too. After hearing about the program from their pastor, one husband and wife met with Hansen and wrote him a check for $9,000—initially saved for a payment on a house in Mexico—so that they could participate. Another noncitizen paid Hansen out of savings he had accumulated over 21 years as a housepainter. Still others borrowed from relatives

and friends. All told, Hansen lured over 450 noncitizens into his program, and he raked in nearly $2 million as a result.

The United States charged Hansen with (among other crimes) violations of [INA § 274] § 1324(a)(1)(A)(iv). That clause forbids "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." In addition to convicting him under clause (iv), the jury found that Hansen had acted "for the purpose of private financial gain," triggering a higher maximum penalty. … § 1324(a)(1)(B)(i).

After the verdict came in, Hansen saw a potential way out. Another case involving § 1324(a)(1)(A)(iv), *United States v. Sineneng-Smith*, was pending before the Ninth Circuit, which had sua sponte raised the question whether the clause was an unconstitutionally overbroad restriction of speech. 910 F.3d 461, 469 (2018). Taking his cue from Sineneng-Smith, Hansen moved to dismiss the clause (iv) charges on First Amendment overbreadth grounds. The District Court rejected Hansen's argument and sentenced him.

***

As in Sineneng-Smith, the Ninth Circuit focused on whether clause (iv) is a narrow prohibition covering solicitation and facilitation of illegal conduct, or a sweeping ban that would pull in "statements or conduct that are likely repeated countless times across the country every day." 25 F.4th 1103, 1110 (2022). It adopted the latter interpretation, asserting that clause (iv) criminalizes speech such as "encouraging an undocumented immigrant to take shelter during a natural disaster, advising an undocumented immigrant about available social services, telling a tourist that she is unlikely to face serious consequences if she overstays her tourist visa, or providing certain legal advice to undocumented immigrants." Concluding that clause (iv) covers an " 'alarming' " amount of protected speech relative to its narrow legitimate sweep, the Ninth Circuit held the provision facially overbroad.

The Ninth Circuit denied the Government's petition for rehearing en banc over the dissent of nine judges. Judge Bumatay, who wrote the principal dissent, attributed the panel's overbreadth concern to a misreading of the statute. See 40 F.4th 1049, 1057–1058 (2022). Correctly interpreted, he explained, clause (iv) reaches only criminal solicitation and aiding and abetting. Ibid. On that reading, the provision raises no overbreadth problem because, "[e]ven if [INA § 274(a)(1)(A)(iv);] 1324(a)(1)(A)(iv) somehow reaches protected speech, that reach is far outweighed by the provision's broad legitimate sweep." *Id*., at 1072.

*** [Ed. Note. The Court ruled that the terms of the statute "encourage or induce" should only be read as specific terms intended to be interpreted in the context of a criminal statute. An alternative reading could have a chilling impact on people who counsel or interact with noncitizens. To avoid the constitutional problem, the majority read the statute in the context of the criminal provisions found in the INA. determined that the terms "encourage" and "induce" are commonly used to denote solicitation and facilitation. The Court found that the statutory history of the statute also points to the narrow interpretation of the terms. Justice Barrett pointed to an 1885 law, that would become the template for clause (iv), which made it an offense to knowingly "assist, encourage or soliciting" immigration under a contract to perform labor. This reinforced that the terms "encourage" and "induce" (which was added to the statute in 1917) was meant to be read as the narrower criminal law meaning of solicitation and facilitation. The terms soliciting and assisting were not included in clause (iv), but the Court finds this was likely only done to streamline the statutory language.

Justices Jackson and Sotomayor dissented. In main, they object to the majority's "redlining" or rewriting the statute and the departure from reading the plain text. The dissent also notes that many amici wrote about the overbreadth in the statute and the chilling impact a conviction could have on providing counsel to noncitizens and their families. Here is a concern in the dissent]

Dissent….at 1963
Moreover, criminal prosecutions are not the only method by which statutes can be wielded to chill free speech. Hansen's amici detail how Customs and Border Protection (CBP) relied on the encouragement provision to justify its creation of a "watchlist" of potential speakers that CBP had compiled in connection with its monitoring of a large group of migrants—a list that included journalists simply reporting factual information about the group's progress. Brief for Reporters Committee for Freedom of the Press as Amicus Curiae 5–6. CBP allegedly compiled dossiers on those reporters and singled them out as targets for special screenings. Ibid. There can be no doubt that this kind of Government surveillance —targeted at journalists reporting on an important topic of public concern, no less —tends to chill speech, even though it falls short of an actual prosecution.

Hansen's amici also describe how a group of Members of Congress recently sent a letter to three religious organizations that help undocumented immigrants, directing the organizations to preserve documents and communications related to their work in advance of a potential congressional investigation into whether such organizations are " 'harbor[ing], transport[ing], and encourag[ing] ' " noncitizens to settle unlawfully in this country. Brief for Religious Organizations as Amici Curiae 34 (emphasis added). Again, this kind of letter invoking the language of the encouragement provision can plainly chill speech, even though it is not a

> prosecution (and, for that matter, even if a formal investigation never materializes).
>
> The majority nevertheless derides the fears of Hansen and his amici as an overimaginative "parad[e]" of "horribles." *Ante*, at 1947. But what may seem "fanciful" to this Court at great remove, ante, at 1939 – 1940, might well prove to be a significant obstacle for those on the ground who operate daily in the shadow of the law. The "gravity" of the encouragement provision's chilling effect is "underscored by the filings of ... amici curiae in support of " Hansen—including briefs from lawyers, immigration advocacy organizations, religious and other charitable organizations, journalists, local governments, and nonprofit policy institutions from across the ideological spectrum. *Americans for Prosperity Foundation v. Bonta*, 594 U. S. ——, ——, 141 S.Ct. 2373, 2388(2021).
>
> The substantial concerns that amici from such diverse walks of life raise illustrate that the "deterrent effect feared by" Hansen and his amici "is real and pervasive." Id., at ——, 141 S.Ct., at 2388. Moreover, at the end of the day, those fears reflect a determination to view enacted statutes as serious business, and, essentially, to take Congress at its word. This Court should have done the same.
>
> As written, the encouragement provision is overbroad. Therefore, it should have been deemed facially unconstitutional and invalid under the First Amendment, as the Ninth Circuit held.

Notes and Questions:

Below is the text of the full criminal statute. As you read it, ask yourself if attorneys and law students may counsel people to seek asylum or to remain in the United States without nonimmigrant status? As you learn more about immigration law you will explore complex procedures and interpretations of when a person is maintaining lawful status, when lapses are an "authorized stay" and when lapses or even intentional violations can be forgiven. For now, consider when would your counsel to a client cross into criminality?

INA § 274; §1324. Bringing in and harboring certain aliens

(a) Criminal penalties

(1)(A) Any person who-

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts, shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs-

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of title 18) to, or places in jeopardy the life of, any person, be fined under title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under title 18, or both.

(C) It is not a violation of clauses [1] (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official

action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs-

(A) be fined in accordance with title 18 or imprisoned not more than one year, or both; or

(B) in the case of-

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry, be fined under title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

(3)(A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under title 18 or imprisoned for not more than 5 years, or both.

(B) An alien described in this subparagraph is an alien who-

(i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and

(ii) has been brought into the United States in violation of this subsection.

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if-

(A) the offense was part of an ongoing commercial organization or enterprise;

(B) aliens were transported in groups of 10 or more; and

(C)(i) aliens were transported in a manner that endangered their lives; or

(ii) the aliens presented a life-threatening health risk to people in the United States.

(b) Seizure and forfeiture

(1) In general

Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a), the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

(2) Applicable procedures

Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of title 18 relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

(3) Prima facie evidence in determinations of violations

In determining whether a violation of subsection (a) has occurred, any of the following shall be prima facie evidence that an alien involved in the alleged violation had not received prior

official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(c) Authority to arrest

No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

(d) Admissibility of videotaped witness testimony

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

(e) Outreach program

The Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, as appropriate, shall develop and implement an outreach program to educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section.

(June 27, 1952, ch. 477, title II, ch. 8, §274, 66 Stat. 228 ; Pub. L. 95–582, §2, Nov. 2, 1978, 92 Stat. 2479 ; Pub. L. 97–116, §12, Dec. 29, 1981, 95 Stat. 1617 ; Pub. L. 99–603, title I, §112, Nov. 6, 1986, 100 Stat. 3381 ; Pub. L. 100–525, §2(d), Oct. 24, 1988, 102 Stat. 2610 ; Pub. L. 103–322, title VI, §60024, Sept. 13, 1994, 108 Stat. 1981 ; Pub. L. 104–208, div. C, title II, §§203(a)–(d), 219, title VI, §671(a)(1), Sept. 30, 1996, 110 Stat. 3009–565 , 3009-566, 3009-574, 3009-720; Pub. L. 106–185, §18(a), Apr. 25, 2000, 114 Stat. 222 ; Pub. L. 108–458, title V, §5401, Dec. 17, 2004, 118 Stat. 3737 ; Pub. L. 109–97, title VII, §796, Nov. 10, 2005, 119 Stat. 2165 .)

Page 70 (§ 1.02[B][2]) Controlling Immigration Through Employer Sanctions: Add the following new Note 13:

13. State Regulation of Federal and State Tax Withholding Forms for Noncitizens.

In *Kansas v. Garcia*, 589 U.S. __, 140 S. Ct. 791 (2020), the Supreme Court ruled on one aspect of the intersection between federal and state law. In the case, the respondents, three noncitizens, used false social security numbers to complete federal and state tax withholding forms. They used the same social security numbers when completing the I-9 forms for employment. The Immigration Reform and Control Act of 1986 makes it unlawful to knowing hire a noncitizen who is unauthorized to work in the United States. INA §§ 274A(a)(1), (h)(3); 8 U.S.C. §§ 1324a(a)(1), (h)(3). Through the I-9 process, employers are required to attest that each employee is "verified" that they are "not an unauthorized alien." INA § 274A(b)(1)(A); 8 U.S.C. § 1324a(b)(1)(A). Federal law makes it a crime for an individual to provide false information on an I-9 form or to use fraudulent documents to show work authorization. However, it is not a federal crime for a noncitizen to work without authorization. Kansas state law makes it a crime to commit identity theft or engage in fraud to obtain a benefit. The three respondents were charged with fraudulently using another person's social security number on tax withholding forms. The Supreme Court held 5-4 that state laws making it a criminal offense to use false social security numbers on tax exemption forms are not expressly preempted by Congress's power to regulate immigration and an individual's right to work.

Page 70 new Note 14:

14. New Form I-9 and Changes in Technology.

The DHS announced that procedures adopted during the pandemic which allowed a waiver of in person verifications of identity and documents would end on July 31, 2023. Remote verification may only be possible if an employer enrolls in E-Verify. See https://www.uscis.gov/i-9-central/form-i-9-related-news/new-form-i-9-notice-published-allowing-e-verify-employers-to-remotely-examine-form-i-9-documents

The government also revised the I-9 form and as of November 1, 2023, employers must use the new form. https://www.uscis.gov/newsroom/alerts/uscis-to-publish-revised-form-i-9

Page 107 (§1.01[C] The Preemption Debate)
New Note11: More on State Involvement in Immigration

August 12, 2021 CRS Report on Section 287(g) Program:

INA § 287(g); 8 U.S.C. § 1367(g) permits the delegation of certain immigration enforcement procedures to state law enforcement agencies. Congressional Research Service, IF11898, The 287(g) Program: State and Local Immigration Enforcement at 1 (Aug. 12, 2021). Agreements between state and federal agencies entered under 287(g) allow specially trained state or local officers to perform certain functions relating to an investigation, apprehension, or

detention of noncitizens. *Id.* All duties performed by state officials must be performed under federal oversight by DHS and ICE during only a predetermined time frame. *Id.*

There are currently two types of Agreements commonly created under the 287(g) Program: The Jail Enforcement Model (JEM) and the Warrant Service Officer (WSO) model. *Id.* Under the Jail Enforcement Model, Local Enforcement Agency members become Designated Immigration Officers (DIOs) after a four-week training. *Id.* DIOs are authorized to identify noncitizens already arrested and booked that have criminal convictions or pending criminal charges through interviews and biographic screening *Id.* The DIOs can then issue detainers, serve warrants, and prepare documents for removal proceedings. *Id.* There are three oversight mechanisms by ICE: (1) Field Supervisors monitor compliance through site visits, meetings with Local Enforcement Agency management, and by tracking DIOs' training completion and upkeep; (2) Biennial Inspections of participants to ensure compliance with agreements and ICE policies; and (3) Complaint Reporting and Resolution processes. *Id.*

The WSO model is narrower in scope than the Jail Enforcement Model. *Id.* The designated Warrant Service Officers are limited to executing administrative warrants for civil immigration violations to incarcerated noncitizens that have already been identified by ICE as potentially removable. *Id.* There are currently no formal ICE oversight mechanisms in place under the WSO model. *Id*.

Some evidence of racial profiling under these 287(g) agreements has led to reports and investigations. *Id* at 2. ICE has henceforth terminated agreements with any Local Enforcement Agencies that were found to have engaged in racial profiling. *Id*. Studies by the North Carolina School of Law and the ACLU of North Carolina have also shown that the 287(g) program may threaten the relationship between Local Law Enforcement and immigrant communities because of the newfound power of local law enforcement to initiate civil immigration actions instead of preserving their role as one distinct from the federal immigration process. *Id.*

To learn more, see the full CRS report here: https://crsreports.congress.gov/product/pdf/IF/IF11898.

March 10, 2020 Congressional Research Service Report on Litigation Surrounding State Information Sharing Restrictions:

A Jan 25, 2017 Executive Order by President Trump instructed the Attorney General and Secretary of DHS to withhold federal grant funds from states and localities that fail to comply with INA § 642; 8 U.S.C. § 1373. Exec. Order No 13768, 82 Fed. Reg. 8799 (Jan 30, 2017) (revoked by Exec. Order No. 13993 on Jan. 20, 2021). President Trump sought to strengthen immigration enforcement by encouraging state compliance with federal immigration information-sharing protocols by withholding grant money requested by states. *Id*. INA § 642; 8 U.S.C. § 1373 provides that State and Local government entities may not prohibit or restrict information exchanges regarding the immigration or citizenship status of any individual. *Id*. The grant money to be withheld was from the Edward Byrne Memorial Justice Assistance Grant

Program which provided money to states and localities for non-federal criminal justice initiatives. *Id.* Several states and localities sued to challenge the withholding of the grant funds claiming that INA § 642; 8 U.S.C. § 1373 and the similar 8 U.S.C. § 1644 unconstitutionally restrained states from prohibiting information sharing between law enforcement entities and federal immigration authorities because the statutes constituted state coercion. *Id.* at 2. For more information about this litigation see Congressional Research Services, LSB10386, Immigration Enforcement & the Anti-Commandeering Doctrine: Recent Litigation on State Information-Sharing Restrictions at 1 (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10386.

Page 107 (§1.01[C] The Preemption Debate)
New Note 12: State Immigration Protections and Sanctuary Jurisdictions

Several states have sought to protect immigrants from facing unnecessary detentions, persecution, and removal proceedings by establishing what are called "Sanctuary Jurisdictions." *See* Congressional Research Service, R44795, Sanctuary Jurisdictions: Federal, State, and Local Policies and Related Litigation (May 3, 2019) (details Sanctuary Jurisdiction characteristics and recent litigation resulting from a restriction on State and Local Sanctuary protocols), https://crsreports.congress.gov/product/pdf/R/R44795. Sanctuary Jurisdictions are states and localities that have opted to not cooperate with federal immigration enforcement efforts for various reasons ranging from concerns about the cost of compliance on state agencies to general disagreement with federal policies. *Id.*

In addition to becoming a Sanctuary Jurisdiction, many states have issued guidance to law enforcement and posted resources for state residents to ensure immigrants in that state are protected and know their rights. For example, the Attorney General's office of Illinois published guidance for their law enforcement in 2019 reminding them that "Illinois law largely prohibits law enforcement from participating in actions to enforce immigration law." Office of The Attorney General, State of Illinois, Guidance: Illinois Laws Governing Law Enforcement interactions with Immigrant Communities at 1 (2019), https://www.illinoisattorneygeneral.gov/rights/ImmigrationLawGuidancetoLawEnforcement.pdf.

The state of New Jersey took similar action when the Attorney General issued a Law Enforcement Directive stating "New Jersey's law enforcement officers protect the public by investigating state criminal offenses and enforcing state criminal laws. They are not responsible for enforcing civil immigration violations except in narrowly defined circumstances." Office of the Attorney General, State of New Jersey, Attorney General Law Enforcement Directive No. 2018-6 v.20 at 1 (2019), https://www.nj.gov/oag/dcj/agguide/directives/ag-directive-2018-6_v2.pdf.

To see more state-issued notices, resources, and guidance on state involvement in immigration law, see *State Attorneys General Policy Resources: Immigration*, American Constitution Society, https://www.acslaw.org/projects/state-attorneys-general-project/state-attorneys-general-policy-resources/immigration/.

See also Rebecca Brown, "Developments In The Law: The New "Sanctuary State": *United States v. California* And Lessons For Comprehensive Immigration Reform," 55 LOY. L.A. L. REV. 185 (2022).

Page 107 (§1.01[C] The Preemption Debate)
New Note 13: State Legislation Preventing Courthouse Arrests

In 2017, following Executive Orders issued by President Trump, DHS Secretary John Kelley issued a memorandum stating the following regarding arrest and detention priorities of DHS agencies:

> Department personnel should prioritize removable aliens who (1) have been convicted of any criminal offense; (2) *have been charged with any criminal offense that has not been resolved*; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful in connection with any official matter before a government agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security. [*Emphasis added*]

Memorandum from DHS Secretary John Kelley, *Enforcement of the Immigration Laws to Serve the National Interests*, DHS PUB. LIBRARY (Feb 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf

This memorandum led to an increase in courthouse arrests of undocumented immigrants by ICE agents pursuing the emphasized point (2) above because they were likely to be present at state and local courthouses to resolve charges pending against them. A number of cases were brought to stop these arrests, all of them citing the common-law privilege against civil arrest in courthouses. James D. Gingerich, *Recent Changes In Federal Policy Will Decrease Immigration Arrests At State And Local Courthouses*, 57 COURT REVIEW 192, 195 (2021). Following the slew of litigation on the topic, California, Colorado, Washington, New York, and Oregon all introduced statutory provisions codifying the protections sought by the individuals and organizations suing. *Id*. at 197. Ranging in specificity and exact parameters, the goal of the statutes is the prevention of civil arrests of undocumented immigrants while they are present in courthouses or attending court proceedings because of pending charges against them. *Id.* Reaching further than simply preventing the courthouse arrests, Washington's and New York's statutes put limitations on courts' ability to gather information about and report the immigration status of individuals participating in court proceedings. *Id*.

Page 110 (§ 1.02[D] 4. Federal Authority to "Fine" States and Cities that Provide Sanctuary):

City and County of San Francisco v. Sessions:

The text excerpts the District Court opinion for its breadth and quality of discussion. The holding of this case was followed in most appeals courts, with the exception of the Second Circuit, which agreed with the federal government that federal funds could be withheld. *New York v. Dep't of Justice*, 951 F.3d 84 (2d Cir. 2020). As noted below, the election of President Biden ultimately resulted in several of the sanctuary cases being withdrawn. One news source reported that the change in policy netted New York over $30 million in funds that would have been withheld. Adam Klasfeld, *Biden's Reversal of Trump's DOJ Funding Denial for Sanctuary Cities Nets More Than $30 Million for New York*, NEWSTEX LAW AND CRIME BLOG (May 4, 2021), https://lawandcrime.com/immigration/bidens-reversal-of-trumps-doj-funding-denial-for-sanctuary-cities-nets-more-than-30-million-for-new-york/.
Attorney General Garland rescinded the barriers to funding in April 2021, mooting the issue of penalizing 'sanctuary" state and city governments by depriving them of these funds. The rescission was reported in the press. *See, e.g.,* Sarah N. Lynch, *U.S. Justice Department Ends Trump-Era Limits on Grants to 'Sanctuary Cities*,' REUTERS (April 28, 2021).

Page 122 (§ 1.02[D]): Under Notes and Questions, replace Note 1 with the following:

1. Sanctuary Cities Litigation in the Biden Era.

In early 2021, there were three cases pending before the Supreme Court, one filed by the Department of Justice, one by the State of New York, and one by the City of New York. These cases were submitted to the Supreme Court to resolve the legality of the Trump Administration's efforts to restrict or withhold federal funds from sanctuary cities and states that do not cooperate with ICE. In January 2021, the cases were rescheduled to account for the Biden administration to come into office and determine their stance on the issue. After two more rescheduling dates for the proceedings, the Department of Justice, the City of New York, the State of New York, and the City and County of San Francisco agreed to dismiss the cases. The Biden administration effectively repealed the Trump Administration's attack on sanctuary cities and the dismissal of the cases before the Supreme Court rendered moot many cases about the ability to withhold funds from sanctuary cities. *See*, *e.g.*, New York v. United States DOJ, 951 F.3d 84 (2d Cir. 2020), *reh'g denied en banc* 964 F.3d 150 (2d Cir. 2020), *cert. dismissed*, 141 S. Ct. 1291(2021) (moot).

Some states, however, still have laws prohibiting sanctuary cities and prohibiting local law enforcement agencies from refusing to cooperate with ICE detainers. Mississippi, North Carolina, Washington, and Tennessee are among some states that have passed laws requiring all localities to comply with federal immigration authorities and no locality has brought a lawsuit to challenge the state laws. Miami successfully challenged Florida's restrictive law. *City of S. Miami v. DeSantis*, No. 508 F. Supp. 3d 1209 (S.D Fla. 2020) (enjoining Florida law as preempted by federal statutes). Court of appeals vacated and remanded the district court judgment that allowed the challenge to Florida law that provided that local officials must

cooperate with federal immigration officials and prevented local entities from adopting any "Sanctuary Policy". The district court decision was remanded for lack of jurisdiction because the plaintiff did not establish an injury or the certainty of impending harm that can be traced back to the Governor or Attorney General. *City of S. Miami v. Governor of Fla.,* 65 F.4th 631 (11th Cir. 2023).

Georgia is experiencing pushback to the state's 2010 law outlawing sanctuary cities, as the Mayor of Atlanta signed an executive order in 2018 directing the chief of the city Department of Corrections to stop accepting immigration detainees and instructed the corrections chief to formally request that ICE transfer detainees out of Atlanta as soon as possible. For regularly updated sanctuary policies by state, see *Sanctuary Jurisdiction Policies by State*, Ballotpedia, https://ballotpedia.org/Sanctuary_jurisdiction_policies_by_state. The conservative nonprofit Center for Immigration Studies maintains an interactive map to current sanctuary states, cities, and counties. *See* Jessica M. Vaughan & Brian Griffith, *Map: Sanctuary Cities, Counties, and States*, Center for Immigration Studies (Mar. 22, 2021), https://cis.org/Map-Sanctuary-Cities-Counties-and-States. The National Council of State Legislatures has a robust database with legislation and statutory proposals that includes a wide range of immigration topics. *Immigration Laws and Current State Immigration Legislation*, National Council of State Legislatures, https://www.ncsl.org/research/immigration/immigration-laws-database.aspx.

A 2023 Florida law (SB 1718) makes it mandatory for any private employer with 25 or more employees to utilize E-verify. Current Florida law makes E-Verify mandatory for all public and private employers contracting with state and local governments or receiving state incentive money, but the new law expands the E-Verify requirement to all private employers with 25 or more employees. Non-compliant employers, who failed to use E-Verify three times within 2 years, will be fined $1,000 and have their state licenses revoked until the employer prove compliance. "The Florida Department of Economic Opportunity (DEO) will being enforcement on July 1, 2023". Alonzo Martinez, *Many Florida Employers Must Use E-Verify by July 1, 2023-Is Your Business Impacted*, FORBES (Jun 12, 2023), https://www.forbes.com/sites/alonzomartinez/2023/06/12/many-florida-employers-must-use-e-verify-by-july-1-2023--is-your-business-impacted/?sh=5572dddf4c18

NPR reports that Florida politicians that helped pass the anti-immigration law, SB 1718, say that the bill was only designed to scare migrants and keep them from coming to Florida. The bill has caused destabilization and fear in the state's established immigrant communities, causing workers to leave the state. Now Florida politicians are focusing on educating immigrant workers and employers on the loopholes in the law to quell fears and stop departures. Vanessa Romo, *To Keep Immigrants From Fleeing, Florida GOP Focus on Immigration Law Loopholes*, (June 7, 2023), https://www.npr.org/2023/06/07/1180646146/florida-immigration-law-sb-1718-republican-lawmakers.

On July 1st, 2023, The Southern Poverty Center, ACLU, ACLU of Florida, Americans for Immigrant Justice, and the American Immigration Council announced that they will file a federal

lawsuit against Governor DeSantis challenging SB 1718. The lawsuit will be filed on behalf of several individuals and the Florida Farmworkers Association. The lawsuit specifically challenges the provision of the bill that criminalizes the transportation of migrants into Florida who may have entered the country without federal inspection. Press Release, American Immigration Council, Legal Advocates to File Lawsuit Challenging the Constitutionality of Florida's Anti-Immigrant Law (July 1st, 2023), https://www.americanimmigrationcouncil.org/news/legal-advocates-file-lawsuit-challenging-constitutionality-florida-anti-immigrant-law

In July of 2023, Mayor Adams of New York authorized the creation of a flier to deter immigrants from seeking to travel to New York City due to the significantly large numbers of people New York received in 2022 and 2023. *See https://www.nyc.gov/office-of-the-mayor/news/519-23/as-asylum-seekers-city-s-care-tops-54-800-mayor-adams-new-policy-help-asylum#/0* Reported and analyzed by here: Joe Anuta, *NYC Mayor warns away migrants with 'no vacancy' fliers*, Politico (July 19, 2023) https://www.politico.com/news/2023/07/19/new-york-city-has-run-out-of-room-for-migrants-for-real-this-time-00107107.

Page 123: New Note 4:

4. Positive Developments in State Laws:

Not every state or local law is targeting immigration enforcement. Many pieces of legislation are explicitly seeking greater immigrant integration. For example, several states liberalized access to State I.D. or driver's licenses. Others reduced license requirements for many professions opening areas of self-employment to authorized migrants as well as those with documents.

Briefing on state laws that allow immigrants to obtain driver licenses. See *States Offering Driver's Licenses to Immigrants*, National Council of State Legislatures (March 13, 2023) https://www.ncsl.org/immigration/states-offering-drivers-licenses-to-immigrants

For a 2020 report on the variety of state legislation, see Ann Morse, *Report on State Immigration Laws | 2020*, National Council of State Legislatures (Mar. 8, 2021) : https://www.ncsl.org/research/immigration/report-on-state-immigration-laws-2020.aspx.

For a summary of state laws addressing occupational restrictions see *Professional and Occupational Licenses for Immigrants*, Clinic Legal (last updated Aug. 22, 2019), https://cliniclegal.org/resources/state-and-local/professional-and-occupational-licenses-immigrants.

Report on variety of state legislation relating to immigration in 2022, see Viviana Westbrook, *CLINIC's State and Local Immigration Project: 2022 State Immigration Legislation & Policies in Review* (January 2023).

Importantly, many cities and states began to fund more free representation of noncitizens who needed assistance to prepare immigration related applications or for defense in removal proceedings. https://immigrationforum.org/article/public-funding-for-immigration-legal-services/

What's new in this chapter?

Highlights of this chapter include:

Supreme Court rejection of State Challenges to the border protocols and updates on litigation over the building of a border wall using funds from other federal programs.

Supreme Court narrowing of the Due Process rights of people in expedited removal proceedings under INA § 235(b); 8 U.S.C. § 1255(b) and an excerpt from the important case *Department of Homeland Security v. Thuraissigiam* __ U.S. __ (2020). We also include the full transcript of his review hearing before an immigration judge.

Biden administration repeal of the territorial expansion of expedited removal discussed in the text at 167 to 181 and graphs that depict the expansion and now contraction of expedited removal.

Revision to the asylum procedures, including graphs that explain the new steps in adjudication for some individuals. Including a brief description of regulations adopted May 12, 2023, that severely restricts access to asylum for irregular entrants and July 25, 2023, vacatur by a federal district court. Including part of the *East Bay Sanctuary Covenant v. Biden* ruling.

New **Problem 2-3-2** is to be analyzed as if the rules were still in effect.

The Introduction of a telephone-based app, CBP One™, used to meter or control applications for admission and asylum at the border.

Updates to data about apprehensions and removals.

Expansion of the use of "parole" to admit people into the United States. The topic is introduced here and address again in the supplement to Chapter 3 which concerns the regular process of admission to the United States via visas, statutory waivers, or special provisions.

These programs have grown dramatically in 2023. *See, e.g.*, https://www.nyc.gov/site/immigrants/help/legal-services/actionnyc.page

New York created several new programs to try to expand free legal aid to recently arriving migrants. *See, e.g.,* Mayor Adams Announces Asylum Seeker Application Help Center [1](June 20, 2023). https://www.nyc.gov/office-of-the-mayor/news/433-23/mayor-adams-asylum-application-help-center#:~:text=%E2%80%9CNew%20York%20City%20continues%20to,Hyndman.

For a report exploring needs in California see Grantmakers Concerns With Immigration, 2022 Update Immigration Legal Services in California: A Time for Bold Action (2022)available at https://www.gcir.org/sites/default/files/resources/GCIR_Legal-Services-Assessment-2020-and_2022-Update_STC.pdf

Chapter 2: Immigration Power at the Borders: Finding the Dividing Lines

Further Introductory Note

There are an exceptional number of updates to this chapter since the text was published in 2019. These changes reflect the struggles of the DHS and the Executive Branch to adapt to changes in policies and migration movements. Other updates reflect the extraordinary amount of litigation over the right of people to seek asylum or to be admitted during a global pandemic. This introductory note provides a short narrative overview to guide you as you study the many complex issues that arise at the border.

The first key inquiry to guide your understanding of the power of the federal government to exclude people at the United States borders or ports of entry is to examine the status of the individual – is the person being refused admission, a citizen, a returning lawful permanent resident, an individual with a valid visa stamp allowing temporary admission, a person who is seeking protection guaranteed under domestic and international law, or is this a person trying to make a surreptitious entry.

A second key inquiry is to ask what body of law is governing the behavior of the government. Is this action authorized by statute, regulations, and/or policy guidance? And even if so authorized, are there any constitutional constraints on this behavior? Chapter Two is organized around these essential important queries.

[1] [Editor's Note: Professor Lenni Benson serves as an informal advisor in the design and implementation of the help center.]

KEY VOCABULARY for Chapter Two:

"Arriving Alien": a person presenting themselves for inspection and admission or apprehended within 100 miles of the international border who has not been inspected or admitted. 8 CFR 1.1

Admission: INA § 101(a)(13) a formal inspection or regular entry to the United States with a grant of status. Parole admission is not an admission for all purposes. Further explained in text.

Parole: This can vary in length and purpose. INA § 212(d)(5) authorizes a case by case permission to physically enter the United States but a parole entry is not consider an admission and so the person remains as if they were at the border under a legal fiction. Parole status can be extended and at times carries authority to work. Variations on parole programs are explained in more detail in the supplement to Chapter 3 which concerns temporary entry and residence to the Unite States. The Biden administration has greatly expanded the use of parole for humanitarian purposes and to lessen congestion at the border with Mexico. Many people, not all who are paroled into the United States are also placed in removal proceedings. (Chapter 6).

Expedited Removal: Created in 1996, this is a statutory grant of power to truncate the due process rights of noncitizens and can be used by Customs and Border Protection at the airports, seaports, land ports of entry and with some limits after apprehension in the interior. Explored throughout this Chapter 2.

Regular Removal: The statutory framework of administrative civil proceedings before an immigration judge to determine an individual's right to remain and possibly permits grants of permission to remain, work, and become a permanent resident. Explored more fully in Chapter 6 and 7. Introduced here as a contrast to the expedited border procedures.

Credible Fear: Credible fear of persecution. Standard created in 1996 for asylum seekers to bypass expedited removal.

Reasonable Fear: Higher standard than credible fear required of people previously removed.

Significant Possibility of Fear: Standard proposed for all irregular entrants and other subject to new transit restrictions under regulations issued May 12, 2023 and subject of ongoing litigation.

The textbook updates begin in regular format on following page.

Page 129 (§ 2.01[B][1]): The Inspection Process: Supplement the summary of the scope of CBP activity with the following combination of reports for FY 2019-2022:

Note that even with pandemic conditions, the CBP reported significant activity.

	FY2019	FY2020	FY2021	FY2022
PROCESSED PASSENGERS TOTAL	1,124,075	650,178	491,688	868,867
Int'l Air Passengers & Crew	371,912	169,842	121,516	263,000
Passengers & Crew by Sea	70,414	35,795	8,094	58,549
Passengers & Pedestrians by Land	681,750	444,541	362,078	547,318
Private Vehicles	273,338	187,049	159,598	226,589
Truck, Rail, and Sea Containers	78,703	77,895	89,458	91,605
$ Amount of Imported Goods	$7.3 billion	$6.64 billion	$7.6 billion	$9.2 billion
$ Amount of Duties, Takes and Other Fees	$224 million	$216 million	$256 million	$306 million
Apprehensions at Ports of Entry	2,354	1,107	1,703	6,068
Arrests of Wanted Criminals	23	39	25	41
Refusals of Inadmissible Persons	790	634	723	1,152
Intercepted Fraudulent Documents	18	269	7	8
Discovered Pests	314	250	264	240
Discovered Materials for Quarantine (plant, meat, animal product, soil)	4,695	3,091	2,548	2,677
Pounds of Narcotics Seized/ Disrupted	3,707 pounds	3,677 pounds	4,732 pounds	2,895 pounds

$ Amount of Undeclared or Illicit Currency Seized	$207,356	$386,195	~$342,000	~$217,700
$ Amount of Products Seized with I.P. Violations	$4.3 million	$3.6 million	$9 million	$8 million

Page 131 (§ 2.01[B][1]): The Inspection Process: Supplement the snapshot Comparing Apprehensions at the Border and Overstay Rates for Fiscal Year 2018 through 2020 report and a new type of report issued in 2023 for FY 22 but not posted at the DHS website[2]:

Fiscal Year	Total Lawful Admissions	Est. Overstays	CBP Apprehensions	Percent of Overstays	Percent of CBP Apprehensions	Total Percent of Unlawful stays/enters
2018	54,706,966	666,582	404,201	1.20%	0.74%	1.96%
2019	55,928,990	676,422	859,501	1.21%	1.54%	2.75%
2020	46,195,116	684,499	405,036	1.48%	0.88%	2.36%
2022	23,243,127	853,955	Not reported	3.76%	Not calculated	3.76%

As part of the 2020 report, Secretary Mayorkas of the DHS explained that the agency believed the lower admission numbers and the higher overstay rate were due to the COVID-19 pandemic, which made international travel more complicated. The Secretary wrote:

> Due to the COVID-19 outbreak, the FY 2020 data represents an anomaly when compared with the prevailing trend of decreasing Expected Departures and Overstay. Expected Departures in FY 2020 (46,195,116) were 17.40 percent lower than in FY 2019 (55,928,990) and were 6,124,522 less than the five-year consolidated report average of 52,319,638. The drop in Expected Departure count increased FY 2020 Overstay Rates. The decrease in the Expected Departure population can be attributed to a multitude of factors including travel restrictions enacted in response to the COVID-19 outbreak.

Dep't of Homeland Sec., Entry/Exit Overstay Report (last updated Jan. 5, 2022), https://www.dhs.gov/publication/entryexit-overstay-report.

The most recent report suggests that overtime more people do depart, albeit later than expected. The main reason given for late departure are pandemic shutdowns.

Here is brief introductory excerpt from the report:

As noted, CBP determined there were 23,243,127 in-scope nonimmigrant admissions1 to the United States through air or sea POEs with expected departures occurring in FY 2022, which represents the majority of air and sea annual nonimmigrant admissions. Of this number, CBP

[2] The DHS website has not posted the most recent report. It is available at the website of a conservation think tank the Center for Immigration Studies. https://cis.org/sites/default/files/2023-06/FY%202022-2023%20Entry%20Exit%20Overstay%20Report.pdf

calculated a total overstay rate of 3.67 percent, or 853,955 overstay events. In other words, 96.33 percent of the in-scope nonimmigrant entries departed the United States on-time and in accordance with the terms of their admission. This report breaks down the overstay rates further to provide a better picture of those overstays who remained in the United States beyond their period of admission and for whom there is no identifiable evidence of a departure, an extension of period of admission, or transition to another immigration status. At the end of FY 2022, there were 795,167 Suspected In-Country Overstays, which represents 3.42 percent of expected departures, and there were 58,788 Out-of-Country Overstays, representing 0.25 percent of expected departures. Due to subsequent departures and adjustments of status to lawful permanent resident by individuals in this population, by February 1, 2023, the number of Suspected In-Country Overstays for FY 2022 decreased to 706,952, resulting in the Suspected In-Country Overstay rate of 3.04 percent. As of February 1, 2023, DHS was able to confirm the departures or adjustments of status of more than 96.96 percent of nonimmigrants scheduled to depart in FY 2022, via air and sea POEs.

End of quote.

At the end of the most recent report the DHS provided summary tables of the FY 2021 overstay rate listed a total of 198,596 overstays and a 2.86% percentage of all nonimmigrant admissions. See footnote for source prior page.

Page 132 (§ 2.01[1][B][2]): 2. The Necessity of Physical Barriers at the Border—Build a Wall?: After the first paragraph on page 132 in **Note 2**, discussing *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. 2019) add the following history and settlement updates:

On June 26, 2020, the Ninth Circuit affirmed the district court's judgment ruling against Trump's re-allocation of $2.5 billion of Defense Department funds towards the construction of a "wall" along the U.S. southern border. The Ninth Circuit specifically held that the transfer of funds was inappropriate under the Appropriations Clause, and an unconstitutional violation of the separation of powers. *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020). The Sierra Club case plaintiffs petitioned the U.S. Supreme Court to consider their prior stay based on the findings of the Ninth Circuit, but the Supreme Court declined to lift the stay in a 5-4 decision issued on July 31, 2020, allowing construction of the border wall to continue. *Trump v. Sierra Club*, __ U.S. __, 140 S. Ct. 2620 (2020). The dispute over funding for former President Donald Trump's border wall was scheduled for oral argument on February 22, 2021, but the case was removed from the February argument session after the Biden administration banned the use of taxpayer funds to build a wall and called an end to its construction. *Biden v. Sierra Club*, __U.S. __, 141 S. Ct.

1289 (2021). In July 2021, the Court granted the Biden administration's request for the Court to vacate the lower court decision and to remand for dismissal based on changed circumstances. *Id.*

In July of 2023, several states and news stories reported a settlement over the misappropriation of federal funds directed to build the border wall. Eighteen states had sued over the use of the funds.

Key points of the settlement include:

The Department of Homeland Security will provide $25 million toward the acquisition of conservation property to offset some of the border wall's environmental impacts.

The Department of Homeland Security will install small and large wildlife passages in the border barrier system for several endangered species. If exigent circumstances arise or border security operations demand it, the Department of Homeland Security may install gates to enable those passages to be closed.

The Department of Homeland Security will provide $1.1 million to fund programs that monitor several federally endangered species, including the Peninsular Bighorn Sheep, Sonoran Desert Pronghorn, Mexican Gray Wolf, ocelot, and jaguar.

The parties confirm that $427,296,000 in funding for military construction projects in the plaintiff states of California, Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin has been restored. Exact amounts per state can be found on page 7 of the settlement agreement."

Read more at the cite of the Connecticut Attorney General William Tong https://portal.ct.gov/AG/Press-Releases/2023-Press-Releases/Attorney-General-Tong-Announces-Settlement-Regarding-Unlawful-Construction-of-Trump-Border-Wall(posted July 17, 2023).

See also a settlement statement from the Sierra Club.

https://www.sierraclub.org/press-releases/2023/07/sierra-club-southern-border-communities-coalition-and-aclu-reach-settlement

Image from https://www.cbp.gov/border-security/along-us-borders/border-wall-system

On this webpage users can click on an interactive map that shows the terrain and the border barriers in place or being built.

Page 133 (§ 2.01[B][2]): Notes and Questions: Add the following new notes after **Note 3**:

4. Do Overstay Rates Matter? As the textbook explains, we spend more than $19 billion on border enforcement. Do overstay rates indicate that our system of visa applications and entry inspections are insufficient? What other controls might DHS seek to ensure greater compliance with temporary lawful admissions?

5. Big Data and Immigration Controls. The DHS has grown more sophisticated in its use of facial recognition software. In airports, temporary entrants to the United States are scanned and fingerprints are taken for most temporary entrants. There have been some news reports of DHS enforcement units trying to use geolocation data sources to track movements of people. For example, in the fall of 2020 Buzzfeed reported: "When DHS buys geolocation data, investigators only know that phones and devices visited certain places — meaning, they don't automatically know the identities of people who visited those locations. Investigators have to match a person's visited locations with, say, property records and other data sets in order to determine who a person is. But this also means that, technically, moment-by-moment location tracking could happen to anyone, not just people under investigation by DHS. In particular, lawyers, activists, nonprofit workers, and other essential workers could get swept up into investigations that start with geolocation data." Hamid Aleaziz & Caroline Haskings, *DHS Authorities Are Buying Moment-By-Moment Geolocation Cellphone Data to Track People*, *Buzzfeed* (Oct. 20, 2020).

The DHS Office of Inspector General announced that it would investigate the use of private cell phone data. In February of 2023, the DHS released a redacted report on the Secret Service and ICE use of geolocation. The report contained six recommendations to ensure DHS compliance with federal laws. The DHS concurred with the Inspector's findings. The report can be found here: https://www.oig.dhs.gov/sites/default/files/assets/2023-03/OIG-23-17-Feb23-Redacted.pdf

DHS use of surveillance, face recognition, big data, and other mechanisms of surveillance also has a disproportionate negative impact on people of color. Black, Muslim, Asian, and Latinx communities have all been subjected to systemic and aggressive surveillance. *See* Nicole Turner Lee & Caitlin Chin, *Police Surveillance and Facial Recognition: Why Data Privacy is an Imperative for Communities of Color*, Brookings Institution, (Apr. 12, 2022), https://www.brookings.edu/research/police-surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color/#top12.

Some critics argue that DHS is already gathering too much biometric data and has inadequate protections in place to secure the databases. In a May 14, 2021, congressional oversight hearing, the Electronic Information Privacy Center submitted testimony expressing concerns over the lack of adequate privacy protections for vulnerable populations and others due to DHS data gathering. *See* Electronic Privacy Information Center, Comments of The Electronic Privacy Information Center to the Department of Homeland Security Data Privacy and Integrity Advisory Committee May 14 Meeting on the Information Sharing Environment, Docket No. DHS-2021-0016 (May 14, 2021), https://www.dhs.gov/sites/default/files/publications/epic-dpiac-meeting-may-2021-

comments_002.pdf. Some members of Congress have also introduced legislation to reduce DHS collection and retention of data. *See*

The Government Accountability Office (GAO) issued a report in June 2021 that notes that the DHS has failed to update its collections systems, some of which are more than 30 years old. Further, the agency has not adequately secured private data. U.S. Gov't Accountability Off., GAO-21-386, DHS Needs to Fully Implement Key Practices in Acquiring Biometric Identity Management System (June 2021), https://www.gao.gov/assets/gao-21-386.pdf. GAO issued another report in May 2023 testifying that DHS I.T. systems are outdated—making them costly to maintain and vulnerable to hackers.

The DHS made some efforts to implement GAO's recommendations, but systems for biometric identity data collection have not been updated and remain vulnerable to security risks. U.S. Gov't Accountability Off., GAO-23-106853, DHS Needs to Continue Addressing Critical Legacy Systems (May 31, 2023), https://www.gao.gov/assets/830/826008.pdf.

After extensive public comments, the Biden administration withdrew regulations by the prior administration that would have expanded the collection of biometric data, including DNA from U.S. citizens. *See* Notice Withdrawing Proposed Rules, 86 Fed. Reg. 24750 (May 21, 2021).

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Excerpt from the U.S. Customs and Border Protection (CBP) Inspector's Field Manual on Arriving Noncitizens, *available at* https://www.aila.org/File/Related/11120959F.pdf:

> For an alien to be subject to the expedited removal provisions at a POE, the alien must first meet the definition of "arriving alien." The term "arriving alien" as defined in 8 CFR 1.1(q)[3] means an applicant for admission coming or attempting to come into the United States at a POE, or an alien seeking transit through the United States at a POE, or an alien interdicted in international or U.S. waters and brought into the United States by any means, whether or not to a designated POE, and regardless of the means of transportation. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act, except that an alien who was paroled before April 1, 1999, or an alien granted parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) the Act.
>
> Aliens who entered the United States without inspection; aliens apprehended in the United States without legal status; and aliens

[3] The regulation can be found at https://www.ecfr.gov/current/title-8/chapter-I/subchapter-A/part-1/section-1.2/

> who have departed the United States, are refused admission into another country and are thereafter returned back to the United States do not fall within the definition of arriving aliens. Alien stowaways on arriving vessels, lawful permanent resident aliens of the United States, or applicants under the Visa Waiver Program may be considered arriving aliens for other purposes under the Act, but are not subject to the expedited removal provisions.
>
> It is the responsibility of the officer to determine whether the alien is an arriving alien subject to being placed in expedited removal proceedings. …

[*This document does not have page numbers – this information is found near the bottom of the third page*]

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Updated Note 3: STRIKE last sentence and replace with the following update:

Although the limits and capabilities of Expedited Removal have changed over the years, the rights and proceedings have not. In general, DHS can use Expedited Removal for anyone an inspector deems inadmissible under either INA § 212(a)(6)(C); 8 U.S.C. § 1182(a)(6)(C) or INA § 212(a)(7); 8 U.S.C. § 1182(a)(7).

For a detailed look at Expedited Removal and a description of how this procedure is being utilized read the following April 6, 2022, Congressional Research Service report excerpt:

> Expedited removal has far fewer procedural protections than formal removal proceedings. The alien has no right to counsel, no right to a hearing, and no right to appeal an adverse ruling to the BIA. Judicial review of an expedited removal order also is limited in scope. Further, the INA provides that an alien "shall be detained" pending expedited removal proceedings. Although DHS has discretion to parole an alien undergoing expedited removal, thereby allowing the alien to physically enter and remain in the United States pending a determination as to whether he or she should be admitted, DHS regulations only authorize parole at this stage for a medical emergency or law enforcement reasons.
>
> Despite these restrictions, further administrative review occurs if an alien in expedited removal indicates an intent to seek asylum or otherwise claims a fear of persecution or torture if removed. If, following an interview, the alien demonstrates a credible fear of

> persecution or torture, the alien may pursue an application for asylum and related protections (if the alien fails to show a credible fear of persecution or torture, he or she may still seek administrative review of the asylum officer's determination before an IJ). Administrative review also occurs if a person placed in expedited removal claims that he or she is a U.S. citizen, a lawful permanent resident (LPR), or has been granted refugee or asylee status. In these circumstances, DHS may not proceed with removal until the alien's claim receives consideration.

Hillel R. Smith, Cong. Research Serv., LSB10336, The Department of Homeland Security's Authority to Expand Expedited Removal at 2 (Apr. 6, 2022), https://sgp.fas.org/crs/homesec/LSB10336.pdf

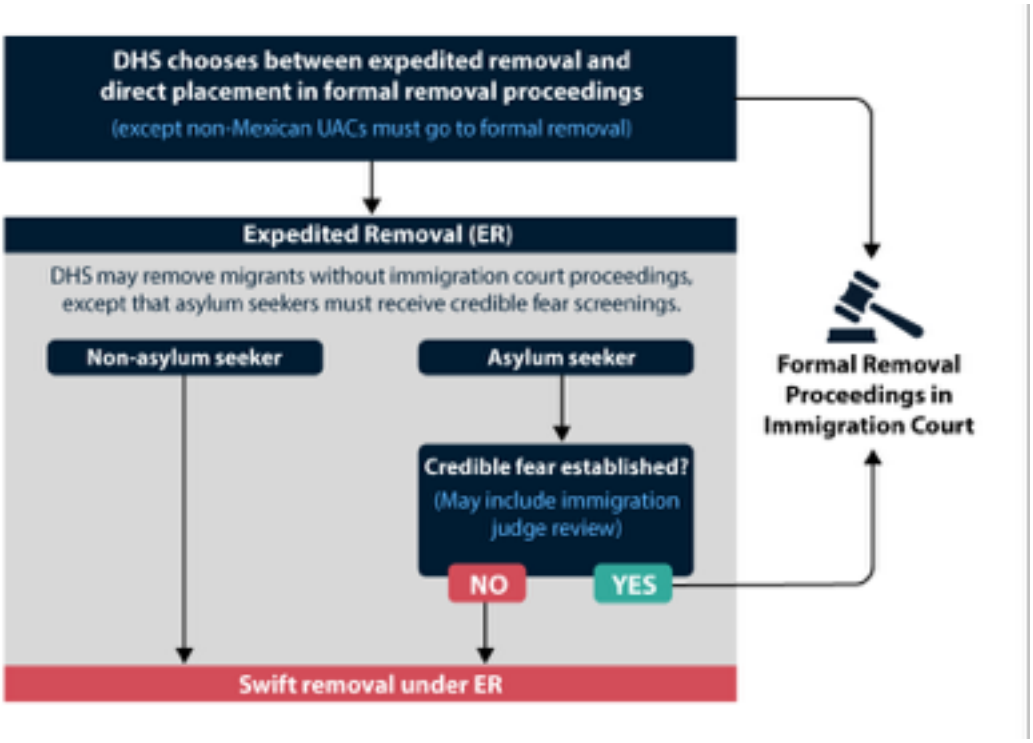

Image Source: Ben Harrington, Cong. Research Serv., R46755, The Law of Asylum Procedure at the Border: Statutes and Agency Implementation (Apr. 9, 2021), *available at* https://fas.org/sgp/crs/homesec/R46755.pdf.

In May of 2023, the Biden administration ended public health expulsions under Title 42. One of the significant changes in the new rules, allowed CBP to determine that an asylum applicant could be refused admission and barred from seeking asylum, subject to exceptions, if the individual had traveled through a safe third country, expressly Mexico. This change and others

have led to litigation. On July 25, 2023, a federal district court vacated the new rules as in violation of law and stayed its vacatur until the end of the first week in August. The government appealed to the Ninth Circuit Court of Appeals on the same day. To put it simply, both law and procedure at the border are in flux.

Here is part of the District Court's vacatur of the 2023 asylum rules:

EAST BAY SANCTUARY COVENANT, et al. v. JOSEPH R. BIDEN, et al.,

Case No. 18-cv-06810-JST, 2023 U.S. Dist. LEXIS 128360 (N.D. Ca July 25, 2023)

[appeal filed to the 9th Circuit]

[**Editor's note:** The Court provides a detailed procedural history of litigating procedures that restricted access to asylum at the U.S. borders that were implemented by both the Trump and Biden administrations. That history is not recited here other than to note that Judge Tigar had, in 2020, permanently enjoyed the Trump administration rules that barred eligibility for asylum if a person traveled through a third country that had signed an agreement with the United States assuring that a person could seek asylum there. These signed agreements were not detailed and the courts found that the agreements were not providing realistic protection. The new Biden rules also created a presumption against asylum eligibility based on a transit ban amongst other grounds as is described below. Most of the citations, footnotes and internal cross references to the record have been omitted.]

On May 16, 2023, DHS and DOJ published a final rule, Circumvention of Lawful Pathways ("the Rule"), which applies a presumption of asylum ineligibility to noncitizens who traveled through a country other than their own before entering the United States through the southern border with Mexico. 88 Fed. Reg. 31314, 31449-52 (May 16, 2023). Unless they meet one of several exceptions, such individuals will be presumed ineligible for asylum; they may rebut this presumption only upon a showing of "exceptionally compelling circumstances" at the time of entry. *Id*. The Rule provides exceptions for unaccompanied children, noncitizens authorized to travel to the United States pursuant to a DHS-approved parole process, certain noncitizens who present at a port of entry, and noncitizens who have been denied asylum or other forms of protection by another country. *Id*.

Plaintiffs are organizations that represent and assist asylum seekers. They argue the Rule is invalid under the Administrative Procedure Act ("APA") for three reasons: first, it is contrary to law; second, it is arbitrary and capricious; and third, it was issued without adequate opportunity for public comment.

A. Statutory Framework

"In 1980, to limit the [Executive's] parole power, create a predictable and permanent admissions system, and fulfill international obligations, Congress passed the Refugee Act," which "provided a statutory basis for asylum, the granting of status to refugees who arrive or have been physically present in the United States." *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1060 (9th Cir. 2017) (en banc); *see also EBSC v. Biden (Entry V)*, 993 F.3d 640, 658 (9th Cir. 2021) ("[T]he Refugee Act of 1980 . . . established an asylum procedure available to any migrant, 'irrespective of such alien's status,' and irrespective of whether the migrant arrived 'at a land border or port of entry.'")
* * *

This statutory basis is now found in the Immigration and Nationality Act ("INA"), which provides that any noncitizen who arrives in the United States, "whether or not at a designated port of arrival" and "irrespective of [their] status, may apply for asylum." [INA § 208(a)(1);] 8 U.S.C. § 1158(a)(1).[1] The statute grants the Attorney General or Secretary of Homeland Security discretion to grant asylum to applicants who qualify as refugees, *id*. § 1158(b)(1)(A), defined as those "unable or unwilling to return to" their home countries "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," *id*. [§ 101(a)(42);] § 1101(a)(42). Certain noncitizens are statutorily barred from eligibility for asylum: those who have persecuted others on the basis of race, religion, nationality, membership in a particular social group, or political opinion; those who have been convicted by final judgment of a particularly serious crime; those who there are serious reasons to believe have committed a serious nonpolitical crime outside the United States prior to arrival; those who there are reasonable grounds to regard as terrorists or a danger to the security of the United States; and those who have firmly resettled in another country prior to arriving in the United States. *Id*. [INA § 208(b)(2)(A)(i)-(v);] § 1158(b)(2)(A)(i)-(vi). The statute also provides that "[t]he Attorney General may by regulation establish additional limitations and conditions" on asylum eligibility, so long as such limitations and conditions are "consistent with this section." *Id*. [INA § 208(b)(2)(C);] § 1158(b)(2)(C).

***

[U]nder the Rule, noncitizens other than Mexican nationals who cross the southern border are presumed ineligible for asylum unless they (1) have received advance permission to travel to the U.S. to apply for parole; (2) present at a port of entry for a pre-scheduled appointment (or without an appointment, if they can demonstrate an "ongoing and serious obstacle" that precluded pre-scheduling); or (3) have already sought and been denied asylum or other protection in another country en route to the U.S.[5] The presumption may be rebutted only upon a showing of exceptionally compelling circumstances.

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[1] This provision does not apply to noncitizens whom the Attorney General determines can be removed to a safe third country, [INA § 208(a)(2)(A);] 8 U.S.C. § 1158(a)(2)(A); or to noncitizens who apply for asylum more than one year after arrival or have previously been denied asylum in the United States, *id*. [INA § 208(b)(2)(B)- (C);]1158(a)(2)(B)-(C), unless they demonstrate changed or extraordinary circumstances, *id*. [§ 208(a)(2)(D);]§ 1158(a)(2)(D).

[5] As noted above, unaccompanied children are also not subject to the presumption. Because this challenge largely does not concern the exception for unaccompanied children, the Court does not discuss this exception in detail.

* * *

Congress granted the agencies authority to impose additional conditions on asylum eligibility, but only those consistent with [INA § 208] Section 1158. The Rule effectively conditions asylum eligibility on whether a noncitizen qualifies for any of three exceptions—presenting at a port of entry, having been denied protection by another country in transit, and having parole-related travel authorization—or can show exceptionally compelling circumstances.[8] The agencies can only condition asylum eligibility based on these factors if doing so is consistent with [§208;] Section 1158.

Two of the conditions imposed by the Rule have been previously found to be inconsistent with Section 1158. Under binding Ninth Circuit precedent, conditioning asylum eligibility on presenting at a port of entry or having been denied protection in transit conflicts with the unambiguous intent of Congress as expressed in Section 1158. Entry V, 993 F.3d at 671 ("[T]he [Entry] Rule is substantively invalid because it conflicts with the plain congressional intent instilled in [Section] 1158(a), and is therefore 'not in accordance with law.'") (quoting 5 U.S.C. § 706(2)(A)); *Transit V, 994 F.3d at 976* ("We hold, independently of *Chevron*, that the [Transit] Rule is not 'consistent with' [Section] 1158. We note, however, that we would come to the same conclusion even if we were to apply *Chevron*, for the Rule is contrary to the unambiguous language of [Section] 1158."). Section 1158(a) permits noncitizens to apply for asylum regardless of whether or not they arrive at a designated port of entry; a rule that conditions eligibility for asylum on presentment at a port of entry conflicts with Section 1158(a). Entry V, 993 F.3d at 669-70. The safe-third-country and firm-resettlement bars, [INA § 208(a)(2)(A);] 8 U.S.C. § 1158(a)(2)(A), (b)(2)(A), "specifically address[] the circumstances in which an alien who has traveled through, or stayed in, a third country can be deemed sufficiently safe in that country to warrant a denial of asylum in the United States"; conditioning asylum eligibility on having been denied protection in transit is not consistent with these bars. *Transit V, 994 F.3d at 978*.

Defendants argue that this Court is not bound by the Ninth Circuit's holdings in *Entry V* and *Transit V* because, unlike the Entry and Transit Rules, this Rule does not impose a categorical bar, and a noncitizen may avoid the application of the presumption by qualifying for a different exception. ECF No. 176-1 at 27-29; *see also* 88 Fed. Reg. at 31374 ("[U]nder this [R]ule . . . manner of entry, standing alone, is never dispositive. . . . [T]he narrower application and numerous exceptions and methods of rebutting the presumption demonstrate the differences between the prior, categorical bars [and the Rule]."); *id.* at 31379 ("[T]he [R]ule imposes a condition on asylum . . . eligibility relating to whether the noncitizen availed themselves of a lawful pathway, but the [R]ule does not direct an inquiry as to whether the noncitizen can or should return to a third country.").

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[8] As noted above, by its terms, the Rule only applies to individuals who transited through a country other than their own en route to the U.S. border. The Rule also contains an exception for unaccompanied minors.

The Court is not persuaded that the existence of other exceptions or the opportunity to rebut the presumption materially distinguishes this Rule from the reasoning of *Entry V* and *Transit V*. In *Entry V*, the Ninth Circuit explained that requiring noncitizens to present at ports of entry "effectively [constitutes] a categorical ban on migrants who use a method of entry explicitly authorized by Congress in [S]ection 1158(a)." 993 F.3d at 669-70. The Entry Rule was contrary to law because it excluded noncitizens from eligibility for asylum based on their failure to present at a port of entry, despite express statutory language providing that any noncitizen may apply for asylum, regardless of "whether or not [they arrived] at a designated port of arrival."[INA § 208(a);] 8 U.S.C. § 1158(a). That a noncitizen may attempt to preserve their eligibility for asylum by meeting another of the Rule's exceptions, or that their failure to present at a port of entry may be excused upon a showing of exceptionally compelling circumstances, does not address the reason why restricting asylum eligibility based on place of entry conflicts with the law. Defendants are correct that the Rule does not impose a categorical bar on all noncitizens subject to the Rule; however, failure to present at a port of entry will exclude those for whom other exceptions are not available and who cannot rebut the presumption.[9]

In *Transit V*, the Ninth Circuit explained that "regulations imposing additional limitations and conditions under [INA § 208(b)(2)(C);] [Section] 1158(b)(2)(C) must be consistent with the core principle of [INA § 208(a)(2)(A) and (b)(2)(A)(vi);] [Sections] 1158(a)(2)(A) and (b)(2)(A)(vi) —that an otherwise qualified alien can be denied asylum only if there is a 'safe option' in another country." 994 F.3d at 979. As written, the Rule imposes a presumption of ineligibility on asylum seekers who did not apply for or were granted asylum in a transit country regardless of whether that country is a safe option. That noncitizens may try to escape the presumption by satisfying a different exception, or that the presumption of ineligibility may be rebutted in exceptionally compelling circumstances, does not address whether a noncitizen has a safe option in another country. While Defendants are correct that failure to seek protection in a transit country alone may not be dispositive for many noncitizens subject to the Rule, it would be so for the subset of noncitizens for whom the other exceptions are unavailable and who cannot rebut the presumption.[10] Regulations imposing additional conditions on asylum must be consistent with the core principle of the safe-third-country and firm-resettlement bars. This Rule is not.

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[9] For example, a noncitizen ineligible for existing DHS parole programs who has been in Mexico for more than 30 business days—and is therefore ineligible for asylum in Mexico, AR 5715 (Ley Sobre Refugiados, Protección Complementaria y Asilo Político, Diario Oficial de la Federación [DOF] 27-01-2011, últimas reformas DOF 18-02-2022 (Mex.))—must present at a port of entry to avoid the presumption altogether. If they cannot safely wait for a CBP One appointment to become available, and cannot show some exceptionally compelling circumstance, they are barred from asylum.

[10] For instance, a noncitizen originating from a third country presently in Mexico who is ineligible for existing DHS parole programs and for whom Mexico is not safe, such that they cannot wait for a CBP One appointment to become available, would be subject to the presumption, regardless of whether any country they traveled through presented a safe option for them. To rebut the presumption, that noncitizen must wait until they experience an extreme and imminent threat to life or safety to enter the United States to seek protection. 88 Fed. Reg. at 31396 ("[D]anger in Mexico generally would justify failing to pre-schedule a time and place to appear at a [port of entry] . . . only when it amounts to an extreme and imminent threat to life or safety."). If they cannot show that or some other exceptionally compelling circumstance, they are barred from asylum.

The Court concludes that the Rule is contrary to law because it presumes ineligible for asylum noncitizens who enter between ports of entry, using a manner of entry that Congress expressly intended should not affect access to asylum. The Rule is also contrary to law because it presumes ineligible for asylum noncitizens who fail to apply for protection in a transit country, despite Congress's clear intent that such a factor should only limit access to asylum where the transit country actually presents a safe option.

The Rule is arbitrary and capricious for at least two reasons. First, it relies on the availability of other pathways for migration to the United States, which Congress did not intend the agencies to consider in promulgating additional conditions for asylum eligibility. Second, it explains the scope of each exception by reference to the availability of the other exceptions, although the record shows that each exception will be unavailable to many noncitizens subject to the Rule.

** *

ii. Scope of Exceptions

Plaintiffs additionally argue that the agencies rely on the exceptions to justify the Rule, while the record demonstrates that many asylum seekers will be unable to qualify for these exceptions. In the preamble, the agencies acknowledge that the Rule's exceptions and opportunity for rebuttal are insufficient to ensure that all noncitizens with otherwise meritorious asylum claims will remain eligible for asylum:

> The Departments acknowledge that despite the protections preserved by the [R]ule and the availability of lawful pathways, the rebuttable presumption adopted in the [R]ule will result in the denial of some asylum claims that otherwise may have been granted, but . . . believe that the [R]ule will generally offer opportunities for those with valid claims to seek protection through asylum, statutory withholding of removal, or protection under the CAT . . . .

88 Fed. Reg. at 31332. However, the Rule justifies the breadth of its presumption of ineligibility by reference to its multiple exceptions and the opportunity to rebut it. *See, e.g.*, 88 Fed. Reg. at 31325 ("These exceptions and opportunities for rebuttal are meant to ensure that migrants who are particularly vulnerable, who are in imminent danger, or who could not access the lawful pathways provided are not made ineligible for asylum by operation of the rebuttable presumption."); id. at 31334 (distinguishing the Transit Rule because "this [R]ule includes a number of broader exceptions and means for rebutting the presumption" and "the means of rebutting or establishing an exception to the presumption are not unduly burdensome"); id. at 31347 ("[T]he meaningful pathways detailed in the [R]ule, combined with the exceptions and rebuttals to the presumption, provide sufficient opportunities for individuals to meet an exception to or rebut the presumption."); *id.* at 31418 ("The Departments believe that the [R]ule will

generally offer opportunities for those with valid claims to seek protection."). The Rule further points to the other exceptions and opportunity for rebuttal to justify the scope of each exception. *See, e.g.,* id. at 31411 ("Applying for, and being denied, asylum or other protection in a third country is one exception to the rebuttable presumption, but noncitizens who choose not to pursue this path may instead seek authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process, or present at a [port of entry] at a pre-scheduled time and place."); id. at 31408 (noting that "the parole processes are not universally available, even to the covered populations," but that individuals who cannot qualify for parole processes "can present at a [port of entry] by using a DHS scheduling mechanism to schedule a time to arrive at [ports of entry] at the [southern border] and not be subject to the presumption of ineligibility"). The Rule therefore assumes that these exceptions will, at the very least, present meaningful options to noncitizens subject to the Rule.

Parole programs are not meaningfully available to many noncitizens subject to the Rule. Though other parole programs exist, ***, the Rule generally relies on the parole programs for Cuban, Haitian, Nicaraguan, Venezuelan, and Ukrainian nationals. These programs are country-specific and "are not universally available, even to the covered populations." 88 Fed. Reg. at 31408. The programs are further limited numerically, capped at 30,000 total individuals from Cuba, Haiti, Nicaragua, and Venezuela per month. *** Puzzlingly, these programs require that individuals fly to an interior port of entry—that is, an airport—rather than cross the southern border. Implementation of a *Parole Process for Cubans, 88 Fed. Reg. 1266, 1273 (Jan. 9, 2023)* ("Beneficiaries are required to fly at their own expense to an interior [port of entry], rather than arriving at the [southern border]."); Implementation of a Parole Process for Nicaraguans, 88 Fed. Reg. 1255, 1261 (Jan. 9, 2023) (same); Implementation of a Parole Process for Haitians, 88 Fed. Reg. 1243, 1249 (Jan. 9, 2023) (same); Implementation of Changes to the Parole Process for Venezuelans, 88 Fed. Reg. 1279, 1279-80 (Jan. 9, 2023) ("DHS provided the new parole process for Venezuelans who are backed by supporters in the United States to come to the United States by flying to interior [ports of entry]—thus obviating the need for them to make the dangerous journey to the [southern border]."); *see also* Implementation of the Uniting for Ukraine Parole Process, 88 Fed. Reg. 25040, 25041 (Apr. 27, 2022) ("If advance authorization is granted, the recipient will be permitted to board a flight to the United States for the purpose of requesting parole."). Because the Rule's presumption only applies at the southern land border, it necessarily would not apply to beneficiaries of these programs arriving at interior ports of entry. Of course, some number of individuals who receive travel authorization pursuant to a parole program might conceivably cross the southern border anyway.[14] Nevertheless, the record shows that the presumption's exception for parole-related travel authorization will necessarily be unavailable to many asylum seekers—due to the parole programs' limited scope and eligibility requirements—and irrelevant to many noncitizens with travel authorization to apply for parole programs that require applicants to fly to interior ports.

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[14] For instance, a prior version of the Venezuelan parole program "required [beneficiaries] to fly to the interior, rather than arriving at the [southern border], *absent extraordinary circumstances* ," suggesting that there are circumstances in which applicants may have remained eligible for parole despite arriving at the southern border. Implementation of a Parole Process for Venezuelans, 87 Fed. Reg. 63507, 64512 (Oct. 19, 2022) (emphasis added).

Seeking protection in a transit country is similarly infeasible for many asylum seekers subject to the Rule. The preamble to the Rule notes that, while the agencies "recognize that not every country will be safe for every migrant," they "expect that many migrants seeking protection will be able to access asylum or other protection in at least one transit country." 88 Fed. Reg. at 31411. The record evidence available to Defendants, however, undermines this finding. Though Defendants argue that "the [R]ule adduces substantial evidence that seeking asylum in transit countries is a viable option for many migrants," ***, the final Rule only specifically discusses Belize, Colombia, and Mexico as countries where noncitizens can effectively seek protection, 88 Fed. Reg. at 31410-11.

The record suggests that seeking asylum or other protection in Belize or Colombia is not a viable option for many migrants. Belize has a limited asylum system: the country has only ever received 4,104 applications for asylum and has granted just 74 of those applications. *** The Rule highlights Belize's 2022 amnesty program, which provided a path to citizenship for asylum seekers registered with the Department of Refugees before March 31, 2020, and limited categories of migrants residing in Belize. *** As of September 30, 2022—two months after the end of the registration period—5,097 people had applied for amnesty. *** Because the registration period has ended and eligibility generally requires prior presence in Belize, the amnesty program is not available to newly arriving asylum seekers. Colombia's asylum system has limited capacity and a significant backlog. *** (2021 State Department report noting that, of approximately 37,000 applications submitted between January 2017 and June 2021, just 753 were granted); *** (2023 DHS memorandum noting 26,000-case backlog of asylum cases). The Rule specifically references Colombia's two-year-old temporary protection program for Venezuelans, 88 Fed. Reg. at 31411, but eligibility is limited to those who arrived irregularly before January 31, 2021, PC 23296, and those who arrived regularly before January 31, 2023, PC 23398. Nothing in the record suggests this program will be available to newly arriving migrants going forward. And migrants who apply for asylum or other protection in Belize or Colombia are at risk of violence while they wait for their applications to be adjudicated. *See, e.g.*, *** (Belizean government source noting "many migrants find themselves victims of human trafficking" in the country); *** (2021 State Department report noting that migrants are at risk of forced labor in Belize); ***(2021 State Department report noting forced labor and human trafficking of migrants, forced recruitment of migrant children by armed groups, and other violence by armed groups in Colombia); *** (2022 non-governmental organization ["NGO"] report documenting gender-based violence against Venezuelan women in Colombia);*** (2022 news report documenting rising violence related to ongoing armed conflict in Colombia).

The record refutes the suggestion that seeking protection in Mexico is a viable option for many asylum seekers. The Rule cites the large number of individuals applying for protection in Mexico as evidence that noncitizens subject to the presumption may seek safety there. 88 Fed. Reg. at 31414-15 ("The Departments . . . note that more than 100,000 individuals felt safe enough to apply for asylum in Mexico in 2022."). However, while a total of 118,478 individuals applied for protection in 2022, Mexico processed just 34,762 applications that year. AR 5707. Mexico's refugee agency is underfunded and unable to keep up with demand. *See, e.g.*, PC 24183 (2021

State Department report noting that the increase in agency's budget "was not commensurate with the growth in refugee claims"); PC 22811 (2023 news report quoting refugee agency director explaining that, as a result of increased demand, the agency is "in a situation of near-breakdown"); PC 23082 (2023 NGO report noting that funding has not kept pace with the increase in applications and that the applications processed in 2022 included "many from previous years"); PC 32446-47 (2022 State Department report noting that civil society groups in Mexico reported that migration authorities did not provide information about how to request asylum, dissuaded migrants from doing so, and encouraged them to instead accept voluntary return to their countries of origin). While they wait for an adjudication, applicants for asylum must remain in Mexico, where migrants are generally at heightened risk of violence by both state and non-state actors. *See, e.g.*, PC 32446-68 (2022 State Department report noting credible reports of gender-based violence against migrants; reports of migrants being tortured by migration authorities; "numerous instances" of armed groups targeting migrants for kidnapping, extortion, and homicide; and that asylum seekers and migrants were vulnerable to forced labor); PC 22839-42 (NGO report documenting violent crimes against 13,480 migrants in Mexico, by both state and non-state actors, between January 2021 and December 2022); PC 76248-87 (table of crimes summarized in preceding report); PC 21752-58 (2022 NGO report discussing gender-based violence in northern Mexico border cities, including against LGBTQI+ and Black migrants); PC 21610-11 (2022 NGO report concerning gender-based violence against Venezuelan women and LGBTIQ+ migrants in southern Mexico).[16]

The record thus undermines the Rule's finding that Belize, Colombia, and Mexico present viable, safe options for many asylum seekers. Defendants argue that sufficient record evidence supports the Rule's finding that transit countries present a viable option for many asylum seekers, instructing the Court to "see generally" over 1,200 pages of the administrative record. ECF No. 176-1 at 31 n.11. At oral argument, Defendants directed the Court to this footnote and sources cited within it for data regarding improved safety and conditions in transit countries. ECF No. 186 at 49:9-20. The sources cited in the footnote document asylum, temporary protection, or other immigration programs of varying capacity presently or formerly available in transit countries. *See, e.g.*, *** (2023 DHS memorandum noting that Costa Rica has established a temporary protection program for certain Cuban, Nicaraguan, and Venezuelan asylum seekers and that Ecuador has opened registration for temporary residence permits for Venezuelans); *** (Costa Rica government website explaining that the temporary protection program applies to nationals of designated countries who applied for asylum prior to September 2022, and is therefore not available to newly arrived migrants);*** (press release from Government of

[16] In addition to these examples, the record is replete with additional documentation of the extraordinary risk of violence many migrants face in Mexico. *See, e.g.*, PC 22129-30 (2023 news report documenting instances of kidnapping of asylum seekers in northern Mexico); PC 23247-50 (2022 news report quoting Chihuahua state police chief stating that "organized criminal gangs are financing their operations through migrant trafficking"); PC 23082 (2023 NGO report discussing treatment of migrants and asylum seekers); PC 20937-43 (2021 NGO report documenting kidnapping and extortion of Venezuelan migrants in Mexico); PC 29740-29744 (2021 NGO report documenting instances of rape, kidnapping, and other violence experienced by migrant women in Mexico); PC 75946-48 (2022 NGO report documenting violence against migrants in Mexico); AR 4881 (2022 NGO report noting that asylum seekers from Central America have been pursued across the border and found in southern Mexico by their persecutors).

Mexico noting the expansion of temporary labor programs). But none of the sources Defendants cite suggests that safety and conditions in these transit countries have improved, and several of the sources suggest migrants are susceptible to harm in these countries. *See, e.g.*, *** (2021 State Department report noting that migrants in Costa Rica are subject to forced labor and that employers use threats of deportation to withhold wages from Nicaraguan migrants); AR 4282-325 (2021 State Department report noting that migrants and refugees in Ecuador are subject to gender-based violence, human trafficking, forced labor, and forcible recruitment into criminal activity). The record evidence cited by Defendants does not support their argument.

That leaves the exception for noncitizens who present at a port of entry. To avoid the presumption under this exception, noncitizens must secure an appointment using the CBP One mobile application and present at the selected port of entry at the pre-scheduled date and time; if a noncitizen presents at a port of entry but lacks an appointment, they must show "it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle," or they will be subject to the presumption. 88 Fed. Reg. at 31450. "This exception [to the exception] captures a narrow set of circumstances in which it was truly not possible for the noncitizen to access or use the CBP One app," and exceptions for language barriers or illiteracy "will be assessed on a case-by-case basis." Id. at 31406. The sub-exception for technical failure is "intended to cover technical failures of the app itself . . . rather than a situation in which a migrant is unable to schedule an appointment due to high demand or one where there is a fleeting temporary technical error." Id. at 31407.

The Rule acknowledges various limitations associated with CBP One, including the existence of "connectivity gaps and unreliable Wi-Fi in central and northern Mexico," the only parts of Mexico in which the app is available; that some individuals may lack smartphones; that the appointment system creates unique challenges for larger families traveling together; that the app is only available in English, Spanish, and Haitian Creole, and some error messages only appear in English; that Login.gov, which applicants must use to access CBP One, is exclusively available in English; and that users have identified various technical issues since the app was first implemented, including the app timing out or becoming overloaded by requests. *Id.* at 31401-05. Additionally, when the Rule was issued, CBP One offered only 1,250 appointments per day across eight southern border ports of entry. AR 2489; 88 Fed. Reg. at 31358 . Demand for appointments exceeds supply. PC 21003; PC 21167; PC 25458; PC 25475.

The agencies also "acknowledge that individuals seeking to make an appointment . . . will generally need to wait in Mexico" and "that, in some cases, the conditions in which such individuals wait may be dangerous." 88 Fed. Reg. at 31400. Because CBP One access is limited to central and northern Mexico, asylum seekers must remain in these areas until they successfully secure an appointment. As discussed above, the record suggests that migrants waiting in Mexico are at serious risk of violence. Under the Rule, however, "danger in Mexico generally would justify failing to pre-schedule a time and place to appear at a [port of entry] . . . only when it amounts to an extreme and imminent threat to life or safety." *Id.* at 31396. Until the

risk of violence rises to this level, individuals seeking to maintain their eligibility for asylum in the United States—and who cannot satisfy either of the other exceptions to the rule—must remain in Mexico, where the record suggests many will not be safe.

While the Rule explains each exception by reference to another, the record suggests these exceptions will not be meaningfully available to many noncitizens subject to the Rule. The Rule is therefore arbitrary and capricious.

Scope of Relief

When an agency decision is unlawful under the APA, the standard remedy is to vacate the agency action and remand to the agency.***

Defendants urge the Court to remand the Rule without vacating it. "[Courts] leave an invalid rule in place only 'when equity demands' that [they] do so." [citations omitted] "Whether agency action should be vacated depends on how serious the agency's errors are and the disruptive consequences of an interim change that may itself be changed."[citations omitted]. Courts also consider "whether the agency would likely be able to offer better reasoning[;] whether by complying with procedural rules, it could adopt the same rule on remand[;] or whether such fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand." [citations omitted].

The severity of the agencies' errors in this case counsels strongly in favor of vacatur. The Rule is both substantively and procedurally invalid. The agencies cannot adopt the same rule on remand; as described above, the Rule is contrary to law. "[T]he threat of disruptive consequences cannot save a rule when its fundamental flaws 'foreclose [the agency] from promulgating the same standards on remand.'" [citations omitted]

The Court is not persuaded that deviating from the presumed remedy of vacatur and remand is appropriate in this case. The Court is mindful that this is "a time of heightened irregular migration throughout the Western Hemisphere,"***; that such migration has dropped since the Rule went into effect, ***; and that, in the absence of the Rule's presumption of asylum ineligibility, "DHS anticipates a return to elevated encounter levels that would place significant strain on DHS components, border communities, and interior cities," ** But the Rule—which has been in effect for two months—cannot remain in place, and vacating the challenged Rule would restore a regulatory regime that was in place for decades before.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment is granted. Defendants' motion for summary judgment is denied. The Rule is hereby vacated and remanded to the agencies.

This order shall be stayed for 14 days. The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

Dated: July 25, 2023

/s/ Jon S. Tigar

JON S. TIGAR

United States District Court

To keep abreast of the litigation you can follow the case at this site: *Eastbay Sanctuary Covenant v. Biden*, 4:18-cv-06810(N.D. CA)(updating pending litigation with new challenges June 2023). Docket available at: https://www.courtlistener.com/docket/8160426/east-bay-sanctuary-covenant-v-biden/?order_by=desc.

For a brief report analyzing the legality of the new rules, see Hillel R. Smith, Cong. Research Serv., LSB10961, The Biden Administration's Final Rule on Arriving Aliens Seeking Asylum, at 2 (May 15, 2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10961

For an analysis of some of the Biden Administration regulatory changes up to the writing in 2022, see Philip G. Schrag, Jaya Ramji-Nogales, Andrew I. Schoenholtz, *The New Border Asylum Adjudication System: Speed, Fairness, and the Representation Problem*, 66 HOWARD LAW JOURNAL forthcoming (2023). *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4233655#*

Page 151 (§ 2.01[1][B][iii]): Refugee and Other Travel Ban Orders: Add the following case update after *Int'l Refugee Assistance Project v. Trump*, 373 F. Supp. 3d 650 (D. Md. 2019) in the last paragraph of section (iii):

In June 2020, the Fourth Circuit held that the district court should have dismissed plaintiff's challenge to President Trump's travel ban because plaintiffs' claims lacked plausibility as the proclamation provided, on its face, "legitimate and bona fide reasons for its entry restrictions." Thus, the court reversed the original judgment and remanded the case back to the district court. *Int'l Refugee Assistance Project v. Trump*, 961 F.3d 635 (4th Cir. 2020).

Biden fully rescinded the original bans. Now litigation continues about the duty of the U.S. government to reconsider or approve visa applications of people unable to travel to the United States due to the bans.

Page 153 (§ 2.01[3]): Exploring the Visa Waiver Program: Add the following case update under "Visa Waiver Program (VWP) and Waiver of Procedural Rights" to *Vera v. Att'y Gen.,* 672 F.3d 187 (3d Cir. 2012), in the second paragraph of this section:

On June 13, 2012, the motion by Respondent to dismiss the petition for review for lack of jurisdiction and vacate the court's opinion was granted and the opinion was vacated. The court based its decision on the incorrect representation of the Department of Homeland Security that the petitioner was admitted to the United States under the visa waiver program. *See Vera v. Att'y Gen.*, 693 F.3d 416 (3d Cir. 2012).

Page 157 Differences In Rights Afforded Between Regular Removal And Expedited Removal

The chart that follows is a summary of **Note 3** in the text. However, there are exceptions and contradictions continuously developing. Consider the chart as a rough summary of the distinctions between Expedited Removal and Regular Removal proceedings. As you expand your understanding of the procedures used in controlling the border and in removal proceedings, you will understand more of the very stark contrasts between expedited removal and regular removal.

The chart includes the 2022 special Asylum Merits Interview Process that was created by an interim final rule in May of 2022. "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers," 87 Fed. Reg. 18078 (March 29, 2022). The Biden administration proposed this new system to allow the Asylum Office to move from a credible fear interview to a full asylum interview and if the individual qualified to a grant of asylum. This process takes more time and if an individual is not granted asylum, they are placed onto a special docket for immigration judge review of the denied application. The AMI docket has been criticized by advocates because it has very short timelines for setting hearings and adjudication the pending application.

This AMI program is paused as of the spring of 2023 because the Asylum Office lacked the personnel to conduct these longer interviews. The Asylum Office has stopped publishing workload statistics on the USCIS or DHS websites. Several sources report that in meetings the Asylum Office stated it had 202,000 affirmative applications in that fiscal year. The Asylum Office must divide its staff to handle both these affirmative applications made by people already inside the United States and not yet in removal and process the credible fear interviews that are part of the Expedited Removal process.

Unable to handle the full workload with existing personnel in the spring of 2023 the Asylum Office stopped using the new AMI process. As of December of 2002, the Asylum Office had referred 971 cases to the EOIR. We defer until Chapter 8 for a discussion of the "affirmative" asylum application process available inside the United States.

Graphic next page. This chart does not include the vacated rules of May 2023.

	EXPEDITED REMOVAL § 235	REGULAR REMOVAL § 240	AS OF NEW IFR EFFECTIVE MAY 31, 2022 Hybrid Process
Interview by DHS Official Determination of Inadmissibility	Only grounds to 212(a)(6) or (a)(7) – Limited geographically and in time	Any Ground of Inadmissibility – Process begun with an issuance of a notice to appear	CBP or ICE can continue to use expedited removal as before. CBP cannot conduct Credible Fear, must refer to Asylum Office
Approximate Time for Processing	As short as a few hours to be removed. Could be a detention of several weeks for a credible fear interview.	If detained, it can be a matter of days. If released, it can be a number of years. Length of regular removal discussed further in Ch. 6	After passing Credible Fear, 21-45 days later there will be an Asylum Merits Interview (AMI)*
Credible Fear Interview	Only if DHS Officers refers to Asylum Officer (AO) If AO finds Credible Fear, Transition to Regular Removal	Not Required prior to commencement of proceedings	Performed by USCIS Asylum Officer. If Credible fear found, sent to AO for "AMI"
Decision by a Judge	NO Decision made by inspector and their supervisor alone unless credible fear is found; Immigration Judge can review lack of Credible Fear by Asylum Officer	YES; but asylum case is heard in court. Notice to Appear Served and Case heard before an Immigration Judge	Not at first stage. Decision made by the AO in the (AMI) and then de novo review in "streamlined" § 240 proceeding
Right to Counsel	NO** At the Border/Point of Inspection	YES Pro Se or Hired Counsel	Not officially at border but theoretically at credible fear and AMI.
Recording of Proceedings	NO	YES, in court	Unclear what AMI record will contain.
Review by Board of Immigration Appeals (BIA)	NO	YES	YES
Judicial Review	NO Specifically Precluded (See discussion of limited habeas review in *Thuraissigiam)*	YES Via Petition for Review in Federal Circuit Courts	Yes, see regular removal under Section 240.
Negotiate for Withdrawal of Application for Admission	YES Very few other options other than Asylum or Statutory Exemption	NO Once proceedings have begun, you can seek discretionary termination or voluntary departure	YES Application for Asylum can be withdrawn even after AMI
Relief Available	Only Asylum or Withholding***	Variety of Forms may be possible	May seek all forms of relief.
Detention During Proceedings	YES	YES	YES Unless granted Parole

	EXPEDITED REMOVAL § 235	REGULAR REMOVAL § 240	AS OF NEW IFR EFFECTIVE MAY 31, 2022 Hybrid Process
Bond	NO Parole may be permitted	Not for Arriving Aliens, prior litigation vacated; release permitted	Unclear as to "arriving alien" Parole may be permitted

*Asylum Merits Interview on pause as of Spring of 2023.

** In some detention centers, DHS has allowed attorneys to appear, provided it is not at the expense of the government.

*** This changes if you pass a credible fear interview and are then in regular removal where additional forms of relief, such as adjustment of status, become available.

Page 158 (§ 2.01[D][1][Note 3]): 3. Does a Statutory Right to Claim Asylum Create Guaranteed Procedural Rights?

Supplement the sentence stating, "Expedited removal had grown to represent more than 44% of all of the orders of removal in FY 2013." with the following:

Expedited removals represent 41.8% of total removals in FY 2021. Sean Leong, *Immigration Enforcement Actions: 2021*, Dep't of Homeland Sec. Office of Immigr. Stat., (November. 2022), https://www.dhs.gov/sites/default/files/202212/2022_1114_plcy_enforcement_actions_fy2021.pdf.

See also, DHS Ann. Performance Rep. 52 (2022), https://www.dhs.gov/publication/dhs-fiscal-year-2021-performance-accountability-reports.

In FY 2022, ERO conducted 72,177 removals and 117,213 Title 42 expulsions. Of the 72,177 removals, 43,973 were border removals and 28,204 were interior removals. Removals increased by 13,166 (22%) from FY21's 59,011.

The percentage of convicted criminal removals decreased from 66% to 53%. ERO arrested 46,396 noncitizens with criminal histories. ICE Ann. Rep. Fiscal Year 2022 (Dec 30, 2022), https://www.ice.gov/doclib/eoy/iceAnnualReportFY2022.pdf

Of the total 89,191 removals by ICE and CBP, 37,241 were expedited removals. This represents 41.8% of all removals. *Immigration Enforcement Actions: 2021*, Dep't of Homeland Sec. Office of Immigr. Stat., (November. 2022), https://www.dhs.gov/sites/default/files/2022-12/2022_1114_plcy_enforcement_actions_fy2021.pdf.

The TRAC data gathered via FOIA shows that in 2020 of the total of 156,158 removals, 39,271 were expedited removals. That would represent 25% of all of the removals. However, this data may only reflect removals made by ICE and not include those removals effectuated by CBP. *See Latest Data: Immigration and Customs Enforcement Removals*, TRAC Reports (2021), https://trac.syr.edu/phptools/immigration/remove/.

Questions:

1. What is the significance of the fact that over 40% of all removals occur at the border, without judicial review, and likely without counsel? Even if CBP and other DHS officers are well trained, are there consequences to a lack of external oversight?

2. Reconsider your assessment of the volume of expedited removals orders after you have read the *Thuraissigaiam* case below in this chapter 2 supplement.

Problem 2-3-2 is out of date as published in the text. Use the materials below to evaluate the rights of the individuals at the U.S. border.

The Problem has also been changed to reflect legal and procedural changes.

Disregard pages 158 – 165 up to the beginning of Problem 2-3-3

Insert a new problem 2-3-2

Page 159 Substitute this Problem 2-3-2 Martiza Xec-Oxlaj and Her 12-year-old Daughter Selena Morales-Xec [Asylum Seeker at the Port of Entry].

Martiza Xec-Oxlaj is an indigenous woman who lived her entire life in Guatemala. She has three children: Selena Morales-Xec, who is 12 and traveling with her. Her two boys, 9 year old twins stayed with her mother in Guatemala. Martiza has traveled by bus and by foot for several weeks to reach the U.S. port of entry in Tijuana, Mexico/San Ysidro California. Martiza has very little cash with her. She spent most of her funds to get to Tijuana. When she approached the U.S. port of entry, a Mexican government official stopped her and asked for her passport. The Mexican official told her that she and her daughter must find a cell phone and download the new CBP One application. The CBP One App™ will allow her to schedule an appointment with an official of the U.S. government where she can seek permission to enter or asylum.

Maritza says she does not have a cell phone. The Mexican official tells her to go ask for help from one of the local missions set up to assist migrants.

At the shelter, a volunteer tells her that she must have a phone and that it might be weeks before she is scheduled for an appointment. “The U.S. government is scheduling more than 1,000 people a day but it can take a long time before your time is called.”

A few weeks later, Maritza receives her interview notice via the CBP One™App. She travels to the port of entry and is escorted to a small interview room. She explains to the official that her daughter was harassed and threatened because she is indigenous. Martiza explains that no one protects indigenous women in Guatemala. “If we go back, they will hurt me and force my daughter to be a sex worker for the gangs.”

Problem 2-3-2 Essential Materials

INA § 235(b); 8 U.S.C. §1225(b).

8 CFR § 235.3(b)(4) ***Claim of asylum or fear of persecution or torture.*** If an alien subject to the expedited removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer in accordance with 8 CFR 208.30. The examining immigration officer shall record sufficient information in the sworn statement to establish and record that the alien has indicated such intention, fear, or concern, and to establish the alien's inadmissibility.

8 CFR § 208.30 partial excerpt here:

> (3) An alien will be found to have a credible fear of torture if the alien shows that there is a significant possibility that the alien is eligible for withholding of removal or deferral of removal under the Convention Against Torture, pursuant to § 208.16 or § 208.17.
>
> (4) In determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, or a credible fear of torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit a positive credible fear finding pursuant to paragraph (f) of this section in order to receive further consideration of the application for asylum and withholding of removal.

8 CFR §§ 208.33(a)(2)(ii)(B)(updated May 16, 2023)

Read the Practice Advisory prepared by the National Immigration Project, a nonprofit organization providing guidance based on the May 16, 2023 changes to the rules. Go to https://nipnlg.org/work/resources/practice-advisory-bidens-asylum-ban

Notes and Questions:

1. What is the standard the CBP agent must use in assessing whether Martiza and Selena can be subject to expedited removal? A removal order under this statute creates a five-year bar to entry. Martiza and Selena do not have valid passports nor any visa documents that authorize entry into the United States.

2. What is the standard Martiza must meet to be paroled into the United States to continue her pursuit of asylum? Review 8 CFR § 208.30 Credible Fear

3. On May 23, 2023, the State of Texas filed suit alleging that the government was encouraging more people to seek asylum in the United States. *Texas v. Mayorkas*, Secretary of DHS, et al, Case 2:23-cv-00024 (W.D. Tex. May 23, 2023). The complaint can be found on the website of the Attorney General of Texas at https://www.texasattorneygeneral.gov/sites/default/files/images/press/Original%20Complaint.pdf

4. **Wait in Mexico – history, repeal, litigation.** The Trump administration had tried to force asylum seekers to remain in Mexico using INA § 235(b)(2)(C) which contains some authority for "tightening" asylum procedures for people who arrive from the contiguous territory. There was extensive litigation over the policies and after the 2020 election, the DHS revoked the prior "wait in Mexico" aka "Migrant Protection Protocols." Understanding this history is important to being able to understand the statutes and regulations governing process at the border. Accordingly we have provided the text of DHS Secretary Mayorkas' memorandum explaining the decision to **suspend** the Migrant Protection Protocols:

   > As an initial matter, my review confirmed that MPP had mixed effectiveness in achieving several of its central goals and that the program experienced significant challenges.
   >
   > I have determined that MPP does not adequately or sustainably enhance border management in such a way as to justify the program's extensive operational burdens and other shortfalls. Over the course of the program, border encounters increased during certain periods and decreased during others. Moreover, in making my assessment, I share the belief that we can only manage migration in an effective, responsible, and durable manner if we approach the issue comprehensively, looking well beyond our own borders. Based on Department policy documents, DHS originally intended the program to more quickly adjudicate legitimate asylum claims and clear asylum backlogs. It is certainly true that some removal proceedings

conducted pursuant to MPP were completed more expeditiously than is typical for non-detained cases, but this came with certain significant drawbacks that are cause for concern. The focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their immigration proceedings. In particular, the high percentage of cases completed through the entry of *in absentia* removal orders (approximately 44 percent, based on DHS data) raises questions for me about the design and operation of the program, whether the process provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief, and whether conditions faced by some MPP enrollees in Mexico, including the lack of stable access to housing, income, and safety, resulted in the abandonment of potentially meritorious protection claims. I am also mindful of the fact that, rather than helping to clear asylum backlogs, over the course of the program backlogs increased before both the USCIS Asylum Offices and EOIR.

MPP was also intended to reduce burdens on border security personnel and resources, but over time the program imposed additional responsibilities that detracted from the Department's critically important mission sets. The Department devoted resources and personnel to building, managing, staffing, and securing specialized immigration hearing facilities to support EOIR; facilitating the parole of individuals into and out of the United States multiple times in order to attend immigration court hearings; and providing transportation to and from ports of entry in certain locations related to such hearings. Additionally, as more than one-quarter of individuals enrolled in MPP were subsequently re-encountered attempting to enter the United States between ports of entry, substantial border security resources were still devoted to these encounters.

A number of the challenges faced by MPP have been compounded by the COVID-19 pandemic. As immigration courts designated to hear MPP cases were closed for public health reasons between March 2020 and April 2021, DHS spent millions of dollars each month to maintain facilities incapable of serving their intended purpose. Throughout this time, of course, tens of thousands of MPP enrollees were living with uncertainty in Mexico as court hearings were postponed indefinitely. As a result, any benefits the program may have offered are now far outweighed by the challenges, risks, and costs that it presents.

In deciding whether to maintain, modify, or terminate MPP, I have reflected on my own deeply held belief, which is shared throughout this Administration, that the United States is both a nation of laws and a nation of immigrants, committed to increasing access to justice and offering protection to people fleeing persecution and torture through an asylum system that reaches decisions in a fair and timely manner. To that end, the Department is currently considering ways to implement long-needed reforms to our asylum system that are designed to shorten the amount of time it takes for migrants, including those seeking asylum, to have their cases adjudicated, while still ensuring adequate procedural safeguards and increasing access to counsel. One such initiative that DHS recently announced together with the Department of Justice is the creation of a Dedicated Docket to process the cases of certain families arriving between ports of entry at the Southwest Border. This process, which will take place in ten cities that have well-established communities of legal service providers, will aim to complete removal proceedings within 300 days—a marked improvement over the current case completion rate for non-detained cases. To ensure that fairness is not compromised, noncitizens placed on the Dedicated Docket will receive access to

legal orientation and other supports, including potential referrals for pro bono legal services. By enrolling individuals placed on the Dedicated Docket in Alternatives to Detention programs, this initiative is designed to promote compliance and increase appearances throughout proceedings. I believe these reforms will improve border management and reduce migration surges more effectively and more sustainably than MPP, while better ensuring procedural safeguards and enhancing migrants' access to counsel. We will closely monitor the outcomes of these reforms, and make adjustments, as needed, to ensure they deliver justice as intended: fairly and expeditiously.

In arriving at my decision to now terminate MPP, I also considered various alternatives, including maintaining the status quo or resuming new enrollments in the program. For the reasons articulated in this memorandum, however, preserving MPP in this manner would not be consistent with this Administration's vision and values and would be a poor use of the Department's resources. I also considered whether the program could be modified in some fashion, but I believe that addressing the deficiencies identified in my review would require a total redesign that would involve significant additional investments in personnel and resources. Perhaps more importantly, that approach would come at tremendous opportunity cost, detracting from the work taking place to advance the vision for migration management and humanitarian protection articulated in Executive Order 14010.

Moreover, I carefully considered and weighed the possible impacts of my decision to terminate MPP as well as steps that are underway to mitigate any potential negative consequences.

In considering the impact such a decision could have on border management and border communities, among other potential stakeholders, I considered the Department's experience designing and operating a phased process, together with interagency and nongovernmental partners, to facilitate the safe and orderly entry into the United States of certain individuals who had been placed in MPP. Throughout this effort, the Department has innovated and achieved greater efficiencies that will enhance port processing operations in other contexts. The Department has also worked in close partnership with nongovernmental organizations and local officials in border communities to connect migrants with short-term supports that have facilitated their onward movement to final destinations away from the border. The Department's partnership with the Government of Mexico has been an integral part of the phased process's success. To maintain the integrity of this safe and orderly entry process for individuals enrolled in MPP and to encourage its use, the Department has communicated the terms of the process clearly to all stakeholders and has continued to use, on occasion and where appropriate, the return-to-contiguous-territory authority in INA Section 235(b)(2)(C) for MPP enrollees who nevertheless attempt to enter between ports of entry instead of through the government's process.

In the absence of MPP, I have additionally considered other tools the Department may utilize to address future migration flows in a manner that is consistent with the Administration's values and goals. I have further considered the potential impact to DHS operations in the event that current entry restrictions imposed pursuant to the Centers for Disease Control and Prevention's Title 42 Order are no longer required as a public health measure. At the outset, the Administration has been—and will continue to be—unambiguous that the immigration laws of the United States will be enforced. The Department has at its disposal various options that can be tailored to the needs of individuals and circumstances, including detention, alternatives to detention, and case management programs that provide sophisticated wraparound stabilization services. Many of these detention alternatives have been shown to be successful in promoting compliance with immigration requirements. This Administration's broader strategy for managing border processing and adjudicating claims for immigration relief—which includes the Dedicated Docket and additional anticipated regulatory and policy changes—will further address multifaceted border dynamics by facilitating both timely and fair final determinations.

I additionally considered the Administration's important bilateral relationship with the Government of Mexico, our neighbor to the south and a key foreign policy partner. Over the past two-and-a-half years, MPP played an outsized role in the Department's engagement with the Government of Mexico. Given the mixed results produced by the program, it is my belief that MPP cannot deliver adequate return for the significant attention that it draws away from other elements that necessarily must be more central to the bilateral relationship. During my tenure, for instance, a significant amount of DHS and U.S. diplomatic engagement with the Government of Mexico has focused on port processing programs and plans, including MPP. The Government of Mexico was a critically important partner in the first phase of our efforts to permit certain MPP participants to enter the United States in a safe and orderly fashion and will be an important partner in any future conversations regarding such efforts. But the Department is eager to expand the focus of the relationship with the Government of Mexico to address broader issues related to migration to and through Mexico. This would include collaboratively addressing the root causes of migration from Central America; improving regional migration management; enhancing protection and asylum systems throughout North and Central America; and expanding cooperative efforts to combat smuggling and trafficking networks, and more. Terminating MPP will, over time, help to broaden our engagement with the Government of Mexico, which we expect will improve collaborative efforts that produce more effective and sustainable results than what we achieved through MPP.

Given the analysis set forth in this memorandum, and having reviewed all relevant evidence and weighed the costs and benefits of either continuing MPP, modifying it in certain respects, or terminating it altogether, I have determined that, on balance, any benefits of maintaining or now modifying MPP are far outweighed by the benefits of terminating the program. Furthermore, termination is most consistent with

> the Administration's broader policy objectives and the Department's operational needs. Alternative options would not sufficiently address either consideration.
>
> Therefore, in accordance with the strategy and direction in Executive Order 14010, following my review, and informed by the current phased strategy for the safe and orderly entry into the United States of certain individuals enrolled in MPP, I have concluded that, on balance, MPP is no longer a necessary or viable tool for the Department. Because my decision is informed by my assessment that MPP is not the best strategy for implementing the goals and objectives of the Biden-Harris Administration, I have no intention to resume MPP in any manner similar to the program as outlined in the January 25, 2019 Memorandum and supplemental guidance.
>
> Accordingly, for the reasons outlined above, I hereby rescind, effective immediately, the Memorandum issued by Secretary Nielsen dated January 25, 2019 entitled "Policy Guidance for Implementation of the Migrant Protection Protocols," and the Memorandum issued by Acting Secretary Pekoske dated January 20, 2021 entitled "Suspension of Enrollment in the Migrant Protection Protocols Program." I further direct DHS personnel, effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP. Furthermore, DHS personnel should continue to participate in the ongoing phased strategy for the safe and orderly entry into the United States of individuals enrolled in MPP.
>
> The termination of MPP does not impact the status of individuals who were enrolled in MPP at any stage of their proceedings before EOIR or the phased entry process describe above.
>
> * * * * *

Memorandum from Alejandro Mayorkas, Secretary of Homeland Security, Termination of the Migrant Protection Protocols Program (June 1, 2021) https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf

On June 30, 2022, the U.S. Supreme Court held that the Secretary of Homeland Security has the discretionary authority to end the Migrant Protection Protocols program. Moreover, the Supreme Court rejected the statutory and APA analysis of the Fifth Circuit and introduced a new critical issue of whether the jurisdictional limitations found within the INA precluded injunctive relief initially granted by the federal district court. Writing for the majority, Chief Justice Roberts held that the INA does not allow injunctive relief even when such relief is not sought as part of an individual non-citizen seeking judicial review of a removal decision. Justice Roberts cited another case decided in the spring of 2022, *Garland v. Aleman Gonzales*, 596 U.S. __, slip op. at 5, finding that a class of people facing mandatory detention due to prior removal orders could not seek bond hearings before immigration judges even if their removal was reopened to seek withholding of removal or protection under the Convention Against Torture.

The majority quoted the relevant INA restriction:

> "Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U. S. C. §§1221–1232], other than with respect to the application of such provisions to an individual alien against whom proceedings under [those provisions] have been initiated." INA § 242(f)(1); 8 U.S.C. § 1252(f)(1)."

Justice Roberts noted that while the lower district court had general subject matter jurisdiction under the federal question statute, 8 U.S.C. § 1331, only the Supreme Court had the power to grant the injunctive relief sought. Justice Barrett wrote a separate dissent in which she wrote that she concurred with the decision of the majority but questioned the appropriateness of deciding the jurisdictional issues. Three other justices joined her dissent but not the first line of her opinion, which agreed with the majority on the merits.

As to the merits, the Supreme Court found that Congress had not mandated a remain in Mexico or contiguous territory policy whenever the DHS could not find sufficient detention space or lacked the ability to make individualized parole and release determinations. The Court emphasized that to interpret the INA differently would unduly interfere with the Executive branch's authority to conduct international affairs and would impede the President's ability to negotiate with Mexico:

> In addition to contradicting the statutory text and context, the novelty of respondents' interpretation bears mention. Since IIRIRA's enactment 26 years ago, every Presidential administration has interpreted [INA § 235(b)(2)(C)] section 1225(b)(2)(C) as purely discretionary. Indeed, at the time of IIRIRA's enactment and in the decades since, congressional funding has consistently fallen well short of the amount needed to detain all land-arriving inadmissible aliens at the border, yet no administration has ever used section 1225(b)(2)(C) to return all such aliens that it could not otherwise detain.
>
> And the foreign affairs consequences of mandating the exercise of contiguous-territory return likewise confirm that the Court of Appeals erred. Article II of the Constitution authorizes the Executive to "engag[e] in direct diplomacy with foreign heads of state and their ministers." *Zivotofsky* v. *Kerry*, 576 U. S. 1, 14 (2015). Accordingly, the Court has taken care to avoid "the danger of unwarranted judicial interference in the conduct of foreign policy," and declined to "run interference in [the] delicate field of international relations" without "the affirmative intention of the Congress clearly expressed." *Kiobel* v. *Royal Dutch Petroleum*

Co., 569 U. S. 108, 115–116 (2013). That is no less true in the context of immigration law, where "[t]he dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy." *Arizona* v. *United States*, 567 U. S. 387, 397 (2012).

By interpreting section [INA § 235(b)(2)(C);] 1225(b)(2)(C) as a mandate, the Court of Appeals imposed a significant burden upon the Executive's ability to conduct diplomatic relations with Mexico. MPP applies exclusively to non-Mexican nationals who have arrived at ports of entry that are located "in the United States." §1225(a)(1). The Executive therefore cannot unilaterally return these migrants to Mexico. In attempting to rescind MPP, the Secretary emphasized that "[e]fforts to implement MPP have played a particularly out-sized role in diplomatic engagements with Mexico, diverting attention from more productive efforts to fight transnational criminal and smuggling networks and address the root causes of migration." ... Yet under the Court of Appeals' interpretation, section 1225(b)(2)(C) authorized the District Court to force the Executive to the bargaining table with Mexico, over a policy that both countries wish to terminate, and to supervise its continuing negotiations with Mexico to ensure that they are conducted "in good faith." 554 F. Supp. 3d, at 857 (emphasis deleted). That stark consequence confirms our conclusion that Congress did not intend section 1225(b)(2)(C) to tie the hands of the Executive in this manner.

Finally, we note that—as DHS explained in its October 29 Memoranda—the INA expressly authorizes DHS to process applicants for admission under a third option: parole. See 8 U.S.C. §1182(d)(5)(A). Every administration, including the Trump and Biden administrations, has utilized this authority to some extent. Importantly, the authority is not unbounded: DHS may exercise its discretion to parole applicants "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Ibid*. And under the APA, DHS's exercise of discretion within that statutory framework must be reasonable and reasonably explained. See *Motor Vehicle Mfrs. Assn. of United States*, *Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983). But the availability of the parole option additionally makes clear that the Court of Appeals erred in holding that the INA required the Government to continue implementing MPP.

> In sum, the contiguous-territory return authority in section 1225(b)(2)(C) is discretionary—and remains discretionary notwithstanding any violation of section 1225(b)(2)(A).To reiterate: we need not and do not resolve the parties' arguments regarding whether section 1225(b)(2)(A) must be read in light of traditional principles of law enforcement discretion, and whether the Government is lawfully exercising its parole authorities pursuant to [INA §§ 212(d)(5) and 236(a);] sections 1182(d)(5) and 1226(a). We merely hold that section 1225(b)(2)(C) means what it says: "may" means "may," and the INA itself does not require the Secretary to continue exercising his discretionary authority under these circumstances.

Slip op. at 16-18.

Page 167. Problem 2-3-3 requires new materials.

The facts are the same. Read the Essential Materials listed on page 167 but as the Trump administration expansion were rescinded stop reading at paragraph 3 on page 180 through [4] Credible Fear and the Complexity of the Process page 181. Additional materials for this problem are required due to new regulations promulgated on May 12, 2023, by the Biden Administration. These are tough new rules and directly impact people like the family in problem 2-3-3 because they crossed into the interior to seek asylum. There is litigation over the legitimacy of the rules which is discussed below.

For detailed story with photographs and interviews about asylum seekers at the Texas border in the summer of 2023 read Maria Sacchetti, *Biden's asylum changes reduced border crossings. But are the rules legal?* WASHINGTON POST (July 18, 2023) available at https://www.washingtonpost.com/immigration/2023/07/18/border-asylum-us-mexico-biden-legal/

Read pages 167 to 181 in the text. Delete all of the Notes and Questions on page 181 and replace with these updated materials.

Notes and Questions:

1. An individual who entered the United States without inspection, without a visa, and entered by crossing at an unauthorized point, could still seek asylum and other humanitarian protections. The individual cases followed several common paths and depending on the place or timing of the apprehension the individual could not be placed into Expedited Removal. While the statute was adopted in 1996, the government did not use Expedited Removal until activated by the Attorney General in 2002.

2. Read the Notices implementing Expedited Removal in 2002, and the expansion in 2004. These are in the **text at pages 167 to 179.** What reasons did the Attorney General give for implementing this tool? Who is impacted? These two Notice remain current law.

Next page graphic exploring the territorial expansion of expedited removal.

Here is a helpful graphic showing the changes to expedited removal over the years, including the 2002 expansion and the 2019 repealed expansion discussed below:

3. **Repeal of Expansion by Biden.** The last expansion, authorized by the Trump administration was repealed in 2021 by Biden. Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 5, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/

   Nevertheless, examining the power Congress has granted is important to explore. Here is part of the announcement made by President Biden when he stopped the expansion of Expedited Removal into the entire U.S. interior:

   "For generations, immigrants have come to the United States with little more than the clothes on their backs, hope in their hearts, and a desire to claim their own piece of the American Dream. These mothers, fathers, sons, and daughters have made our Nation better and stronger.

   The United States is also a country with borders and with laws that must be enforced. Securing our borders does not require us to ignore the humanity of those who seek to cross them. The opposite is true. We cannot solve the humanitarian crisis at our border without addressing the violence, instability, and lack of opportunity that compel so many people to flee their homes. Nor is the United States safer when resources that should be invested in policies targeting actual threats, such as drug cartels and human traffickers, are squandered on efforts to stymie legitimate asylum seekers.

   Consistent with these principles, my Administration will implement a multi-pronged approach toward managing migration throughout North and Central America that reflects the Nation's highest values. We will work closely with civil society, international organizations, and the governments in the region to: establish a comprehensive strategy for addressing the causes of migration in the region; build, strengthen, and expand Central and North American countries' asylum systems and resettlement capacity; and increase opportunities for vulnerable populations to apply for protection closer to home. At the same time, the United States will enhance lawful pathways for migration to this country and will restore and strengthen our own asylum system, which has been badly damaged by policies enacted over the last 4 years that contravened our values and caused needless human suffering.

   * * *

(ii) The Secretary of Homeland Security shall promptly review and consider whether to modify, revoke, or rescind the designation titled "Designating Aliens for Expedited Removal," 84 Fed. Reg. 35,409 (July 23, 2019), regarding the geographic scope of expedited removal pursuant to INA section 235(b)(1), 8 U.S.C. 1225(b)(1), consistent with applicable law. The review shall consider our legal and humanitarian obligations, constitutional principles of due process and other applicable law, enforcement resources, the public interest, and any other factors consistent with this order that the Secretary deems appropriate. If the Secretary determines that modifying, revoking, or rescinding the designation is appropriate, the Secretary shall do so through publication in the Federal Register."

4. **New Irregular Pathways Regulations—A new harsh reality?**
Rather than expand expedited removal into the interior of the United States as Trump's administration had done, the Biden administration implemented significant regulatory and policy changes to try to control the flow of asylum seekers, especially at the border with Mexico.

On May 12, 2023, the Department of Homeland Security promulgated new regulations that seek to control irregular entry into the United States. See 88 Fed. Reg 313314 (May 12, 2023) available at Federal Register :: Circumvention of Lawful Pathways.

These new rules are dramatic. And in unprecedented ways they change both expedited removal procedures but also future access to asylum or other protections even if the person is undetected at the border or near the border. The full impact of these new rules is difficult to measure but even in the first few weeks, observers have noted significant problems due to a lack of information about the consequences of unlawful or irregular entry and the push facts of violence and insecurity present in the border regions between Mexico and the United States. See Human Rights First, Refugee Protection Travesty: Biden Asylum Ban Endangers and Punishes At-Risk Asylum Seekers (July 12, 2023) available at: https://humanrightsfirst.org/library/refugee-protection-travesty/

Here is a quote from that report which was based on 300 interviews at the border or in detention centers: "Like the Trump administration asylum transit ban, the Biden asylum ban has artificially driven down fear screening pass rates by unlawfully raising the standard created by Congress, with pass rates plummeting by 45 percent for those barred by the asylum ban, as detailed below. The vast majority (88 percent) of the 8,195 people subject to the asylum ban between May 12 and June 13 were unable to meet one of the extremely limited exceptions to the

ban. Over the last two months, the asylum ban has been imposed in fear screening interviews against asylum seekers from Colombia, El Salvador, Guatemala, Honduras, Venezuela, and other countries including those fleeing anti-LGBTQ persecution, politically-motivated attacks, religious persecution, gender-based violence, and other harm" Report at p.5.

Litigation was immediately filed by immigration advocates to challenge the legality of the new rules. See Complaint at https://www.aclu.org/documents/complaint-east-bay-sanctuary-covenant-v-biden

On July 25, 2023 a federal district court vacated the rules but stayed the impact until the end of the first week of August 2023. To help you understand how these rules might alter rights at the border, compare the two graphics below.

Quick Chart comparing manner of applying for asylum BEFORE May 12, 2023

Encounter at US Border	Apprehended w/in 100 miles or arrival by sea < 2 yrs before	Interior w/out status apprehension	Interior with or without authorized status NO arrest by DHS
Expedited Removal or	Expedited Removal or	Repealed expansion of expedited removal 2019 to 2021	
Regular Removal before EOIR	Regular Removal before EOIR	Regular removal proceedings before EOIR	Affirmative Application at Asylum Office of USCIS
AMI program paused Spring 2023			possible later referral to Court if not approved

Quick Chart comparing manner of applying for asylum AFTER May 12, 2023[4]

Encounter at US Border	Apprehended w/in 100 miles or arrival by sea < 2 yrs before	Interior w/out status apprehension	Interior with or without authorized status NO arrest by DHS

[4] The new rules were vacated by the federal district court on July 25, 2023, the government appealed the same day.

Expedited Removal or	Expedited Removal but higher burden to establish fear or	Repealed expansion of expedited removal 2019 to 2021	After May 12, 2023 BARS affirmative filing possible if entry was irregular
Regular Removal before EOIR	Regular Removal before EOIR but higher burden of proof	Regular removal proceedings before EOIR but if entry after May 12, higher burden of proof/ transit bans	Affirmative Application at Asylum Office of USCIS only for those who entered with inspection
AMI program paused spring 2023			possible later referral to Court if not approved ONLY apply in immigration court if irregular entry

For an excellent analysis of the potential impact of these May 2023 rules prepared by a former Immigration Judge see Jeffrey Chase, *Bidens Asylum Bar*, Opinions/Analysis on Immigration Law Blog (July 5, 2023) available at https://www.jeffreyschase.com/blog/2023/7/5/bidens-asylum-bar Judge Chase likens the new rules to a game of "Mother May I?" but where no one is informed of the rules of the game. He was one of several judges who authored amici briefs in support of litigation filed against the rules.

Broadly speaking, with few exceptions, anyone who does not fall under the following categories is presumptively ineligible for asylum under the "Circumvention of Lawful Pathways" rule:

Exceptions to Asylum Ban
Unaccompanied Children
Mexican Citizens or Stateless People Who Have a Habitual Residence in Mexico
Paroled Individuals
Individuals Who Present at Port of Entry With an CBP One™ App Appointment
Individuals Who Can Prove Inability to Access CBP One™ App and Present Themselves at a Port of Entry
Asylum Seekers Who Sought Asylum and Were Denied "On The Merits" En Route to U.S.

See also Chapter 8 which discusses the substantive and procedural law governing asylum and other protections, we provide more details that compare the process for asylum seekers at the border and those who are in the interior. Problem 2-3-3 allows you to evaluate the impact the May 2023 regulations that "punished" irregular entrants could have imposed.

5. Applying the Irregular Pathways Rules to Problem 2-3-3

Yovilli and her child crossed the border irregularly. While she still will be able to have a credible fear interview with the asylum office, the May 12, 2023 regulations now require that a person meet a much higher standard. Here is how the standard is described by Human Rights First. "The impermissibly high screening standard requires the asylum seeker to show a "reasonable possibility" that they could establish eligibility for withholding of removal or Convention Against Torture (CAT) protection. This is a much higher bar than the statutory credible fear standard.

There are exceptions to the higher standards found in the rules. For example, the new program does not apply to Mexican people or stateless people who have been living in Mexico. The rules do not apply to unaccompanied children. But how will Yovilli know whether she qualifies for an exception? Will Yovilli be subject to any transit bans? Should she have had to apply for asylum in Mexico?

6. Statutory and Regulatory Harshness but is it Constitutional?

This text is designed to first have you evaluate the rights of parties under the statute and regulations before you turn to an examination of possible Constitutional limitations on the power of Congress to expel asylum seekers and other new arrivals. Some advocates will want to look to international treaties or customary international law to argue that the new rules are in violation of those protections. It is too early to predict how those questions will be addressed.

The Biden Administration in promulgating the rules asserted that the provisions were consistent with U.S. treaty obligations; however, the United Nation High Commission on Refugees (UNHCR) submitted comments on the rule questioning the sufficiency of the protections. The comment is available here at https://www.regulations.gov/comment/USCIS-2022-0016-7428

On July 25, 2023, the federal district court in granting a summary judgment vacating the rules also agreed that the statutory and treaty obligations were not met under these rules. The District Court found that the regulations violated provisions of the Administrative Procedures Act but also that the regulations were outside or below the

statutory standards required by Congress. This order effectively prevents the Biden administration from applying the new limits on asylum seekers who enter the United States without inspection and/or those who transited through a country that is a signatory to the Refugee convention and protocols.

Put more simply, people who enter the United States and who had not sought asylum in a transit country, do not have to meet the higher standards proposed in the May 2023 regulations. The government filed an appeal on the same day. The Court stayed the impact of its order until August 8, 2023. The grant of summary judgment can be downloaded from the docket link above at Item 187.

7. CBP One™ App Press Release.

In June of 2023, the CBP issued a press release that provided the following information about the new app. CBP One™ App

> The CBP One™ mobile application remains a key component of DHS efforts to incentivize migrants to use lawful and orderly processes and disincentivize attempts at crossing between ports of entry. In June, more than **38,000** individuals who scheduled appointments through the CBP One™ app were processed at a point of entry.

Since the appointment scheduling function in CBP One™ was introduced in January through the end of June, more than **170,000** individuals have successfully scheduled appointments to present at a port of entry using CBP One™.

The top nationalities who have scheduled appointments are Haitian, Mexican, and Venezuelan. Beginning on July 1, CBP announced the expansion of available appointments for noncitizens through the CBP One™ app from **1,250** to **1,450** per day. [Emphasis in the original]

Available at: https://www.cbp.gov/newsroom/national-media-release/cbp-releases-june-2023-monthly-update

Image from https://www.cbp.gov/about/mobile-apps-directory/cbpone

8. Alternatives—Use of Parole, New Procedures – New Litigation

Just as State governments challenged the end of Title 42 expulsions, now States are litigating the creation of the new parole admission programs and alternatives to detention. One of the leading cases was filed by the State of Florida against the Department of Homeland Security. The District Court enjoined the implementation of the parole release programs and the 11th Circuit refused to stay the injunction. *See Florida v. United States,* 2023 U.S. App. LEXIS 13863; 2023 WL 3813774 (June 5, 2023).

Eighteen states, led by Indiana, filed suit in a federal court in North Dakota, challenging the May 12, 2023, regulations that will reduce the ability of people to seek asylum if they bypass regular pathways. This suit argues that the Biden administration is creating new pathways to admit people to the United States in violation of the INA requirements of expedited removal, detention, and removal hearings. *See Indiana, et al. v. Department of Homeland Security*, Case 1:23-cv-00106-CRH (D. N.D. May 31, 2023).

Texas also filed a separate suit against Secretary Mayorkas and the Department of Homeland Security. *Texas v. Mayorkas et al*, Docket No. 2:23-cv-00024 (W.D. Tex. May 23, 2023). This suit alleges that the creation and encouragement of the use of the CBP One app to make appointments at the U.S. border encourages illegal entry. "Attorney General Paxton filed a lawsuit against the Biden Administration to challenge a rule that encourages illegal immigrants to use a mobile application to schedule their unlawful crossing into the United States." Website news release of Attorney General Paxton available at: https://www.texasattorneygeneral.gov/news/releases/paxton-sues-biden-administration-over-their-illegal-use-mobile-phone-app-bring-countless-illegal

As was mentioned above, advocates have also filed litigation over the new regulations arguing they create new illegal and ultra vires barriers to seeking asylum and other protections guaranteed under U.S. law. *Eastbay Sanctuary Covenant v. Biden*, 4:18-cv-06810(N.D. CA)

(updating pending litigation with new challenges. Docket available at: https://www.courtlistener.com/docket/8160426/east-bay-sanctuary-covenant-v-biden/?order_by=desc

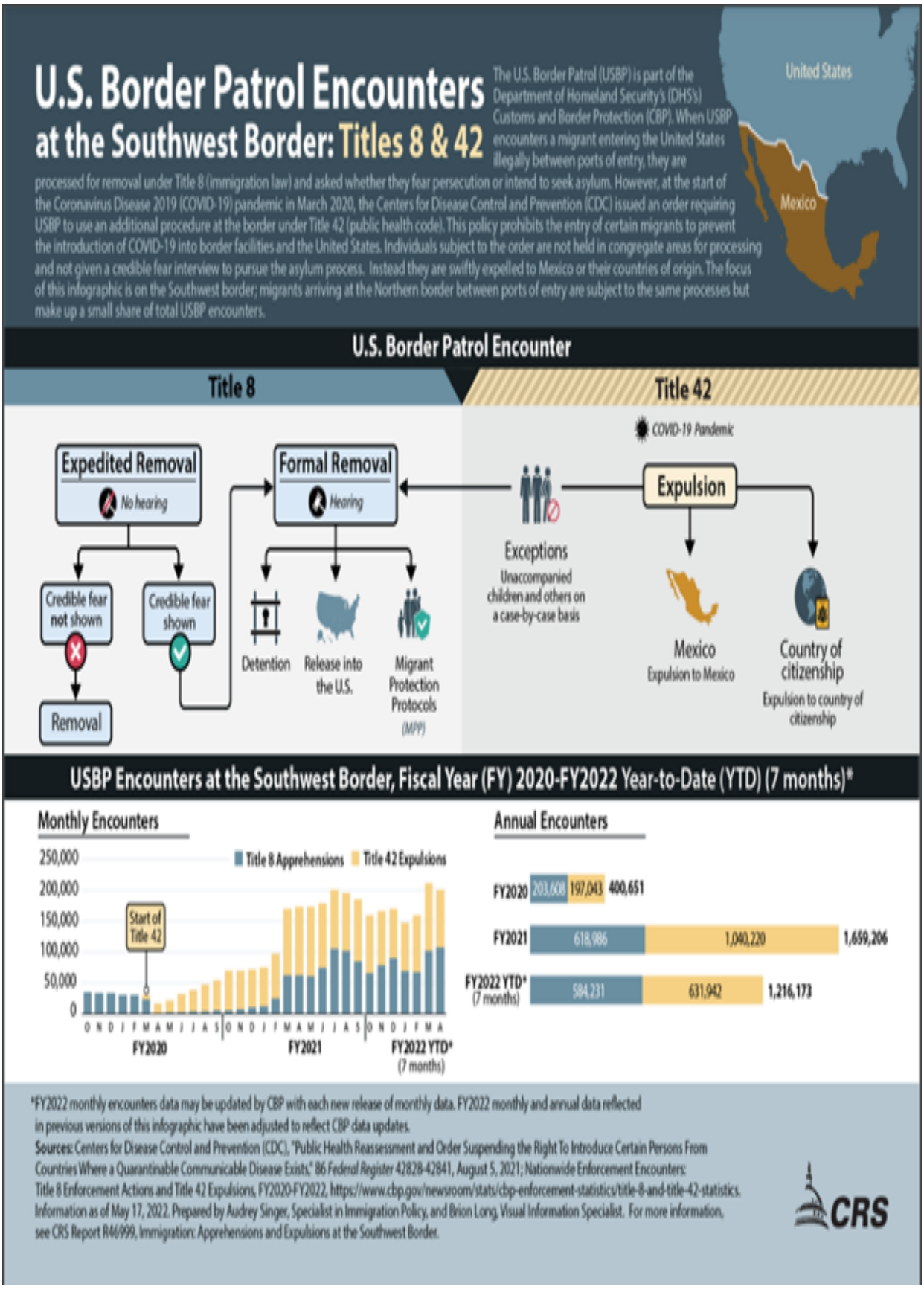
As noted above the regulations were vacated on July 25, 2023 and the government appealed the same day. It is unclear how this ruling will impact the Texas or Indiana litigation that also challenged the rules.

Page 183: ADD Historical Note: TITLE 42 EXPULSIONS

9. INTRODUCTION TO TITLE 42

As a reaction to the COVID-19 outbreak in early 2020, the Department of Health and Human Services issued an emergency order putting in place the expulsion of immigrants under § 265 of Title 42. This section of Title 42 allows the exclusion and expulsion of individuals seeking admission to the United States on the grounds that they have been exposed to or are carrying a dangerous communicable disease that is present in the country they are coming from. 42 U.S.C § 165. Expulsions and exclusions under Title 42 fall outside the realm of typical immigration law, meaning that these removals are not governed by the INA or any other federal law regarding immigration. For example, there is no 5-year ban on reapplication for entry with a Title 42 expulsion where there would be with any other inadmissibility finding. (See Chapter 5 for more information about inadmissibility determinations regarding communicable diseases.)

This graphic image—**Next page** -- prepared by the Congressional Research Services helps illustrate how Title 42 expulsions became part of the removal process:



10. Extensive Litigation over Health Expulsions

We do not recount the entire history of litigation over the Title 42 expulsions here. But in large part, the issue of preserving the power of DHS to expel people at the Southwest border was no longer about infectious disease but instead a desire to preserve a very rapid process of precluding admission to the United States.

Initially the Trump Administration used Title 42 expulsions even if the person was an unaccompanied minor. After litigation, the government stopped expelling children who were protected under the 2008 Trafficking Victims Reauthorization Act (TVPRA). See pages 218 and 219 in the text and this update discussing the litigation that stopped the Title 42 expulsion of unaccompanied minors.

For more information on Title 42 expulsions, see *A Guide to Title 42 Expulsions at the Border*, American Immigration Council (May 2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border_0.pdf.

See also Sarah Sherman-Stokes, *Public Health and The Power to Exclude: Immigrant Expulsions At The Border*, 36 GEO. IMMIGR. L.J. 261 (2021).

Adam Isacson, Commentary: "10 Things to Know About the End of Title 42" published at the WOLA website (May 9, 2023) https://www.wola.org/analysis/end-title-42/. This article has a lengthy history of the implementation of the pandemic exclusion, charts that compare the use of Title 42 to regular immigration and discussions of the litigation surrounding various end dates proposed by the Biden administration. None of the litigation stopped the final end of the program which coincided with the Center for Disease Control officially ending the Covid-19 pandemic on May 11, 2023.

Some key points from the article:

- 2.8 million expulsions using the provisions between 2020 and May 2023.
- "Mexico agreed to take back expelled migrants from some countries: from the very beginning, from El Salvador, Guatemala, and Honduras, and later from Cuba, Haiti, Nicaragua, and Venezuela. Expelled migrants from other countries had to be removed by air, which is expensive and resulted in very low expulsion rates for most other nationalities."
- "In 2022, U.S. Border Patrol encountered 1,480,416 individual migrants on 2,206,436 occasions (the rapidity of Title 42 expulsions eased repeat attempts to cross)."
- New regulations that would be going into effect in May [of 2023] would likely deter and prevent more people from arriving, especially combined with new parole programs that would authorize temporary admissions for certain nationalities.

11. Disproportionate Impact of Title 42 Expulsions on Haitian Immigrants

The use of Title 42 expulsions for immigrants from Haiti has drawn heavy criticism. In mid- to late 2021, a worsening of socio-political conditions, in combination with a 7.2 magnitude earthquake, prompted an influx of Haitian immigrants seeking asylum in the United States. Many of these Haitian immigrants sought entry near Del Rio, Texas. Facing more than 30,000 immigrants, mostly Haitian, in Del Rio, conditions worsened, culminating in a temporary staging area with highly unsanitary and inhumane conditions with patrol by CBP agents on horseback. According to Secretary of Homeland Security Alejandro Mayorkas, of the 30,000 immigrants at the Del Rio staging area between September 9 and 24, 2021, approximately 2,000 (~7%) of them were sent back to Haiti pursuant to Title 42 expulsions. The immediate expulsion under Title 42 prevented any of the deported migrants from filing asylum petitions.

In reaction to the mistreatment and deportation of Haitian migrants during September of 2021, the State Department's Special Envoy for Haiti, Daniel Foote, resigned, stating the following in a letter to Secretary of State Antony Blinken:

> I will not be associated with the United States inhumane, counterproductive decision to deport thousands of Haitian refugees and illegal immigrants to Haiti, a country where American officials are confined to secure compounds because of the danger posed by armed gangs in control of daily life. Our policy approach to Haiti remains deeply flawed, and my recommendations have been ignored and dismissed, when not edited to project a narrative different from my own story.
>
> The people of Haiti, mired in poverty, hostage to the terror, kidnappings, robberies and massacres of armed gangs and suffering under a corrupt government with gang alliances, simply cannot support the forced infusion of thousands of returned migrants lacking food, shelter, and money without additional, avoidable human tragedy. The collapsed state is unable to provide security or basic services, and more refugees will fuel further desperation and crime. Surging migration to our borders will only grow as we add to Haiti's unacceptable misery.

Letter from Daniel Foote, Special Envoy for Haiti, to Antony Blinken, Secretary of State (Sept. 22, 2021), *available at* https://www.washingtonpost.com/context/read-resignation-letter-from-u-s-special-envoy-for-haiti-daniel-foote/3136ae0e-96e5-448e-9d12-0e0cabfb3c0b/.

See Kristen E. Eichesehr, *Contemporary Practice of The United States Relating to International Law: Immigration And Migration: Biden Administration Continues Efforts to Change Immigration Policy Amidst Surges of Migrants and Court Losses*, 116 A.J.I.L. 197 (2022).

See Elazar Kosman, *Current Development: 15,000 Haitian Migrants Beneath A Bridge: A Tale of Abusive Title 42 Policy Implementation*, 36 GEO. IMMIGR. L.J. 491 (2021).

The Biden administration did restore an older parole admission program for Haitians based on family reunification and expanded the criteria. It also created special new parole programs for Haitians sponsored by any person residing in the United States.

These parole programs are described in more detail in chapter 3.

Page 192 ([2.02][B][Note 2]): Additional Notes and Questions to *United States ex rel. Knauff v. Shaughnessy*: Add the following case update to *INS v. St. Cyr*, 533 U.S. 289 (2001), as the fourth paragraph to Note 2:

In *Nasrallah v. Barr*, __U.S. __, 140 S. Ct. 428 (2020), the Court held that federal courts have jurisdiction to review a noncitizen's factual challenges to an administrative order denying relief under the Convention Against Torture. The Court described three interlocking statutes that provide for judicial review of final orders of removal and CAT orders, which includes the REAL ID Act of 2005. The REAL ID Act supersedes the Court's decision in *INS v. St. Cyr*, where the Court held that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, although purporting to eliminate district court review of final orders of removal, did not eliminate district court review via habeas corpus of constitutional or legal challenges to final orders of removal. The REAL ID Act clarifies that those final orders of removal may not be reviewed in district courts, even via habeas corpus, and may be reviewed only in the courts of appeals. Thus, the relevant statutory text precludes judicial review of factual challenges to final orders of removal, where it is concluded the noncitizen is deportable or removal is ordered.

Page 218 (§ 2.01[D] What Does Due Process Require? The Context of Large Numbers of Apprehension

This supplemental material will allow you to review **Problem 2-3-1** concerning Marta from Ethiopia (page 154); **2-3-2** Maritza from Guatemala (updated in this supplement see page XX); and **2-3-3** Yovilli from Honduras (page 165). Each of these problems asked you to consider the statutory and regulatory processes governing recent arrivals of people seeking asylum. Marta is at an airport, Maritza is at the U.S.-Mexico border and CBP has been told her that she has to wait to pursue her claim using the CBP One App, and Yovilli, managed to cross into the interior of the United States but now has been apprehended.

This update addresses recent case law, regulatory, and policy changes. It has been a period of tremendous change both due to the election in 2020 but also impacted by factors such as the pandemic and the litigation over the rights of asylum seekers.

The material below also addresses a recent Supreme Court case that rejected a challenge to the constitutional sufficiency of the expedited removal procedures for a recent border crosser. That case, *Department of Homeland Security v. Thuraissigiam*, below, largely agrees with the reasoning of the Third Circuit Court of Appeals in *Castro v. Department of Homeland Security*,

excerpted on pages 220-40 of the text. Read together, *Castro and Thuraissigiam* suggest that people have few procedural rights, even those seeking asylum, if they are at the physical border or apprehended after a brief period.

In April 2021, the Congressional Research Service summarized some of the legal shifts of the rights of asylum seekers at the border. It includes a table of changes illustrating differences between the Trump and Biden administrations and some changes required by litigation. Ben Harrington, Cong. Research Serv., R46755, The Law of Asylum Procedure at the Border: Statutes and Agency Implementation (Apr. 9, 2021), *available at* https://fas.org/sgp/crs/homesec/R46755.pdf.

In light of the end of the pandemic expulsions and the implementation of new regulations on May 12, 2023, the legal procedures are uncertain and unclear as of this writing in July of 2023.

Page 218 (§ 2.02[D]): What Does Due Process Require? The Context of Large Numbers of Apprehensions: Replace the chart titled "Comparison of Southwest Border Apprehensions Oct. 2018 to April 2019 (6 months of a fiscal year) with the following:

The CBP provides a data tool that allows you to control some variables to produce a report on apprehensions and enforcement by the components of CBP, e.g., Border Patrol and Office of Enforcement. The image below only shares people processed under the INA and excludes expulsions made under the health rules of Title 42 of the U.S. Code. If an individual is expelled under Title 42, the person does not receive the limited protections of expedited removal.

The numbers had dropped after the end of Title 42 and the Biden Administration argued it was because of the May 2023 regulations and other mechanisms such as parole admissions that reduced the border apprehensions. This chart below only provides data through April of 2023.

Image next page

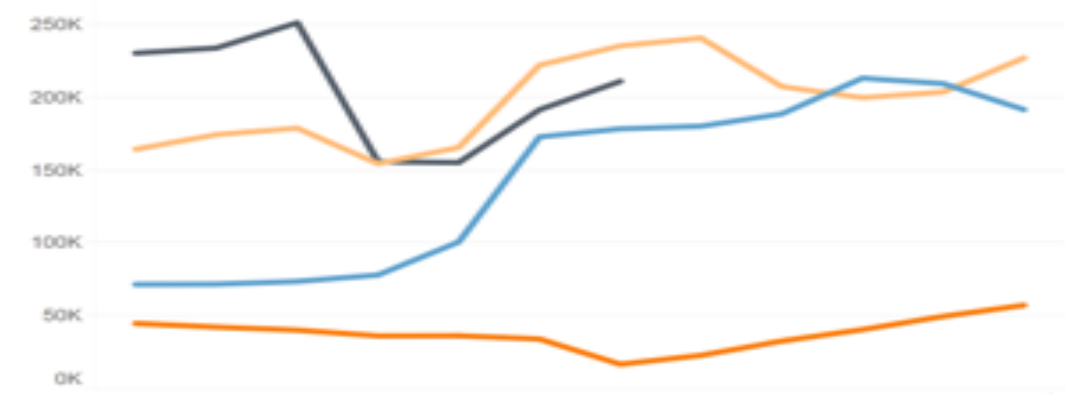
U.S. Customs and Border Protection

U.S. Customs and Border Protection (CBP) Encounters
US Border Patrol (USBP) Title 8 Apprehensions,
Office of Field Operations (OFO) Title 8 Inadmissible Volumes,
and Title 42 Expulsions by Fiscal Year (FY)

FY: All | Component: All | Demographic: All
Citizenship Grouping: All | Title of Authority: All | Reset Filters

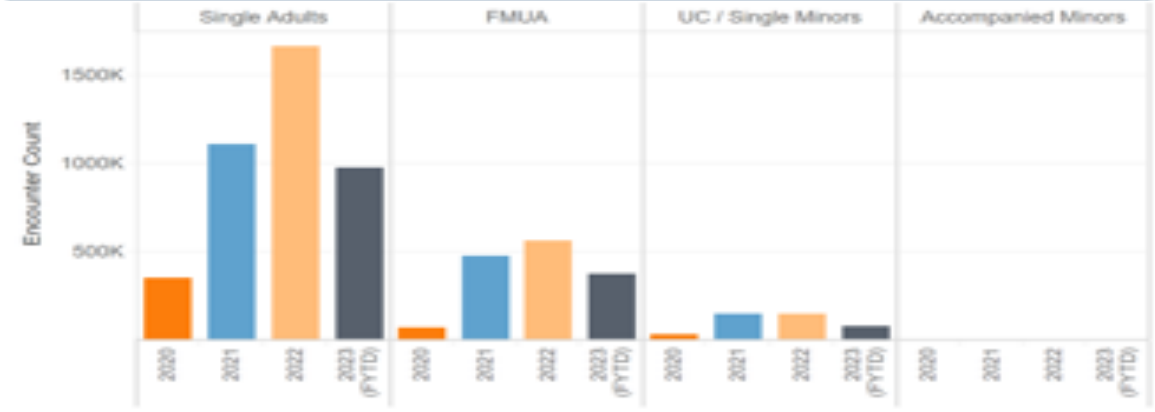
FY 2020 2021 2022 2023 (FYTD)

FY Southwest Land Border Encounters by Month



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2023 (FYTD)	230,778	234,306	251,644	156,223	155,656	191,956	211,401						1,431,964
2022	164,837	174,845	179,253	154,874	186,010	222,574	235,785	241,136	207,834	200,162	204,087	227,547	2,378,944
2021	71,929	72,113	73,994	78,414	101,099	173,277	178,795	180,597	189,034	213,593	209,840	192,001	1,734,686
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	458,088

FY Comparison by Demographic



Source: USBP and OFO official year end reporting for FY20-FY22; USBP and OFO month end reporting for FY23 to date. Data is current as of 5/3/2023.

New Materials for Additional Notes and Questions page 240:

1A. Expedited Removal Habeas Review Challenge Rejected. In June 2020, the Supreme Court issued a 7-2 decision in *Department of Homeland Security v. Thuraissigiam*, rejecting the suspension clause and due process challenges to restrictions on the ability of asylum seekers to challenge the sufficiency of the expedited removal proceedings. This case, which discusses and distinguishes the use of habeas petitions in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and *Boumediene v. Bush*, 553 U.S. 723 (2008), is excerpted below:

Department of Homeland Security v. Thuraissigiam

Supreme Court of the United States

591 U.S. __, 140 S. Ct. 1959 (2020)

[Editors' Note: internal citations have been removed. The longer discussion of the history of access to habeas corpus review has been reduced.]

Opinion

JUSTICE ALITO delivered the opinion of the Court.

Every year, hundreds of thousands of aliens are apprehended at or near the border attempting to enter this country illegally. Many ask for asylum, claiming that they would be persecuted if returned to their home countries. In 1996, when Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), 110 Stat. 3009-546, it crafted a system for weeding out patently meritless claims and expeditiously removing the aliens making such claims from the country. It was Congress's judgment that detaining all asylum seekers until the full-blown removal process is completed would place an unacceptable burden on our immigration system and that releasing them would present an undue risk that they would fail to appear for removal proceedings.

This case concerns the constitutionality of the system Congress devised. Among other things, IIRIRA placed restrictions on the ability of asylum seekers to obtain review under the federal habeas statute, but the United States Court of Appeals for the Ninth Circuit held that these restrictions are unconstitutional. According to the Ninth Circuit, they unconstitutionally suspend the writ of habeas corpus and violate asylum seekers' right to due process. We now review that decision and reverse.

Respondent's Suspension Clause argument fails because it would extend the writ of habeas corpus far beyond its scope "when the Constitution was drafted and ratified." *Boumediene v. Bush*, 553 U.S. 723, 746(2008). Indeed, respondent's use of the writ would have been unrecognizable at that time. Habeas has traditionally been a means to secure release from unlawful detention, but respondent invokes the writ to achieve an entirely different end, namely, to obtain additional administrative review of his asylum claim and ultimately to obtain authorization to stay in this country.

Respondent's due process argument fares no better. While aliens who have established connections in this country have due process rights in deportation proceedings, the Court long ago held that Congress is entitled to set the conditions for an alien's lawful entry into this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause. *See Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).

Respondent attempted to enter the country illegally and was apprehended just 25 yards from the border. He therefore has no entitlement to procedural rights other than those afforded by statute.

In short, under our precedents, neither the Suspension Clause nor the Due Process Clause of the Fifth Amendment requires any further review of respondent's claims, and IIRIRA's limitations on habeas review are constitutional as applied.

I

A

We begin by briefly outlining the provisions of immigration law that are pertinent to this case. Under those provisions, several classes of aliens are "inadmissible" and therefore "removable." INA §§ 212, 240; 8 U.S.C. §§1182, 1229a (e)(2)(A). An alien like respondent who is caught trying to enter at some other spot is treated the same way. INA § 235(a)(1), (3); 8 U.S.C. §§1225(a)(1), (3).

If an alien is inadmissible, the alien may be removed. Among other things, an alien may apply for asylum on the ground that he or she would be persecuted if returned to his or her home country. INA § 240(b)(4) §1229a(b)(4); 8 CFR §1240.11(c) (2020). If that claim is rejected and the alien is ordered removed, the alien can appeal the removal order to the Board of Immigration Appeals and, if that appeal is unsuccessful, the alien is generally entitled to review in a federal court of appeals. INA § 240(c)(5), 242(a); 8 U.S.C. §§1229a(c)(5), 1252(a). During the time when removal is being litigated, the alien will either be detained, at considerable expense, or allowed to reside in this country, with the attendant risk that he or she may not later be found. INA § 236(a); 8 U.S.C. §1226(a).

Applicants can avoid expedited removal by claiming asylum. If an applicant "indicates either an intention to apply for asylum" or "a fear of persecution," the immigration officer "shall refer the alien for an interview by an asylum officer." INA § 235(b)(1)(A)(i)-(ii); 8 U.S.C. §§1225(b)(1)(A)(i)-(ii). The point of this screening interview is to determine whether the applicant has a "credible fear of persecution." §1225(b)(1)(B)(v). The applicant need not show that he or she is in fact eligible for asylum—a "credible fear" equates to only a "significant possibility" that the alien would be eligible. Ibid. Thus, while eligibility ultimately requires a "well-founded fear of persecution on account of," among other things, "race" or "political opinion," §§1101(a)(42)(A), 1158(b)(1)(A), all that an alien must show to avoid expedited removal is a "credible fear."

If the asylum officer finds an applicant's asserted fear to be credible, 5 the applicant will receive "full consideration" of his asylum claim in a standard removal hearing. 8 CFR §208.30(f); see 8 U. S. C. §1225(b)(1)(B)(ii). If the asylum officer finds that the applicant does not have a credible fear, a supervisor will review the asylum officer's determination. 8 CFR §208.30(e)(8). If the supervisor agrees with it, the applicant may appeal to an immigration judge, who can take further evidence and "shall make a de novo determination." §§1003.42(c), (d)(1); see 8 U. S. C. §1225(b)(1)(B)(iii)(III).

An alien subject to expedited removal thus has an opportunity at three levels to obtain an asylum hearing, and the applicant will obtain one unless the asylum officer, a supervisor, and an immigration judge all find that the applicant has not asserted a credible fear.

Over the last five years, nearly 77% of screenings have resulted in a finding of credible fear. And nearly half the remainder (11% of the total number of screenings) were closed for administrative reasons, including the alien's withdrawal of the claim. As a practical matter, then, the great

majority of asylum seekers who fall within the category subject to expedited removal do not receive expedited removal and are instead afforded the same procedural rights as other aliens.

Whether an applicant who raises an asylum claim receives full or only expedited review, the applicant is not entitled to immediate release. Applicants "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." INA § 235(b)(1)(B)(iii)(IV); 8 U.S.C. §1225(b)(1)(B)(iii)(IV). Applicants who are found to have a credible fear may also be detained pending further consideration

Applicants can avoid expedited removal by claiming asylum. If an applicant "indicates either an intention to apply for asylum" or "a fear of persecution," the immigration officer "shall refer the alien for an interview by an asylum officer." INA § 235(b)(1)(A)(i)-(ii); 8 U.S.C. §§1225(b)(1)(A)(i)-(ii). The applicant need not show that he or she is in fact eligible for asylum—a "credible fear" equates to only a "significant possibility" that the alien would be eligible. *Ibid*.

Whether an applicant who raises an asylum claim receives full or only expedited review, the applicant is not entitled to immediate release. Applicants "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." INA § 235(b)(1)(B)(iii)(IV); 8 U.S.C. §1225(b)(1)(B)(iii)(IV). Applicants who are found to have a credible fear may also be detained pending further consideration of their asylum applications. INA § 235(b)(1)(B)(ii); 8 U.S.C. §1225(b)(1)(B)(ii); *see Jennings v. Rodriguez*, 583 U.S. ___, 138 S. Ct. 830, 834(2018).[5] [FN8]

B

The IIRIRA provision at issue in this case, INA § 242(e)(2); §1252(e)(2), limits the review that an alien in expedited removal may obtain via a petition for a writ of habeas corpus. That provision allows habeas review of three matters: first, "whether the petitioner is an alien"; second, "whether the petitioner was ordered removed"; and third, whether the petitioner has already been granted entry as a lawful permanent resident, refugee, or asylee. §§1252(e)(2)(A)-(C). If the petitioner has such a status, or if a removal order has not "in fact" been "issued," INA § 242(e)(5); 8 U.S.C. §1252(e)(5), the court may order a removal hearing, INA § 242(e)(4)(B); 8 U.S.C.§1252(e)(4)(B).

In accordance with that aim, INA § 242(5) 8 U.S.C. § 1252(e)(5) provides that "[t]here shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal." And "[n]otwithstanding" any other "habeas corpus provision"—including 28 U. S. C. § 2241—"no court shall have jurisdiction to review" any other "individual determination" or "claim arising from or relating to the implementation or operation of an order of [expedited] removal." INA § 242(a)(2)(A)(i); 8 U.S.C. §1252(a)(2)(A)(i). In particular, courts may not review "the determination" that an alien lacks a credible fear of persecution. INA § 242(a)(2)(A)(iii); 8 U.S.C.§ 1252(a)(2)(A)(iii); *see also* INA § 242(a)(2)(A)(ii), (iv); 8 U.S.C. §§ 1252(a)(2)(A)(ii), (iv) (other specific limitations).

C

Respondent Vijayakumar Thuraissigiam, a Sri Lankan national, crossed the southern border without inspection or an entry document at around 11 p.m. one night in January 2017. A Border Patrol agent stopped him within 25 yards of the border, and the Department detained him for expedited removal; *see* INA § 212(a)(7)(A)(i)(I), 235(b)(1)(A)(ii), and 235(b)(1)(B)(iii)(IV); 8

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[5] [FN8] The Department may grant temporary parole "for urgent humanitarian reasons or significant public benefit."INA § 213(d)(5)(A); 8 U.S.C. § 1182(d)(5)(A); *see also* 8 CFR §§ 212.5(b), 235.3(b)(2)(iii) and 4 (ii).

U.S.C. §§1182(a)(7)(A)(i)(I), 1225(b)(1)(A)(ii), and (b)(1)(B)(iii)(IV). He claimed a fear of returning to Sri Lanka because a group of men had once abducted and severely beaten him, but he said that he did not know who the men were, why they had assaulted him, or whether Sri Lankan authorities would protect him in the future. *Id.*, at 80. He also affirmed that he did not fear persecution based on his race, political opinions, or other protected characteristics. *See* INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

The asylum officer credited respondent's account of the assault but determined that he lacked a "credible" fear of persecution, as defined by INA § 235(b)(1)(B)(v); 8 U.S.C. §1225(b)(1)(B)(v), because he had offered no evidence that could have made him eligible for asylum (or other removal relief). *See* INA § 208(b)(1)(A); 8 U.S.C. § 1158(b)(1)(A). The supervising officer agreed and signed the removal order. After hearing further testimony from respondent, an Immigration Judge affirmed on de novo review and returned the case to the Department for removal.

Respondent then filed a federal habeas petition. Asserting for the first time a fear of persecution based on his Tamil ethnicity and political views, he argued that he "should have passed the credible fear stage,". But, he alleged, the immigration officials deprived him of "a meaningful opportunity to establish his claims" and violated credible-fear procedures by failing to probe past his denial of the facts necessary for asylum. Allegedly they also failed to apply the "correct standard" to his claims—the "significant possibility" standard—despite its repeated appearance in the records of their decisions. Respondent requested "a writ of habeas corpus, an injunction, or a writ of mandamus directing [the Department] to provide [him] a new opportunity to apply for asylum and other applicable forms of relief." His petition made no mention of release from custody.

The District Court dismissed the petition, holding that INA § 242(a)(2) and (e)(2); 8 U.S.C. §§1252(a)(2) and (e)(2) and clear Ninth Circuit case law foreclosed review of the negative credible-fear determination that resulted in respondent's expedited removal order. The court also rejected respondent's argument "that the jurisdictional limitations of INA § 242(e); 8 U.S.C. §1252(e) violate the Suspension Clause," again relying on Circuit precedent.

The Ninth Circuit reversed. It found that our Suspension Clause precedent demands "reference to the writ as it stood in 1789." 917 F. 3d 1097, 1111 (2019). But without citing any pre-1789 case about the scope of the writ, the court held that INA § 242(e)(2); 8 U.S.C. §1252(e)(2) violates the Suspension Clause. The court added that respondent "has procedural due process rights," specifically the right "'to expedited removal proceedings that conformed to the dictates of due process.'" *Id.*, at 1111, n. 15 (quoting *United States v. Raya-Vaca*, 771 F. 3d 1195, 1203 (9th Cir. 2014)).

II

A

The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, cl. 2. In *INS v. St. Cyr*, 533 U.S. 289 (2001), we wrote that the Clause, at a minimum, "protects the writ as it existed in 1789," when the Constitution was adopted. Id., at 301 (internal quotation marks omitted). And in this case, respondent agrees that "there is no

reason" to consider whether the Clause extends any further. We therefore proceed on that basis.[6] [FN 12]

B

This principle dooms respondent's Suspension Clause argument, because neither respondent nor his amici have shown that the writ of habeas corpus was understood at the time of the adoption of the Constitution to permit a petitioner to claim the right to enter or remain in a country or to obtain administrative review potentially leading to that result. The writ simply provided a means of contesting the lawfulness of restraint and securing release.

In this case, however, respondent did not ask to be released.[7][FN 13] Instead, he sought entirely different relief: vacatur of his "removal order" and "an order directing [the Department] to provide him with a new . . . opportunity to apply for asylum and other relief from removal." (habeas petition)("a fair procedure to apply for asylum, withholding of removal, and CAT relief")("a new, meaningful opportunity to apply for asylum and other relief from removal"). Such relief … falls outside the scope of the common-law habeas writ.

Not only did respondent fail to seek release, he does not dispute that confinement during the pendency of expedited asylum review, and even during the additional proceedings he seeks, is lawful. Nor could he. It is not disputed that he was apprehended in the very act of attempting to enter this country; that he is inadmissible because he lacks an entry document, see 8 U.S.C. §§1182(a)(7)(A), 1225(b)(1)(A)(i); and that, under these circumstances, his case qualifies for the expedited review process, including "[m]andatory detention" during his credible-fear review, 8 U.S.C. §§1225(b)(1)(B)(ii), (iii)(IV), 835 F. 3d, at 450-451.

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IV

In addition to his Suspension Clause argument, respondent contends that IIRIRA violates his right to due process by precluding judicial review of his allegedly flawed credible-fear proceeding. The Ninth Circuit agreed, holding that respondent "had a constitutional right to

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[6] [FN12] The original meaning of the Suspension Clause is the subject of controversy. In *INS v. St. Cyr*, 533 U.S. 289 (2001), the majority and dissent debated whether the Clause independently guarantees the availability of the writ or simply restricts the temporary withholding of its operation. *See also Ex Parte Bollman*, 8 U.S. 75 (1807) We do not revisit that question. Nor do we consider whether the scope of the writ as it existed in 1789 defines the boundary of the constitutional protection to which the *St. Cyr* Court referred, since the writ has never encompassed respondent's claims.

We also do not reconsider whether the common law allowed the issuance of a writ on behalf of an alien who lacked any allegiance to the country. *Compare Boumediene v. Bush*, 553 U.S. 723, 746-747 (2009) (forming "no certain conclusions"), with Brief for Criminal Justice Legal Foundation as *Amicus Curiae* 5-13. *See also* Hamburger, "Beyond Protection," 109 COLUM L. REV. 1823, 1847 (2009); P. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 204 (2010) (Halliday).

[7] [FN 13] In his brief, respondent states that "he requests an entirely ordinary habeas remedy: conditional release pending a lawful adjudication. J. A. 33." Brief for Respondent 29. Citing the same page, the dissent argues that respondent "asked the district court to '[i]ssue a writ of habeas corpus' without further limitation on the kind of relief that might entail." (opinion of SOTOMAYOR, J.). However, neither on the cited page nor at any other place in the habeas petition is release, conditional or otherwise, even mentioned. And in any event, … the critical point is that what he sought in the habeas petition and still seeks—a writ "directing [the Department] to provide [him] a new opportunity to apply for asylum," --is not a form of relief that was available in habeas at the time of the adoption of the Constitution.

expedited removal proceedings that conformed to the dictates of due process." 917 F. 3d, at 1111, n. 15 (internal quotation marks omitted). And the Ninth Circuit acknowledged, ibid., that this holding conflicted with the Third Circuit's decision upholding INA § 242(e)(2); 8 U.S.C. §1252(e)(2) on the ground that applicants for admission lack due process rights regarding their applications, *see Castro*, 835 F. 3d, at 445-446. [Editors' Note included in textbook Chapter 2, page 220.] Since due process provided an independent ground for the decision below and since respondent urges us to affirm on this ground, it is hard to understand the dissent's argument that the due process issue was not "seriously in dispute below" or that it is somehow improper for us to decide the issue.

Nor is the dissent correct in defending the Ninth Circuit's holding. That holding is contrary to more than a century of precedent. In 1892, the Court wrote that as to "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," "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Nishimura Ekiu*, 142 U.S., at 660. Since then, the Court has often reiterated this important rule. *See*, *e.g.*, *Knauff*, 338 U.S., at 544("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"); *Mezei*, 345 U.S., at 212(same); *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").

Respondent argues that this rule does not apply to him because he was not taken into custody the instant he attempted to enter the country (as would have been the case had he arrived at a lawful port of entry). Because he succeeded in making it 25 yards into U.S. territory before he was caught, he claims the right to be treated more favorably. The Ninth Circuit agreed with this argument.

We reject it. It disregards the reason for our century-old rule regarding the due process rights of an alien seeking initial entry. That rule rests on fundamental propositions: "[T]he power to admit or exclude aliens is a sovereign prerogative," *id*., at 32; the Constitution gives "the political department of the government" plenary authority to decide which aliens to admit, *Nishimura Ekiu*, 142 U.S., at 659; and a concomitant of that power is the power to set the procedures to be followed in determining whether an alien should be admitted, *see Knauff*, 338 U.S., at 544.

This rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil. When an alien arrives at a port of entry—for example, an international airport—the alien is on U. S. soil, but the alien is not considered to have entered the country for the purposes of this rule. On the contrary, aliens who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are "treated" for due process purposes "as if stopped at the border." *Mezei*; *see Leng May Ma v. Barber*, 357 U.S. 185, 188-190, (1958); *Kaplan v. Tod*, 267 U.S. 228, 230-231 (1925).

The same must be true of an alien like respondent. As previously noted, an alien who tries to enter the country illegally is treated as an "applicant for admission," 8 U.S.C. § 1225(a)(1), and an alien who is detained shortly after unlawful entry cannot be said to have "effected an entry," *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Like an alien detained after arriving at a port of entry, an alien like respondent is "on the threshold." *Mezei*, 345 U.S., at 21. The rule advocated by respondent and adopted by the Ninth Circuit would undermine the "sovereign prerogative" of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location. *Plasencia*, 459 U.S., at 32.

For these reasons, an alien in respondent's position has only those rights regarding admission that Congress has provided by statute. In respondent's case, Congress provided the right to a "determin[ation]" whether he had "a significant possibility" of "establish[ing] eligibility for asylum," and he was given that right. 8 U.S.C. §§1225(b)(1)(B)(ii), (v). Because the Due Process Clause provides nothing more, it does not require review of that determination or how it was made. As applied here, therefore, INA § 242(e)(2); 8 U.S.C. §1252(e)(2) does not violate due process.[8] [FN 28]

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Because the Ninth Circuit erred in holding that INA § 242(e)(2); 8 U.S.C. §1252(e)(2) violates the Suspension Clause and the Due Process Clause, we reverse the judgment and remand the case with directions that the application for habeas corpus be dismissed.

It is so ordered.

[Concurrence of Justice Thomas omitted.]

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, concurring in the judgment.

The statute at issue here, INA § 242(e)(2); 8 U. S. C. §1252(e)(2), sets forth strict limits on what claims a noncitizen subject to expedited removal may present in federal habeas corpus proceedings. I agree that enforcing those limits in this particular case does not violate the Suspension Clause's constitutional command: "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. But we need not, and should not, go further.

We need not go further because the Government asked us to decide, and we agreed to review, an issue limited to the case before us. The question presented is "whether, as applied to respondent, [INA § 242(e)(2)] Section 1252(e)(2) is unconstitutional under the Suspension Clause." Pet. for Cert. i (emphasis added). All we must decide is whether, under the Suspension Clause, the statute at issue "is unconstitutional as applied to this party, in the circumstances of this case." *Chicago v. Morales*, 527 U. S. 41, 74 (1999) (Scalia, J., dissenting).

Nor should we go further. Addressing more broadly whether the Suspension Clause protects people challenging removal decisions may raise a host of difficult questions in the immigration context. What review might the Suspension Clause assure, say, a person apprehended years after she crossed our borders clandestinely and started a life in this country? Under current law, noncitizens who have lived in the United States for up to two years may be placed in expedited-removal proceedings, *see* INA § 235(b)(1)(A)(iii); 8 U.S.C. §1225(b)(1)(A)(iii), but Congress might decide to raise that 2-year cap (or remove it altogether). Does the Suspension Clause let Congress close the courthouse doors to a long-term permanent resident facing removal? In I*NS v. St. Cyr*, 533 U. S. 289 (2001), we avoided just that "serious and difficult constitutional issue." *Id.*, at 305.

Could Congress, for that matter, deny habeas review to someone ordered removed despite claiming to be a natural-born U. S. citizen? The petitioner in *Chin Yow v. United States*, 208 U. S.

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[8] [FN 28] Although respondent, during his interviews with immigration officials, does not appear to have provided any information tying the assault he suffered at the hands of those who arrived at his home in a van to persecution on the basis of ethnicity or political opinion, his counseled petition offers details about "white va[n]" attacks against Tamils in Sri Lanka. (internal quotation marks omitted). As now portrayed, his assault resembles those incidents. Department officials and immigration judges may reopen cases or reconsider decisions, *see* 8 CFR §§ 103.5(a)(1), (5), and 1003.23(b)(1), and the Executive always has discretion not to remove, *see AADC,* 525 U.S. at 483-84.

8(1908), and others have faced that predicament. *See also* INA § 242(e)(2)(A); §1252(e)(2)(A) (permitting, at present, habeas review of citizenship claims). What about foreclosing habeas review of a claim that rogue immigration officials forged the record of a credible-fear interview that, in truth, never happened? Or that such officials denied a refugee asylum based on the dead-wrong legal interpretation that Judaism does not qualify as a "religion" under governing law? *Cf. Tod v. Waldman*, 266 U. S. 113, 119-120 (1924) (observing that immigration officials ignored a Jewish family's claim that they were "refugees" fleeing "religious persecution").

The answers to these and other "difficult questions about the scope of [Suspension Clause] protections" lurk behind the scenes here. *Lozman v. Riviera Beach*, 585 U. S. ___, ___, 138 S. Ct. 1945, 1953 (2018). I would therefore avoid making statements about the Suspension Clause that sweep beyond the principles needed to decide this case—let alone come to conclusions about the Due Process Clause, a distinct constitutional provision that is not directly at issue here.

As for the resolution of the dispute before us, Congress, in my view, had the constitutional power to foreclose habeas review of the claims that respondent has pressed in this case. Habeas corpus, as we have said, is an "adaptable remedy," and the "precise application and scope" of the review it guarantees may change "depending upon the circumstances." *Boumediene v. Bush*, 553 U. S. 723, 779 (2008). So where the Suspension Clause applies, the "habeas court's role" may prove more "extensive," or less so, depending on the context at issue. Here, even assuming that the Suspension Clause guarantees respondent some form of habeas review—which is to say, even accepting for argument's sake that the relief respondent seeks is "release," —the scope of that constitutionally required review would not extend to his claims. Two features of this case persuade me.

First, respondent's status suggests that the constitutional floor set by the Suspension Clause here cannot be high. A Border Patrol agent apprehended respondent just 25 yards inside the border. Respondent was placed in expedited removal proceedings shortly thereafter, where he received the same consideration for relief from removal that Congress has afforded persons arriving at the border. Respondent has never lived in, or been lawfully admitted to, the United States.

To my mind, those are among the "circumstances" that inform the "scope" of any habeas review that the Suspension Clause might guarantee respondent. *Boumediene*, 553 U. S., at 779. He is thus in a materially different position for Suspension Clause purposes than the noncitizens in, for example, *Rowoldt v. Perfetto*, 355 U. S. 115 (1957), *United States ex rel. Accardi v. Shaughnessy*, 347 U. S. 260 (1954), *Bridges v. Wixon*, 326 U. S. 135(1945), and *Hansen v. Haff*, 291 U. S. 559, (1934). They had all lived in this country for years. The scope of whatever habeas review the Suspension Clause assures respondent need not be as extensive as it might for someone in that position.

Second, our precedents demonstrate that respondent's claims are of the kind that Congress may, consistent with the Suspension Clause, make unreviewable in habeas proceedings. Even accepting respondent's argument that our "finality era" cases map out a constitutional minimum, his claims, on the facts presented here, differ significantly from those that we reviewed throughout this period.

To begin, respondent concedes that Congress may eliminate habeas review of factual questions in cases like this one. He has thus disclaimed the "right to challenge the historical facts" found by immigration officials during his credible-fear process. But even though respondent has framed his two primary claims as asserting legal error, substance belies that label. Both claims are, at their core, challenges to factual findings.

During his credible-fear interview, respondent said that he is an ethnic Tamil from Sri Lanka and that, one day, a group of men abducted him in a van and brutally beat him. … The asylum officer believed respondent's account, which respondent confirmed was his sole basis for seeking relief. The critical question, then, concerned the nature of the attack: Who attacked respondent and why? In written findings, the asylum officer concluded that it was "unknown who these individuals were or why they wanted to harm [respondent]." Based on those findings, the asylum officer determined that respondent had not established a credible fear of persecution or torture within the meaning of governing law.

Respondent, to be sure, casts the brunt of his challenge to this adverse credible-fear determination as two claims of legal error. But it is the factual findings underlying that determination that respondent, armed with strong new factual evidence, now disputes. Brief for Professors of Sri Lankan Politics as Amici Curiae 7-11; n. 28 (noting that immigration officials may revisit their findings in light of this additional evidence).

Respondent first asserts that the asylum officer failed to apply—or at least misapplied—the applicable legal standard under INA § 235(b)(1)(B)(v); 8 U.S.C. §1225(b)(1)(B)(v), which required only a "significant possibility" that respondent could establish entitlement to relief from removal. Respondent also contends that the asylum officer "demonstrated a fatal lack of knowledge" about conditions in Sri Lanka, in violation of provisions requiring that asylum officers consider "other facts as are known to the officer," INA § 235(b)(1)(B)(v); 8 U.S.C. §1225(b)(1)(B)(v), and have "had professional training in country conditions," INA § 235(b)(1)(E)(1); 8 U.S.C. §1225(b)(1)(E)(i).

At the heart of both purportedly legal contentions, however, lies a disagreement with immigration officials' findings about the two brute facts underlying their credible-fear determination—again, the identity of respondent's attackers and their motive for attacking him. Other than his own testimony describing the attack, respondent has pointed to nothing in the administrative record to support either of these claims.

As to his legal-standard claim, respondent does not cite anything affirmatively indicating that immigration officials misidentified or misunderstood the proper legal standard under INA § 235(b)(1)(B)(v); 8 U.S.C. §1225(b)(1)(B)(v). Rather, he argues that their credible-fear determination was so egregiously wrong that it simply must have rested on such a legal error. But that contention rests on a refusal to accept the facts as found by the immigration officials. Specifically, it rejects their findings that no evidence suggested respondent was attacked by men affiliated with the Sri Lankan Government and motivated by respondent's Tamil ethnicity or (as he now alleges) history of political activism. Respondent's quarrel, at bottom, is not with whether settled historical facts satisfy a legal standard, *see Guerrero-Lasprilla v. Barr*, 589 U. S. ___, ___, 140 S. Ct. 1062, 1069 (2020), but with what the historical facts are.

Respondent's country-conditions claim is much the same. Respondent does not cite anything in the administrative record affirmatively indicating that, contrary to INA §§ 235(b)(1)(B)(v) and (E)(i); 8 U.S.C. §§1225(b)(1)(B)(v) and (E)(i), immigration officials, for example, consciously disregarded facts presented or otherwise known to them, or that the asylum officer never received relevant professional training. Instead, respondent offers a similar refrain: The credible-fear determination was so egregiously wrong that immigration officials simply must not have known about conditions in Sri Lanka. So this claim, too, boils down to a factual argument that immigration officials should have known who respondents' attackers were and why they attacked him.

Mindful that the "Constitution deals with substance, not shadows," *Salazar v. Buono*, 559 U. S. 700, 723 (2010) (ROBERTS, C. J., concurring) (internal quotation marks omitted), I accordingly view both claims as factual in nature, notwithstanding respondent's contrary characterization. For that reason, Congress may foreclose habeas review of these claims without running afoul of the Suspension Clause. *See, e.g., Nishimura Ekiu*, 142 U. S., at 660.

The other two claims of error that respondent has pressed assert that immigration officials violated procedures required by law. He first contends that, by not asking additional questions during the credible-fear interview, the asylum officer failed to elicit "all relevant and useful information," in violation of 8 CFR § 208.30(d) (2020). Respondent further alleges that translation problems arose during the interview, in violation of the asylum officer's duty under §§208.30(d)(1) and (2) to ensure that respondent was "[a]ble to participate effectively" and "ha[d] an understanding of the credible fear determination process." Though both claims may reasonably be understood as procedural, they may constitutionally be treated as unreviewable—at least under the border-entry circumstances present in this case.

Respondent's procedural claims are unlike those that we reviewed in habeas proceedings during the finality era. Throughout that period, the procedural claims that we addressed asserted errors that fundamentally undermined the efficacy of process prescribed by law. *See Chin Yow*, 208 U. S., at 11 (observing that a noncitizen could obtain habeas relief on procedural grounds if he was denied "an opportunity to prove his right to enter the country, as the statute meant that he should have"). Many of our finality era cases thus dealt with situations in which immigration officials failed entirely to take obligatory procedural steps.

In *Waldman*, for example, we faulted immigration officials for making "no finding[s]" at all on potentially dispositive issues, including whether the noncitizens were fleeing religious persecution and therefore exempt from a literacy requirement. 266 U. S., at 120. And in *United States ex rel. Johnson v. Shaughnessy*, 336 U. S. 806(1949), we reversed for procedural error because the noncitizen was denied outright "the independent [medical] review and reexamination" required by then-governing law. *See also Accardi*, 347 U. S., at 267 (faulting the Attorney General for short-circuiting altogether legally prescribed adjudication procedures by "dictating" an immigration decision himself).

Respondent's procedural claims are different. He does not allege that immigration officials, say, denied him a credible-fear interview or skipped a layer of intra-agency review altogether. Nor do his allegations suggest that the asylum officer's questioning or the interpreter's translation constructively deprived him of the opportunity to establish a credible fear; indeed, he has consistently maintained that the information that was elicited more than sufficed. *cf. Chin Yow*, 208 U. S., at 13 (observing that "the denial of a hearing cannot be established" merely "by proving that the decision was wrong"). Respondent thus contends that the credible-fear process was procedurally defective for reasons that are more technical. He alleges that additional questions would have yielded further "relevant and useful" information and that "communication issues affected the interview" in some way.

Respondent's procedural claims consequently concern not the outright denial (or constructive denial) of a process, but the precise way in which the relevant procedures were administered. They raise fine-grained questions of degree—i.e., whether the asylum officer made sufficiently thorough efforts to elicit all "relevant and useful information" and whether he took sufficiently thorough precautions to ensure that respondent was "[a]ble to participate effectively" in the interview. 8 CFR § 208.30(d).

Reviewing claims hinging on procedural details of this kind would go beyond the traditionally "limited role" that habeas has played in immigration cases similar to this one—even during the finality era. To interpret the Suspension Clause as insisting upon habeas review of these claims would require, by constitutional command, that the habeas court make indeterminate and highly record-intensive judgments on matters of degree.

Together with respondent's status, these characteristics convince me that Congress had the constitutional power to foreclose habeas review of respondent's procedural claims. Recasting those claims as an allegation that respondent's "due process rights were violated by" immigration officials makes no material difference. That alternative description changes none of the features that, in my view, put respondent's procedural claims beyond the scope of any minimum habeas review that the Suspension Clause might assure him under the circumstances.

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For these reasons, I would hold that, as applied to respondent, § 242(e)(2); §1252(e)(2)'s limits on habeas review do not violate the Suspension Clause. I would go no further.

DISSENT

JUSTICE SOTOMAYOR, with whom Justice Kagan joins, dissenting.

By determining that respondent, a recent unlawful entrant who was apprehended close in time and place to his unauthorized border crossing, has no procedural due process rights to vindicate through his habeas challenge, the Court unnecessarily addresses a constitutional question in a manner contrary to the text of the Constitution and to our precedents.

The Court stretches to reach the issue whether a noncitizen like respondent is entitled to due process protections in relation to removal proceedings, which the court below mentioned only in a footnote and as an aside. In so doing, the Court opines on a matter neither necessary to its holding nor seriously in dispute below.[9] [FN 11in dissent]

The Court is no more correct on the merits. To be sure, our cases have long held that foreigners who had never come into the United States—those "on the threshold of initial entry"—are not entitled to any due process with respect to their admission. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (*citing Ekiu*, 142 U.S., at 660); *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982). That follows from this Courts' holdings that the political branches of Government have "plenary" sovereign power over regulating the admission of noncitizens to the United States.; *see also Ekiu*, 142 U.S., at 659.

Non-citizens in this country, however, undeniably have due process rights. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court explained that "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens" but rather applies "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." Id., at 369; *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (reiterating that "once an alien enters the country," he is entitled to due process in his removal proceedings because "the Due Process

[9] [FN 11 in dissent] While the Court contends that the writ of habeas corpus does not allow an individual to "obtain administrative review" or additional procedures, it arrives at this conclusion only in the context of discussing what sorts of "relief " properly qualified as release from custody at common law. … (contrasting request for additional remedies with a "simple" release from custody). To the extent that this discussion necessarily prohibits federal courts from entertaining habeas petitions alleging due process violations in expedited removal proceedings, the Court's separate discussion in Part IV is unnecessary.

Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent").

But the Court has since determined that presence in the country is the touchstone for at least some level of due process protections. *See Mezei*, 345 U.S. at 212 (explaining that "aliens who have once passed through our gates, even illegally," possess constitutional rights); *Mathews v. Diaz*, 426 U.S. 67, 77(1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment . . . protects every one of these persons . . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection"). As a noncitizen within the territory of the United States, respondent is entitled to invoke the protections of the Due Process Clause.

Notes and Questions:

1. Where is the Border? Does the majority determine whether due process limits are controlled by time within the territory or by physical distance from a port of entry? Is a person never formally within the United States unless he or she has been inspected and admitted? As of June 2021, the expansion of expedited removal was still being litigated. See page 180 in the text for a discussion of the expansion of expedited removal to the entire U.S. territory for those who cannot prove two years of presence or formal admission and inspection. Re-read the Breyer opinion. Does his opinion adequately address what will happen if expedited removal is expanded throughout the United States?

2. Is Due Process Only for the Admitted? Is it only after inspection and admission? Does the majority determine when an individual has made an entry into the United States for purposes of qualifying for due process protections? Is it only after inspection and admission? In *Yamataya v. Fisher*, 189 U.S. 86 (1903), excerpted on pages 184-86, Ms. Yamataya had been inspected and admitted and a few days later the officer arrested her to put her into an immigration proceeding. Would this reading permit Congress to extend expedited removal beyond the two years physical presence in the territory?

3. Policy Considerations After This Decision. Suppose you were working in Congress to ensure proper consideration of asylum and withholding of removal claims. Would you recommend a program such as the "Migrant Protection Protocols" that was used to force people to wait in Mexico even if they present themselves at a port of entry seeking protection? Could advocates organize assistance to these individuals to help them present their claims in a more organized fashion than trying to reach people at the border or in brief periods of detention as they prepare for the critical credible fear interview? The Migrant Protection Protocols, a misnamed program, is discussed in Problem 2-3-2 in the text at page 158. DHS ended this program on June 1, 2021, but litigation challenging termination of the Migrant Protection Protocols then ensued.

4. Credible Fear Review and Standards May Become Much More Difficult. In the summer of 2020, the Trump administration proposed joint regulations guiding and binding both the Asylum officers and the Immigration Judges within the Executive Office for Immigration Review. These proposed rules would have required individuals to demonstrate more than a significant possibility of persecution to establish a credible fear of persecution. The rules would have raised the standard to a "reasonable fear" standard. The proposed rules were over 160 pages long and proposed many procedural and substantive alterations to expedited removal, the asylum withholding, and Convention Against Torture standards. Litigation also sought to prevent this change. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020).

This change was revoked in Executive Order No. 14010, 86 Fed. Reg. 8267 (Feb. 2, 2021).

One of the major regulatory changes would appear to alter some of the factual basis that undergirds the majority opinion in *Thuraissigiam*. In his opinion, Justice Alito referred multiple times to the statutory grant of an immigration judge's "de novo" review of the credible fear determination of the asylum officers. The proposed new regulatory standards would have allowed an asylum officer to determine that an individual was statutorily ineligible or that the claim was frivolous. Immigration judges were also instructed that they could also "pretermit" the asylum application altogether for a range of reasons, from an exercise of discretion to brief residence in a third country. Again, many of the rule and policy changes were suspended or are under review after President Biden came into office.

Questions:

1. Does a joint rulemaking between the DOJ Executive Office for Immigration Review and the DHS undermine the independence of the immigration court? How would you view joint rulemakings between the civil division of the Department of Justice and the federal courts controlling standards of proof in civil proceedings brought under the Administrative Procedure Act?
2. Why might joint rulemakings for these agencies be permitted as a lawful delegation from Congress to the Executive branch?

5. De Novo Review? What does de novo review entail? You can read the entire transcript of the Immigration Judge's review of the denial of credible fear for Mr. Thuraissigiam. Here is an excerpt:

Editors' Note: The transcript misspells the name Thuraissigiam.

JUDGE TO MR. THURASSIGIAM [sic]

Sir, I have reviewed the paperwork from the credible fear interview. And I'm going to read to you now the officer's summary. So just listen closely as it is translated for you. It says you indicated that you are fearful of returning to Sri Lanka because you believe you will be beaten up and that you do not feel safe there.

INTERPRETER TO JUDGE

The interpreter --

JUDGE TO MR. THURASSIGIAM

And that you do not feel safe there. You testified that you were taken by men and beaten, and awoke one day --

MR. THURASSIGIAM TO JUDGE

(Untranslated.)

JUDGE TO MR. THURASSIGIAM

Sir, just listen. And awoke one day later in the hospital. You do not know who these individuals are or why they beat you. You testified that you were working on your farm when these men came in a van , blindfolded you, and took you away and beat you . You do not know if the police or other government entities are willing or able to protect you because you did not report this

incident to the authorities. Although you do not know who beat you or why you were beaten, you are fearful of returning to Sri Lanka. So, sir, is that a fair summary of what you told the officer?

MR. THURASSIGIAM TO JUDGE

Yes, Your Honor. It's truth.

JUDGE TO MR. THURASSIGIAM

Okay. Is there anything that you would like to say for purposes of this review here today?

MR. THURASSIGIAM TO JUDGE

Yes. We would like to continue the review, sir.

JUDGE TO MR. THURASSIGIAM

All right, sir. Well, I have read the officer's report, and I am required to review the interview that took place before the officer. It appears that you agree with the summary of the information, but I wanted to know if there was anything that you would like to tell me for purposes of the review.

MR. THURASSIGIAM TO JUDGE

Yes.

JUDGE TO MR. THURASSIGIAM

Go ahead, sir.

MR. THURASSIGIAM TO JUDGE

If I go back to Sri Lanka, they will beat me and they would kill me. They were, they were threatening me, they were beating me, and they, they told me that they would kill me. That's what they did to me. And I don't want to go to Sri Lanka.

JUDGE TO MR. THURASSIGIAM

Sir, the officer found you to be a credible applicant. So the officer found that when you related your story, you did so in a truthful manner. And when I review the interview, there is no reason to reach a different conclusion.

INTERPRETER TO JUDGE

Interpreter needs repetition, Your Honor.

JUDGE TO MR. THURASSIGIAM

There is no reason to reach a different conclusion. So in other words, you were found to be a credible witness. There's no reason to doubt your fear of return for the reasons you stated, or that you were beaten on this occasion. Being truthful, however, does not necessarily result in a positive determination in your case. In your case, the officer very specifically analyzed the information and found no testimony that you were or would be harmed on account of race, religion, nationality, membership in a particular social group, or political opinion. This does seem to follow the information that you did not know who these individuals were or why they were doing this to you.

Also, with respect to the issue of torture, the officer, in part, noted that this does not appear to have been on the instigation of or by a public official or other person acting in an official

capacity. The officer noted that you had not reported the incident to the police, so there was no basis to conclude that the police or authorities would acquiesce to any harm against you. And these are issues that relate directly to the officer's ability to find a positive credible fear in your case. As it did not appear that the information you gave offered any showing of past or future harm on account of one of the five grounds noted, and also, in part, because it did not appear that the authorities of your country were in any way behind or would permit the harm against you were you to return, the officer had to reach the conclusion that you did not show a reasonable fear of persecution or torture. But if there was something more that you wanted to say about that reasoning, please do so, sir.

MR. THURASSIGIAM TO JUDGE

If they take me, they would, they, they can do whatever they want, but nobody would be able to find out. So please, I don't want to go back.

JUDGE TO MR. THURASSIGIAM

But, sir, about the specific reasoning that the officer included in the report and which I just summarized for you, did you have anything in particular to say about that reasoning?

MR. THURASSIGIAM TO JUDGE

In, in which one?

JUDGE TO MR. THURASSIGIAM

Sir, I explained to you the officer's reasoning. Was there anything further that you wanted to say about that?

MR. THURASSIGIAM TO JUDGE

They, they were telling me that they would shoot me and they would kill me. That's what they kept on repeating, and they, they were beating me. They were like in a -- they took almost five hours to threaten me and beat me. I found out only about that when I opened my eyes in the hospital.

JUDGE TO MR. THURASSIGIAM

You had indicated to the officer that you did not know who these individuals were or why they were doing this to you. Is that true?

MR. THURASSIGIAM TO JUDGE

Yes, sir.

JUDGE TO MR. THURASSIGIAM

And you never reported to the police, correct?

MR. THURASSIGIAM TO JUDGE

Yes, Your Honor. I did not.

JUDGE TO MR. THURASSIGIAM

Again, sir, I have no reason to doubt your subjective fear of return. But upon de novo review of the Asylum Officer's determination, I must find as follows. First, the Asylum Officer appears to

have done a diligent job of attempting to obtain and record the relevant information. Second, the officer reached the proper conclusion in the context of controlling law for the reasons articulated. In other words, anyone could understand how difficult a situation this must have been for you and how you can still have fear. But considering all the circumstances, it does not qualify for a reasonable fear of persecution as defined under the law or of torture as defined under the law. So the decision of the Asylum Officer, finding no credible fear of persecution or torture, must be affirmed. And the record is returned to the Department of Homeland Security.

Now, sir, you are being served with a copy of the decision. Regulations provide no appeal of the decision. However, you may request the Department of Homeland Security to reconsider its determination, and you are also encouraged to talk to the Department of Homeland Security about any other options that may be available to you in the discretion of the Department of Homeland Security, including humanitarian parole or deferred action of any removal order or any collateral visa. But as I indicated to you before, I do not have authority over that, only authority over the review. And it does appear that the officer reached the correct conclusion based on the information provided. Thank you to the respondent.

. . . .

MR. THURASSIGIAM TO JUDGE

I, I don't want Sri Lanka. I don't want Sri Lanka.

JUDGE TO MR. THURASSIGIAM

Yes, I understand, sir. You were provided with the opportunity to express your concerns of return to Sri Lanka. It does appear that subjectively you have a fear. But under the law, it does not qualify for further proceedings. Thank you, sir.

***

Notes and Questions:

1. What Happened After the Supreme Court Ruling Denying Mr. Thuraissigiam's Challenge? Ultimately, DHS granted Mr. Thuraissigiam a rare reconsideration of his credible fear assessment. Before an individual is subjected to expedited removal it is possible to try to secure such a discretionary review, although that mechanism is effectively unavailable to individuals who do not have legal representation. Mr. Thuraissigiam was fortunate that a coalition of advocates came forward to help establish the risk of persecution to a member of the Tamil ethnic community in Sri Lanka. Professor Ahilan Arulanantham, formerly with the ACLU, confirmed that as of June 2021, Mr. Thuraissigiam was placed into regular removal proceedings and found to have credible fear. DHS released him from detention as a discretionary matter before the Supreme Court's decision.

2. Does the Supreme Court Understand the Scope of a Credible Fear Review Hearing? The credible fear hearing transcript was added to the Supreme Court docket after oral argument. Go back a few pages and read the transcript excerpt provided. You can find the full transcript at: https://www.supremecourt.gov/DocketPDF/19/19-161/137250/20200306095524611_Thurassigiam%20CF%20IJ%20transcript%20-%20Redacted%20transcript.pdf (last accessed June 17, 2022).

Remember that a credible fear review hearing is not a trial. The individual is usually unrepresented, and some immigration judges take the position that there is no formal role for participation by counsel in the review hearing.

Given the limited scope of judicial review and the Supreme Court's rejection of the habeas due process challenge, should Congress revisit the expedited removal statutory procedures? What procedures might you recommend to preserve an efficient review but allow greater development of the facts and analysis of the legal grounds for protection?

In Chapter 8 you will study asylum, withholding of removal, and the protections mandated under the Convention Against Torture. At this stage in your reading, you may not have a better understanding of the law than that of Mr. Thuraissigiam. Do you understand why his claim was insufficient?

3. Manage Your Assumptions. What do you know about the current conflicts in Sri Lanka? Some commentators believe that the violence and insurgencies (aka a civil war) ended around 2010 after decades of conflict. *See* Nithyani Anandakugan, *The Sri Lankan Civil War and its History, Revisited in 2020*, Harvard International Review (Aug. 31, 2020, 12:00PM), https://hir.harvard.edu/sri-lankan-civil-war/. Many people assume that residents of Sri Lanka are fully protected by the government. Why is there no reference to country conditions in the Immigration Judge review? Do you assume Mr. Thuraissigiam would have access to the Internet during his DHS detention?

Here is an excerpt from the 2020 U.S. Department of State Country Condition Report on Sri Lanka:

> Significant human rights issues included: unlawful killings by the government; torture and cases of cruel, inhuman, or degrading treatment or punishment by government agents; arbitrary arrest and detention by government entities; arbitrary and unlawful interference with privacy; restrictions on free expression and the press, including unjustified arrests of journalists and authors; widespread corruption; overly restrictive nongovernmental organization laws; interference with the freedom of peaceful assembly and freedom of association; serious acts of corruption; lack of investigation of violence against women; trafficking in persons; crimes involving violence targeting members of ethnic minority groups; crimes involving violence against lesbian, gay, bisexual, transgender, and intersex persons; and existence or use of laws criminalizing same-sex sexual conduct.
>
> Police reportedly harassed civilians with impunity. The government took steps to investigate and prosecute some officials who committed human rights abuses.

U.S. Dep't of State, 2020 Country Reports on Human Rights Practices: Sri Lanka (Mar. 30, 2021), https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/sri-lanka/

4. Recent Federal Cases Citing *Thuraissigiam*

- *Singh v. Gills*, U.S. Dist. Ct. for the S.D. of Mississippi (Dec. 2020)
  - Cites and follows the decision in *Thuraissigiam* that petitions under Habeas Corpus cannot lead to an administrative review of asylum determination if the petitioner does not seek release from detention, but just a review of the asylum determination. Therefore, refusal to review the habeas petition does not violate the Suspension Clause because the petitioner does not seek release from detention.

- *Singh v. Gillis*, No. 5:20-cv-86-DCB-MTP, 2020 U.S. Dist. LEXIS 249881 (S.D. Miss. Dec. 17, 2020)

- *Romeo S.K. v. Barr*, U.S. Dist. Ct. for the Dist. of N.J. (Dec 2020)
  - Petition for relief in the form of an order directing the reopening of his case by BIA with a stay on his removal proceedings so he could appeal
  - Petition filed under a Writ of Habeas Corpus and was therefore denied following the precedent of *Thuraissigiam* because relief was not requested in the form of release because of unlawful detention but for the reopening and stay of his removal proceedings
  - *Romeo S.K. v. Barr*, No. 20-18065 (KM), 2020 U.S. Dist. LEXIS 241554 (D.N.J. Dec. 23, 2020)
- DHS is also using *Thuraissigiam* for non-expedited removal cases. See *Ivan A. v. Anderson*, No. 20-2796 (KM), 2021 U.S. Dist. LEXIS 42589, at *15 (D.N.J. Mar. 8, 2021).
  - Provides a thorough analysis of *Thuraissigiam* explaining its application by other district courts and applicability in this case of a petition to re-open removal proceedings 15 years after an order for removal was filed

Page 241 (§ 2.02[D] [Note 6]): Additional Notes and Questions to *Castro v. Department of Homeland Security*: Add the following sentence providing an update to *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017), at the end of the first paragraph in Note 6:

The settlement providing many protections for detained children remains in effect. The case has been renamed *Flores v. Garland*, 3 F.4th 1185 (9th Cir. 2021).

Page 242 (§ 2.03 Crossing into the Interior? Constitutional Rights *Within* the U.S. Territory

The update above concerning *DHS v. Thuraissigiam* should be integrated into your consideration of Problem 2-4, where you are asked to suggest alternative approaches to the administrative process to ensure greater fairness for the individual seeking protection. Congress may not have to provide more due process protections, but should they?

In the fiscal year 2019 report on enforcement actions, DHS said that 164,296 people, or 46% of all removals, were subjected to the expedited removal process. Another 39% were reinstatements of removal. Added together, that means that 85% of all removals occur with little or no involvement of the immigration courts. *See* U.S. Dep't of Homeland Sec., Enforcement Actions 2019 (Sept. 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf

All findings of inadmissibility by DHS (some would not be made using expedited removal):

Air: 53,237

Land: 157,153

Sea: 77,575

Total: 287,977

If a person reenters without permission after an expedited removal order, he or she can be criminally prosecuted for illegal reentry. Technically, an individual is barred for five years from seeking admission after an expedited removal order. If the individual reenters unlawfully within this period, is not detected, and then seeks benefits or asylum under the immigration law, it is possible that the DHS will reinstate the prior order.

Should there be more formal administrative procedures to allow an individual to collaterally attack an expedited removal order? Could the order be rescinded in the exercise of discretion?

To help you formulate your ideas for reform consider these points made in a 48-page report written by the American Immigration Council. The summarized key features included:

1. Expand Customs and Border Protection's (CBP) Office of Field Operations' capacity to process asylum seekers at ports of entry in a timely, orderly, and fair manner, and publicize this route.

2. Surge resources to U.S. Border Patrol to improve humanitarian processing and transportation of migrants, to reduce overcrowding and abuses, and to free up agents to carry out other law enforcement duties.

3. Establish a Center for Migrant Coordination to coordinate federal, state, and local efforts to support newly arrived migrants and reduce impacts on local communities.

4. Grow federal support for case management alternatives to detention to help migrants navigate the asylum system.

5. Revamp asylum processing at USCIS to keep up with both affirmative asylum backlogs and the new border processing rule.

6. Begin clearing immigration court asylum backlogs through the use of prosecutorial discretion. 7. Construct noncustodial regional processing centers where federal agencies are co-located with nongovernmental organizations (NGOs) to carry out processing, coordinate release, and provide effective case management for newly-arrived migrants.

8. Execute the termination of Title 42 once legally permitted, allowing a return to normal immigration law.

9. Fund a right to counsel in immigration court to ensure a fair process for individuals seeking asylum.

10. Create a Federal Emergency Management Agency (FEMA)- based Emergency Migration Fund to provide for a flexible and durable response during times of high migration.

11. Increase legal immigration pathways through congressional overhaul of immigration laws and executive expansion of existing pathways.

12. Build domestic and international refugee and asylum processing capacity in Latin America with the support of the United Nations High Commissioner for Refugees (UNHCR) and the international community.

13. Bring asylum law into the 21st century, lifting harmful antiimmigrant laws passed in the 1990s and moving past a post-World War II framework for asylum.

See American Immigration Council, *Beyond a Border Solution How to Build a Humanitarian Protection System That Won't Break* (May 2023) available at: https://www.americanimmigrationcouncil.org/research/beyond-border-solutions

Page 258 (§ 2.04[A] [Note 3]): Detention-Related Web Resources: Replace "In 2009, more than 44,000 people were in U.S. immigration detention at an annual cost of $1.7 billion" with the following:

The Detention Watch Network, a grassroots coalition to abolish U.S. immigration detention has stated that in fiscal year (FY) 2019, the U.S. government detained over 500,000 people. According to ICE's FY 2018 budget, it costs, on average, $133.99 a day to maintain one adult detention bed. But immigration groups have estimated that the actual number is closer to $200 a day. *Immigration Detention 101*, Detention Watch Network, https://www.detentionwatchnetwork.org/issues/detention-101#:~:text=In%20Fiscal%20Year%20(FY)%202019,an%20appalling%20record%20of%20abuse (last visited June 17, 2022).

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Note 3 Addition:

The TRAC (Transactional Records Access Clearinghouse) compiles immigration data, including statistics on ICE detentions here: https://trac.syr.edu/immigration/quickfacts/. In a recent notification sent out by TRAC (David Burnham and Susan B. Long at Syracuse University), they reported the following:

January 9, 2023 update:

"The federal government's use of immigration detention fluctuated throughout 2022 without maintaining a clear increase or decreases according to data released by Immigration and Customs Enforcement at the end of the calendar year.

The number of immigrants booked into immigrant detention facilities by Customs and Border Protection initially grew during the first several months of the Biden administration, from less than 10,000 per month to over 30,000 per month. But from a high of 33,044 book-ins in August 2021, the number of book-in has declined as a general trend to 17,559 in December 2022.

However, the number of immigrants in detention at a single time actually grew over 2022, from slightly more than 22,068 on January 2, 2022 to 30,001 on November 20, 2022, before falling quickly to 20,506 on January 1, 2023. Fluctuations in immigrant detention data are driven by a wide variety of factors, including current agency policies, the number of people arriving at the border, and the availability of beds in detention centers.

The number of people in Immigration and Customs Enforcement's Alternative to Detention (ATD) program also appears to have declined—although very slightly—for the first time since the start of the Biden administration, from 377,980 on December 17 to 376,030 on December 31, 2022. Although not necessarily an indication of a broader downward trend in ATD, these data do raise questions about whether ICE will be able to maintain the pace of growth of the ATD program indefinitely.

It is also plausible, based on ICE's recent significant issues with data mismanagement within the ATD program (as TRAC noted here and here), that these data may not represent an accurate picture of the program. The agency has not yet responded to TRAC's request for corrected ATD data. Even more concerning, ICE recently responded to a Freedom of Information Act (FOIA) request from TRAC by saying that the agency could not locate any records at all for any individuals in its Alternatives to Detention (ATD) program. This follows quickly on the heels of ICE's similarly troubling response in December, when that the agency say it could not find any ATD records then, either. See the agency's latest response to TRAC here.

* * *

- Immigration and Customs Enforcement held 29,914 in ICE detention according to data current as of June 4, 2023.
- 19,324 out of 29,914—or 64.6%—held in ICE detention have no criminal record, according to data current as of June 4, 2023. Many more have only minor offenses, including traffic violations.
- ICE relied on detention facilities in Texas to house the most people during FY 2023, according to data current as of May 30, 2023.
- ICE arrested 7,841 and CBP arrested 22,677 of the 30,518 people booked into detention by ICE during May 2023.

- South Texas ICE Processing Center in Pearsall, Texas held the largest number of ICE detainees so far in FY 2023, averaging 1,282 per day (as of May 2023).
- ICE Alternatives to Detention (ATD) programs are currently monitoring 224,725 families and single individuals, according to data current as of May 7, 2022.
- Harlingen's area office has [the] highest number in ICE's Alternatives to Detention (ATD) monitoring programs, according to data current as of June 3, 2022.

David Burnham & Susan B. Long, *Ice Starts 2023 With 20,506 Immigrants in Detention, ICE Still Can't Find ATD Records* Transactional Records Access Clearinghouse (TRAC), Syracuse University (Jan 9, 2023), https://trac.syr.edu/whatsnew/email.230109.html

Page 259 (§ 2.04[A]: Add the following to the end of Note 6 and add new Note 7:

A June 2021 Supreme Court ruling denying an opportunity for a bond hearing for people who passed a reasonable fear interview (a higher standard than the credible fear interview) may indicate that discretionary parole is just one option to secure release. See below in the discussion in Note 7.

PAGE 259 – Supplement Note 6: When is Parole a Possibility?

Please see the opening narrative at the beginning of this chapter update for a discussion of the use of parole to admit close to 100,000 Afghans and thousands of Ukrainian nationals.

That update also includes challenges by many states to the Executive's use of the parole authority.

Please also see the discussion of parole in the supplemental material to chapter 3. Expansion of parole opportunities has been rapid under the Biden administration and as was mentioned above litigation by several states is trying to stop the use of parole as a method of orderly admission.

Page 259 Add Note 7. The Power of Prior Orders of Removal. The border apprehensions and administration process continue to be an area of political attention and of great significance to thousands of individuals. While few of these people will be directly represented during expedited procedures, attorneys meet clients at many stages where a prior expedited order may be one of the most significant obstacles to obtaining status or protection in the United States.

For example, people who were subject to an expedited removal order may be apprehended after making an unlawful entry into the United States and charged with criminal entry after an order of removal under INA § 276; 8 U.S.C. § 1326. (reprinted in Chapter 1 at page 61).

Alternatively, or in addition, the DHS may also choose to reinstate the prior order of removal using INA § 241(a)(5); 8 U.S.C. § 1231(a)(5):

> Reinstatement of removal orders against aliens illegally reentering. If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

On June 29, 2021, the Supreme Court held that people in the reinstatement of removal context who sought bond after passing a reasonable fear of persecution interview and who were detained pending a judicial determination of their eligibility for withholding of removal were ineligible for a bond hearing. *Johnson v. Guzman Chavez*, 594 U.S. __, 141 S. Ct. 2271 (2021).

Page 259 Add Note 8: Bond and Immigration Detention for People Facing a Reinstatement Order of Removal

Note on *Johnson v. Guzman Chavez*, 594 U.S. _, 141 S. Ct. 2271 (2021)

In *Johnson v. Guzman Chavez*, the Supreme Court had two issues to determine: (1) if the respondents were "ordered removed" under INA § 241; 8 U.S.C. § 1231; and (2) if the respondent's removal orders were "administratively final" under INA § 241; 8 U.S.C. § 1231. The respondents in the case had been removed from the United States and then later re-entered without authorization. Upon re-entry, all respondents were determined to have a credible fear of returning to their home country and were referred to an Immigration Judge for withholding-only proceedings. (For an explanation of the difference between asylum proceedings and withholding of removal proceedings, see *Asylum Withholding of Removal*, American Immigr. Council (Oct. 6, 2020), https://www.americanimmigrationcouncil.org/research/asylum-withholding-of-removal.)

All respondents were eventually detained by DHS while their withholding-only proceedings were pending, and all respondents sought release on bond while the proceedings were pending because they had been detained under INA § 236; 8 U.S.C. § 1226. If detained under INA § 236; 8 U.S.C. § 1226, respondents would be eligible for release on bond, but if they were detained under INA § 241; 8 U.S.C. § 1231, they would not be eligible for release on bond and would be required to remain in detention awaiting the completion of their proceedings.

Both the government and the respondents agreed that detention of aliens was governed by INA §236; 8 U.S.C. § 1226 until the "removal period" of INA § 241; 8 U.S.C. § 1231 began. The Supreme Court found that for the purposes of the case at hand, the respondents' removal period was to begin when they were "ordered removed" and the removal order became "administratively final." As it was undisputed that the respondents had all been previously

removed prior to their illegal reentry, the Court found that they had been "ordered removed" under INA § 241; 8 U.S.C. § 1231. On the second issue, the Court determined that the respondents' removal orders were "administratively final" as meant by Congress in INA § 241; 8 U.S.C. § 1231. The Court read INA § 241(a)(1)(B)(i); 8 U.S.C. § 1231(a)(1)(B)(i) in conjunction with the following section (ii) that Congress intended "administrative finality" to be determined when the BIA has reviewed the removal order and DHS is free to remove the aliens, even if the aliens petition for stay of removal proceedings.

Respondents argued against INA § 241; 8 U.S.C. § 1231 governing their detention for reasons ranging from the statistical unlikelihood of their being actually removed after their withholding-only proceedings, to the 90-day clause of INA § 241; 8 U.S.C. § 1231 being impractical in cases with pending withholding-only proceedings because they take too long. The Court rejected all of the respondents' arguments for INA § 236; 8 U.S.C. § 1226 governing their detention and reversed the lower court decision that had been in their favor. As a result, the respondents were not granted bond release in accordance with INA § 241; 8 U.S.C. § 1231.

The relevant portions of INA §§ 236, 241; 8 U.S.C. §§ 1226, 1231 are excerpted below:

INA § 236; 8 U.S.C. § 1226 Detention

> (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) 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; but
> >
> > (3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.
> >
> > * * *

INA 241(a); § 8 U.S.C. § 1231(a)

(1) Removal Period

(A) In general. Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period. The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

* * *

(2) Detention. During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 212(a)(2) or 212(a)(3)(B) [8 USCS § 1182(a)(2) or (a)(3)(B)] or deportable under section 237(a)(2) or 237(a)(4)(B) [8 USCS § 1227(a)(2) or (a)(4)(B)].

* * *

(5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

Note 7: CBP Statistics on Electronic Searches at the Border

The following chart includes data for ALL travelers at the border and ports of entry including U.S. Citizens, Visa Holders, and other non-citizens. International Travelers Processed with Electronic Device Search

Month	FY 2018	FY 2019	FY 2020	FY 2021	FY2022	FY2023YTD
October	2,539	3,026	3,959	2,969	3,275	3,493
November	2,446	2,962	3,805	2,909	2,991	3,250
December	2,509	3,365	3,966	2,760	3,894	3,343
January	3,090	3,765	4,450	3,014	3,642	3,441
February	2,512	3,096	3,702	2,829	4,148	3,165
March	2,921	3,526	2,514	3,445	4,976	3,401
April	2,701	3,218	451	3,139	4,136	3,270
May	2,764	3,138	616	3,323	4,156	3,758
June	2,606	3,480	1,149	3,150	3,746	3,434
July	2,798	3,458	2,047	3,244	3,524	
August	3,320	4,085	2,614	3,425	3,486	
September	3,090	3,794	2,765	3,243	3,525	
Total	33,296	40,913	32,038	37,450	45,499	30,555

Source: https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics Under CBP enforcement action the agency reported as follows: " In Fiscal Year 2020, CBP processed more than 238 million travelers at U.S. ports of entry. During that same period of time, CBP conducted 32,038 border searches of electronic devices, representing less than .014 percent of arriving international travelers." *Id.*

New Note 8: More on Electronic Device Searches at the Border

In May of 2023, Judge Rakoff of the Southern District of New York ruled that Customs and Border Patrol agents do need a warrant to search a returning U.S. citizen's cell phone and cannot cure the lack of a warrant by making a copy of the data and later securing a warrant based on probably cause. Ultimately, while the ruling granted a limited "good faith" exception to the federal agents and therefore did not suppress the evidence obtained from the phones, the case did reject an absolute border exception for warrantless searches of citizen's phones or laptops. However, in a footnote, the opinion specifically states that the issue of whether the same exception applied to noncitizens was not before the court. *See United States v. Smith*, 2023 U.S. Dist. LEXIS 82455 * at note 8; __ F.Supp.3d __ (S.D.N.Y. May 11, 2023)(motion to suppress denied). Full text of note 8: The Court need not here address whether the same result would hold for a non-resident or non-citizen. *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 261, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) (holding that the Fourth Amendment does not protect property held in Mexico by a Mexican resident and citizen against search or seizure by the U.S. Government).

This ruling is in tension with cases of several federal circuit courts of appeal who have held that the border search exception to a warrant could be applied to border searches by DHS or other federal agents.

See, e.g., United States v. Aigbekaen, 943 F.3d 713, 720-21 (4th Cir. 2019) (border exception cannot be based on general claims of law enforcement) *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018)(government must show a nexus between a search of the phone and a violation related to border control); *United States v. Cano*, 934 F.3d 1002, 1014 (9th Cir. 2019) (allowing warrantless search for digital contraband not for general purposes).

However, two other circuits have ruled that the federal government may conduct warrantless searches at the border. *See, e.g., See Alasaad v. Mayorkas,* 988 F.3d 8, 21 (1st Cir. 2021)*; United States v. Touset,* 890 F.3d 1227, 1235 (11th Cir. 2018).

See also, Ashley N. Gomez, *ARTICLE: Over the Border, Under What Law: The Circuit Split over Searches of Electronic Devices on the Border*, 52 ARIZ. ST. L.J. 279 (2020).

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

What's New in this Chapter:

Visa Issuance and Annual Data updated to provide context on the use and reliance on nonimmigrant visas. This data helps you understand patterns in employment and other temporary admissions in the nonimmigrant visa categories.

Urgent Circumstances—new parole admissions and the limits of that status

Update for Foreign Student admissions and expansion of categories of work authorization post-graduation for some in science fields.

Update on problems with H-1B lottery selection for the capped H-1B initial petitions. In FY 2023 there were serious allegations of petition fraud.

Update on presumptions of visa misrepresentation or fraud (INA § 212(a)(6)(C) for behavior that contradicts admission category within 90 days of entry.

Humanitarian temporary admissions:

Update on alternatives to a visa to seek admission or temporary status in the United States

Including Temporary Protected Status (TPS) a reminder about the special new parole admissions by nationality and programs discussed in the beginning of this chapter update.

Updates on U process expanding certification for labor abuses.

Brief note on Supreme Court interpretation of "admission" as not including a grant of Temporary Protected Status at the end of this chapter.

Updates begin next page

Page 269 (§ 3.01): Add the following paragraph at the end of Section 3.01 Introduction and before [A] Nonimmigrant Status and the Issue of Nonimmigrant Intent:
In 2021, President Biden's administration encourage Congress to adopt a statutory change that would have reclassified F-1 student visas as "dual intent" visas. F-1 students would also be able to apply for green cards without going through the H-1B lottery discussed later in this chapter. The bill would have allowed F-1, H-1B, L-1, and O-1 visa holders to extend their status in one-year increments if the visa holder has a pending PERM application for more than one year or has a pending or approved I-140 visa petition. The bill would also have give employment authorization to children and spouses of H-1B visa holders. Furthermore, the bill would expand and raise the annual cap on U visas from 10,000 to 30,000. All of the nonimmigrant visas are explained in detail below and many of these changes would be a significant change. However, the legislation did not pass. For historical background see U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. (2021); *see also* National Immigration Law Center, *Summary of Key Provisions of the U.S. Citizenship Act* (Feb. 2021), https://www.nilc.org/issues/immigration-reform-and-executive-actions/summary-key-provisions-of-usca.

In the late Spring and early summer of 2022, some members of Congress have been discussing changes to the legal immigration categories, but few observers believe any compromise can be reached before the 2024 elections. A useful source to find information about current legislative proposals is the Bipartisan Policy Center. https://bipartisanpolicy.org/policy-area/immigration.

Page 274 (§ 3.01[A][2]): This section discusses the Department of State procedures that allow a consular officer to assume a foreign national engaged in misrepresentation if the person takes objective acts that are inconsistent with expressed intentions within 90 days of entering the United States. For example, a person may ask for a tourist visa and then within that 90-day period begin interviewing for employment. The USCIS adjudicators who process requests for change of status between nonimmigrant categories or requests to adjust status to permanent resident status use a slightly different set of criteria before presuming a person engage in misrepresentation or fraud. In 2021, the USCIS removed reference to the prior State department rules that allowed a rebuttable presumption if an action was taken more than 30 days after admission. The USCIS Policy Manual states: "If there is evidence that would permit a reasonable person to conclude that the applicant may be inadmissible for fraud or willful misrepresentation, then the applicant has not successfully met the burden of proof. In these cases, USCIS considers the applicant inadmissible for fraud or willful misrepresentation, unless the applicant is able to successfully rebut the officer's inadmissibility finding." *See* USCIS Policy Manual Volume 8, Part J, Chapter 3.

As you read in chapter 2, an allegation that someone secured a visa by misrepresentation or fraud can be used by DHS to subject the person to expedited removal under INA § 235(b). This ground of inadmissibility found in INA § 212(a)(6)(c) weaves in and out through every stage of a person's immigration process. In sum, individuals who think they can evade some of the

obstacles to securing longer term visas but entering the United States with a tourist visa or under the visa waiver program may find that taking a short cut create many future problems.

Page 283 (§ 3.01[C]: Choosing the Right Nonimmigrant Category
The text contains a chart that summarizes most of the nonimmigrant categories and describes some of the critical requirements.
The Migration Policy Institute has analyzed trends in nonimmigrant admissions from a high of over 10 million in 2015 to a low of under 2 million during the pandemic in 2020. https://www.migrationpolicy.org/article/temporary-visa-holders-united-states#visa_issuance_admissions. This report also charts the types of work and countries of origin using the majority of temporary visas.

Here is a chart based on data released by the DHS that indicates the total of admissions in each of the nonimmigrant categories through FY 21 the most recent data available as of July 2023:

NONIMMIGRANT ADMISSIONS BY CLASS OF ADMISSION: FISCAL YEAR 2021 compared to 2022

Class of admission	2021	2022
Total all admissions[1]	**35,300,000**	96,700,000
Total I-94 admissions	13,623,118	43,176,853
Temporary workers and families	1,843,944	3,049,583
Temporary workers and trainees	1,448,739	2,257,595
CNMI-only transitional workers (CW1)	374	935
Spouses and children of CW1 (CW2)	117	234
Temporary workers in specialty occupations (H1B)	148,603	410,195
Chile and Singapore Free Trade Agreement temporary workers (H1B1)	373	1,173
Registered nurses participating in the Nursing Relief for Disadvantaged Areas (H1C)	-	-
Agricultural workers (H2A)	586,992	669,978
Nonagricultural workers (H2B)	123,046	149,391
Returning H2B workers (H2R)[2]	25	106
Trainees (H3)	400	930
Spouses and children of H1, H2, or H3 (H4)	69,549	166,939

Workers with extraordinary ability or achievement (O1)	26,395	77,256
Workers accompanying and assisting in performance of O1 workers (O2)	8,512	37,515
Spouses and children of O1 and O2 (O3)	5,687	12,660
Internationally recognized athletes or entertainers (P1)	37,213	87,381
Artists or entertainers in reciprocal exchange programs (P2)	1,814	7,483
Artists or entertainers in culturally unique programs (P3)	1,000	8,370
Spouses and children of P1, P2, or P3 (P4)	2,283	3,848
Workers in international cultural exchange programs (Q1)	102	713
Workers in religious occupations (R1)	4,374	7,744
Spouses and children of R1 (R2)	1,472	2,851
North American Free Trade Agreement (NAFTA) professional workers (TN)	385,869	526,016
Spouses and children of TN (TD)	44,539	85,877
Intracompany transferees (all)	182,379	446,369
Intracompany transferees (L1)	116,120	294,142
Spouses and children of L1 (L2)	66,259	33,564
Treaty traders and investors (all)	200,672	321,082
Treaty traders and their spouses and children (E1)	27,332	43,494
Treaty investors and their spouses and children (E2)	164,175	251,627
Treaty investors and their spouses and children (CNMI only) (E2C)	11	57
Australian Free Trade Agreement principals, spouses and children (E3)	9,154	25,397
Representatives of foreign information media	12,154	24,537
Representatives of foreign information media and spouses and children (I1)	12,154	24,537
Students (all)	798,977	1,119,931
Academic students (F1)	758,458	1,059,414
Spouses and children of F1 (F2)	32,309	50,638
Vocational students (M1)	7,872	9,382

Spouses and children of M1 (M2)	338	497
Exchange visitors (all)	174,412	405,133
Exchange visitors (J1)	151,257	360,811
Spouses and children of J1 (J2)	23,155	44,322
Diplomats and other representatives (all)	161,041	318,318
Ambassadors, public ministers, career diplomatic or consular officers and their families (A1)	21,640	32,203
Other foreign government officials or employees and their families (A2)	65,441	130,362
Attendants, servants, or personal employees of A1 and A2 and their families (A3)	598	777
Principals of recognized foreign governments (G1)	9,059	12,972
Other representatives of recognized foreign governments (G2)	2,797	12,450
Representatives of non-recognized or nonmember foreign governments (G3)	365	897
International organization officers or employees (G4)	38,400	80,531
Attendants, servants, or personal employees of representatives (G5)	139	346
North Atlantic Treaty Organization (NATO) officials, spouses, and children (N1 to N7)	22,602	47,780
Temporary visitors for pleasure (all)	9,055,378	33,679,378
Temporary visitors for pleasure (B2)	8,169,825	23,727,014
Visa Waiver Program – temporary visitors for pleasure (WT)	883,556	9,833,385
Guam - Commonwealth of Northern Mariana Islands (CNMI) Visa Waiver Program - temporary visitors for pleasure to Guam or Northern Mariana Islands (GMT)	1,997	118,979
Temporary visitors for business	1,346,208	4,109,687
Temporary visitors for business (B1)	1,223,567	2,941,206
Visa Waiver Program – temporary visitors for business (WB)	122,576	1,167,974
Guam - Commonwealth of Northern Mariana Islands (CNMI) Visa Waiver Program - temporary visitors for business to Guam or Northern Mariana Islands (GMB)	65	507

Transit individuals	211,283	429,970
Foreign nationals in continuous and immediate transit through the United States (C1)	207,307	423,132
Foreign nationals in transit to the United Nations (C2)	132	175
Foreign government officials, their spouses, children, and attendants in transit (C3)	3,844	6,663
Commuter students	514	965
Canadian or Mexican national academic commuter students (F3)	514	965
Noncitizen fiancé(e)s of U.S. citizens and children	18,974	24,819
Fiancé(e)s of U.S. citizens (K1)	16,643	21,534
Children of K1 (K2)	2,331	3,285
Other	32	9
Unknown	12,355	39,006

D Data withheld to limit disclosure. – indicates no data

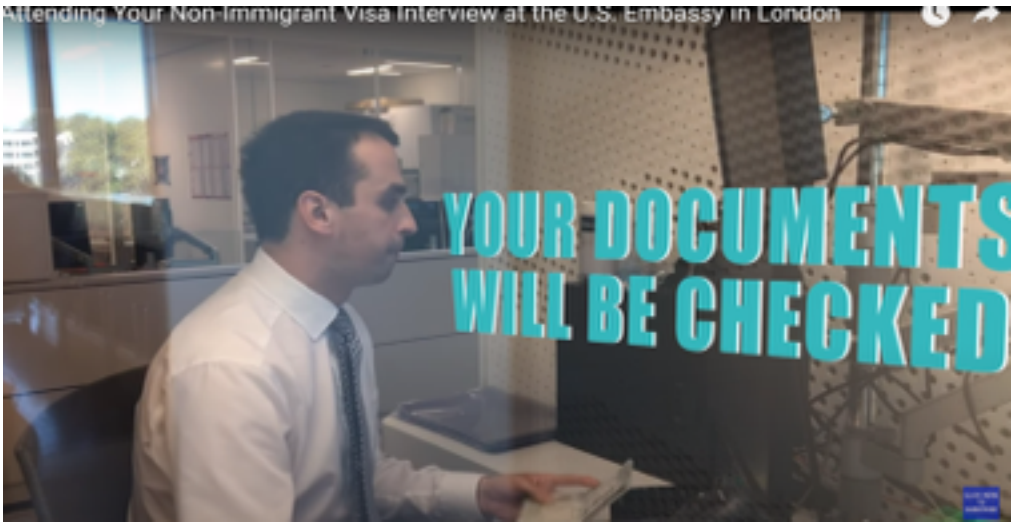
As you will see, there are some categories where admissions are quite small. Now look at data about visa stamp issuance by country or region released by the Department of States, you will see that in many countries some of the nonimmigrant visas are rarely if ever used?

Full data for FY 22 at: https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html

Only 40 countries currently qualify for the visa waiver admission as a 90-day business or tourist visitor and this data reflects only visa stamp issuance, not change of status nor extensions of stay within the United States. See INA § 217 Visa Waiver. Current countries exempted are listed at: https://www.dhs.gov/visa-waiver-program-requirements

These countries include:
Andorra, Australia, Austria, Belgium, Brunei, Chile, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Republic of, Latvia, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, new Zealand, Norway, Poland, Portugal, San Marino, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan, United Kingdom.

Here is a link to a Department of State YouTube video that explores the many video categories that benefit the U.S. economy: https://youtu.be/IVFY8yz8xFM. In the video you will see images of Consular Offices interviewing people at posts and images of technology used to screen visa applicants.



Clip from U.S. Consulate video showing visa stamp process at U.S. Embassy in London.

https://www.youtube.com/watch?v=QOHqCigJ6Jk minute 2.17.

Here is a snapshot of nonimmigrant visa issuance summarized here by the regional groupings employed by the State Department:

Region	**B-1**	**B-1/B-2**	**E**	**F**	**H**	**L**	**O**
Africa	1,320	264,603	127	30,781	15,686	3,851	1,009
Asia/South Asia	7,343	1,011,233	25,174	29,0075	312,480	70,732	6,090
Europe	5,447	28,3784	17,249	63,519	20,914	40,541	19,136
N. & C. America	14,418	37,0120	7,238	18,281	2,119	12,296	4,103
Oceania	118	9,324	10425	2549	991	1,883	1,598
S. America	3,296	1,288,282	1,735	31,730	12,139	22,089	4,980
TOTALS	21,943	3,228,199	61,949	437,018	769,299	151,406	369,922

Source: Table XVI (Part 1) Nonimmigrant Visas Issued Fiscal Year 2022 Department of State. Available at: https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports/report-of-the-visa-office-2022.html

Questions:

1. What factors might contribute to the comparative lack of nonimmigrant visas for some regions or nationalities? For example, people from Nigeria a country of over 206 million people received 9,003 F-1 student visas compared to 20,225 students from South Korea, a country of 51 million. Mexico, a top U.S. trading partner with a population of 129 million had 2,394 E visas issue as compared to 4,612 for Canada with a population of 38 million.

   Are the differences in visa issuance based on a lack of economic power? A disfavored trade or treaty status? Fewer international students from that country who make connections with U.S. based employers? National origin, religious or racial discrimination? The burden of proving temporary intent for most of the categories? Use the link above to visit the Department of States data and make your own comparisons.

2. Do you understand that counting visa stamp issuance is not counting people inside the United States? In addition to some people who are visa stamp exempt due to special treatise, the data may include visa stamps for derivative family members and people that never sought admission to the United States. Further, in June of 2023 the State Department and CBP announced some automatic visa revalidation for rentry to the United States without requiring a new visa stamp. https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visa-expiration-date/auto-revalidate.html The exceptions are narrow and include people with an approved L or H petition that extends beyond the validity of the visa stamp itself.

Page 287 (§ 3.02[B][1]): In January 2022, the Biden administration announced new actions to increase opportunities in the United States for STEM students and professionals. DHS added 22 new fields of study to the STEM OPT program designed to permit more students to remain in the United States for up to 36 months after graduation. 87 Fed. Reg. 3317 (Jan. 21, 2022). DHS also gave updated guidance how students and entrepreneurs can take advantage of the national interest waiver and self-petition for employment-based visa classification without first testing the labor market. 6 USCIS Policy Manual § (5)(D), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5#S-D.

Litigation by interest groups seeking to limit the discretionary and regulatory power of the USCIS to authorize longer periods of post-graduation work were unsuccessful. The litigation

predated the Biden administration. *See Washington Alliance of Technology Workers v. Department of Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022).

In July the DHS formally announced an additional six categories that could qualify for expanded OPT work authorization in an expansion of the STEM categories. For a full list of categories see https://www.ice.gov/doclib/sevis/pdf/stemList2022.pdf (posted July 12, 2023).

Page 289 (§ 3.02[B][3]): On July 27, 2021, the Departments of State and Education issued a joint statement of principles in support of international education. U.S. Dep'ts of State and Education, A Renewed U.S. Commitment to International Education, https://educationusa.state.gov/sites/default/files/intl_ed_joint_statement.pdf. The State Department subsequently announced an extension applicable up to the 2022-2023 academic year for students in STEM fields on the J-1visa that will facilitate additional academic training for periods of up to 36 months. BridgeUSA, Opportunity for Academic Training Extensions for J-1 College and University Students in Stem Fields, https://j1visa.state.gov/opportunity-for-academic-training-extensions-for-j-1-college-and-university-students-in-stem-fields/.

Page 292 (§ 3.02[C][1]): The H-1B registration process in March of 2023 revealed significant problems with the system. In that single year, applications for the registration rose over 147% to 758,994 registrations. Significantly, the agency found that over 50% of the registrations were presented by multiple employers for the same new H-1B worker. Investigations are now pending into possible fraud and many stakeholders are calling for reforms of the system. Here is a quote from the USCIS website about why each registration had to be for a bona fide job offer to a potential H-1B worker:

> Unfairly Increasing Chances of Selection
> When you submit your registration(s), you must attest, under penalty of perjury, that all of the information contained in the submission is complete, true, and correct. Beginning in FY 2023, the attestation that is required before submission indicates, "I further certify that this registration (or these registrations) reflects a legitimate job offer and that I, or the organization on whose behalf this registration (or these registrations) is being submitted, have not worked with, or agreed to work with, another registrant, petitioner, agent, or other individual or entity to submit a registration to unfairly increase chances of selection for the beneficiary or beneficiaries in this submission."
>
> If USCIS finds that this attestation was not true and correct (for example, that a company worked with another entity to submit multiple registrations for the same beneficiary to unfairly increase chances of selection for that beneficiary), USCIS will find that registration to not be properly submitted. Since the registration was not properly submitted, the prospective petitioner would not be eligible to file a petition

> based on that registration in accordance with the regulatory language at 8 CFR 214.2(h)(8)(iii)(A)(1). USCIS may deny or revoke a petition based on a registration that contained a false attestation and was therefore not properly submitted. Furthermore, USCIS may also refer the individual or entity who submitted a false attestation to appropriate federal law enforcement agencies for investigation and further action as appropriate.

Posted at: https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process (last visited 7.6.2023).

In the prior year, the agency had received over 480,000 registrations. For many years the annual quota of 85,000 new H-1B workers is quickly exhausted.

Both foreign nationals and employers must explore alternative nonimmigrant petitions or post workers outside the United States. Part of practicing business immigration law is developing strategies to avoid the problem of "losing" the H-1B lottery for registration.

Page 292 (§ 3.02[C][2]):
To address the domestic labor shortage, the DHS and the DOL made available an additional 35,000 H-2B temporary nonagricultural worker visas during the second half of fiscal year 2022. These additional visas are for employers seeking to employ additional H-2B workers on or after April 1, 2022, through Sept. 30, 2022. 87 Fed. Reg. 30,334 (May 18, 2022). The semiannual cap of 33,000 visas for the second half of FY 2022 was reached on February 25, 2022. Press Release, USCIS, DHS and DOL Announce Availability of Additional H-2B Visas for Second Half of Fiscal Year (May 16, 2022), https://www.uscis.gov/newsroom/news-releases/dhs-and-dol-announce-availability-of-additional-h-2b-visas-for-second-half-of-fiscal-year.

In 2023 the DHS and DOL jointly took broader, more proactive action by increasing the allocation by over 64,000 visas for the entire year rather than having to create a second increase. Read more at: https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/temporary-increase-in-h-2b-nonimmigrant-visas-for-fy-2023

Do these statutory caps on nonimmigrant visas make sense? Consider the policy arguments for and against increasing the allocations.

Page 293 (§ 3.02[E]): In January 2021, the USCIS gave updated guidance explaining how the agency makes determinations of eligibility for O-1A nonimmigrant status for noncitizens of extraordinary ability and gave examples of evidence that might satisfy the evidentiary criteria for STEM workers. USCIS Policy Alert, O-1 Nonimmigrant Status for Persons of Extraordinary Ability or Achievement (Jan. 21, 2022), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220121-ExtraordinaryAbility.pdf.

Page 296 (§ 3.02[H][2]): The annual cap for U visas has been reached every year since 2011, and the backlog of pending applications as of the end of fiscal year 2022 stands at more than 170,000. Added to the derivative family members, the pending list is over 285,000 people. Adjudication of the underlying petition can take two to five years and the quota limit of 10,000 primary U status grants means backlogs to full status can take five to ten years.
In June 2021, the USCIS released a process to address the mounting backlog. If the petitioner has a bona fide petition, the USCIS determines whether to exercise its discretion to issue a bona fide determination employment authorization document and grant deferred action to the petitioner. USCIS, Policy Manual Volume 3, Chapter 5 – Bona Fide Determination Process, https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5.

One of the reasons demand for the U status is so great, is that it is one of the only nonimmigrant categories that can convert to permanent resident status and a grant of U status may waive many other problems such as prior orders of removal. There is more about this remarkable nonimmigrant category later in the chapter.

Page 298 (§ 3.02 [I] There is No "Catch-All" Temporary Visa Category

This chapter focuses on admission to the United States using one of the visa categories that grants temporary "status" under INA § 101(a)(15); 8 U.S.C. § 1101(a)(15). One of the alternatives to entry with a visa is a form of admission called "parole." The term may sound very odd but is an archaic term used to mean permission to enter a place and move about subject to the conditions of your admission. In chapter 2 where we discussed treatment at the border we noted one form of parole which is a deferred inspection pursuant to 8 CFR § 235(a)(4).

Using its statutory authority found in INA § 212(d)(5); 8 U.S.C. § 1182(d)(5) the DHS does sometimes admit people with short grants of parole as a condition of being released to pursue asylum interviews or removal hearings. More robust are formal grants of parole authority to be admitted for a temporary period of time based on humanitarian need or special government priorities. These forms of parole are not a grant of "nonimmigrant status" but a period of authorized stay. Some may include the ability to seek work authorization. A parole admission does allow an individual to qualify later for adjustment of status to permanent resident if they fit one of the relevant categories, e.g., marriage to a U.S. citizen. But it is not a form of status that authorizes a --"change of status" to another nonimmigrant category under INA § 248; 8 U.S.C. § 1258.

Examples of special parole programs implement since 2019:[10]

Evacuation Parole for Afghans summer of 2021 --

[10] This is not a complete list there are other special programs, e.g., for military family members, Filipino War Veterans.

A. two year admission for Afghans being evacuated by the U.S. and allies most arrive Aug to October 2021.
B. Re-Parole announced June of 2023 https://www.uscis.gov/humanitarian/information-for-afghan-nationals/re-parole-process-for-certain-afghans
C. Over 40,000 people sought humanitarian parole for Afghans in the fall of 2021 and fewer than 114 requests appear to have been processed. The USCIS has a special note on its website about the possibility of humanitarian parole but advocates advise that few if any cases are being approved. https://www.uscis.gov/humanitarian/humanitarian-parole/information-for-afghan-nationals-on-requests-to-uscis-for-parole For a report on the failures of the evacuations see https://www.americanimmigrationcouncil.org/foia/uscis-failures-afghans-parole.

Central American Minor humanitarian parole – a reauthorized program first created in 2014, for children of parents who are residing in specified forms of status or with pending applications for asylum and who are separate from their children at home who are residing in El Salvador, Guatemala, or Honduras. Update in April of 2023 visit https://www.uscis.gov/CAM

Uniting for Ukraine – April of 2022, people in the United States may sponsor a Ukrainian to enter with parole. The reported data available indicates that more than 118,000 Ukrainians have entered the United States using this program. https://www.uscis.gov/ukraine Congressman Michael Quigley and others introduced a statute to allow adjustment of status for these and an estimated 270,000 more Ukrainians. https://quigley.house.gov/media-center/press-releases/quigley-keating-fitzpatrick-and-kaptur-introduce-ukrainian-adjustment [See chapter 4 for a discussion of Adjustment of Status to permanent resident]

In the fall of 2022, for people from Cuba, Nicaragua, Venezuela, and Haiti the DHS announced some new parole programs to try to deter illegal entry.
The general criteria for these programs are as follows:

Who May be Considered for Advance Travel Authorization

In order to be eligible to request and ultimately be considered for an advance authorization to travel to the United States to seek parole under these processes, beneficiaries must:

- Be outside the United States;
- Be a national of Cuba, Haiti, Nicaragua, or Venezuela; or be an immediate family member (spouse, common-law partner, and/or unmarried child under the age of 21) who is traveling with an eligible Cuban, Haitian, Nicaraguan, or Venezuelan;
- Have a U.S.-based supporter who filed a Form I-134A on their behalf that USCIS has vetted and confirmed;
- Possess an unexpired passport valid for international travel;

- Provide for their own commercial travel to an air U.S. POE and final U.S. destination;
- Undergo and pass required national security and public safety vetting;
- Comply with all additional requirements, including vaccination requirements and other public health guidelines; and
- Demonstrate that a grant of parole is warranted based on significant public benefit or urgent humanitarian reasons, and that a favorable exercise of discretion is otherwise merited.

Source: https://www.uscis.gov/CHNV

Haitian Parole –Two qualifying groups:

A. Program for humanitarian parole (updated May 17, 2023) https://www.uscis.gov/CHNV
B. Parole for beneficiaries of approved family-based immigrant petitions (created in 2014 updated in 2023) https://www.uscis.gov/humanitarian/humanitarian-parole/the-haitian-family-reunification-parole-hfrp-program

Nicaraguan Parole – updated May 17, 2023 https://www.uscis.gov/CHNV

Venezuelan Parole – updated May 17, 2023 https://www.uscis.gov/CHNV

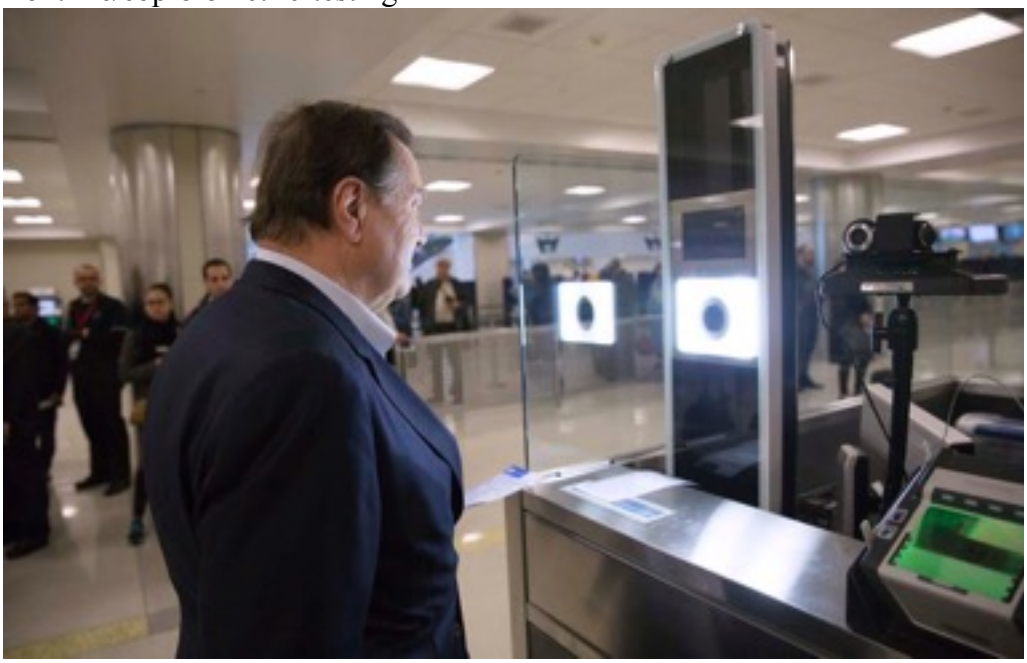
Cuban Parole – Originally created in 2007, updated in 2023 https://www.uscis.gov/humanitarian/humanitarian-parole/the-cuban-family-reunification-parole-program

Colombian, El Salvadoran, Guatemalan, and Honduran Parole for those with approve family based immigrant petitions – July 2023—this program is summarized at the end of chapter 4 supplement.

Questions:

1. Why do you think the DHS has identified these nations as deserving of special considerations? What characteristics do they share?
2. Litigation has surrounded several of these programs. Most recently, as summarized in the update to Chapter 2, the Supreme Court found that Texas and Louisiana lacked standing to challenge some changes in border admission policies that relied on discretion to parole and not to detain.
3. Can you identify policy concerns in creating country specific temporary parole programs?
4. How might future climate change emergencies impact parole programs?

CBP Image of facial recognition technology now used at ports of entry. https://www.cbp.gov/frontline/cbp-biometric-testing



Page 303 (§ 3.02[B] Multiple Options for the Business Executive; Problem 3-1 Manuel Hayek

In this material the text explores a wide array of options for a business executive working for a multinational corporation. While the INA and regulations may provide many choices, when time is of the essence, processing delays can be a deciding factor.

Here is a link to a State Department page that lists typical waiting periods to obtain an appointment to secure a visa stamp (should one be required) for some of the most common forms of nonimmigrant visa options:

https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/global-visa-wait-times.html

The U.S. Embassy consular section post a wait of over 750 days to secure an appointment for a B-1/B-2 business or tourist visitor stamp. But if approved for an H-1B, L-1, or O-1 (all requiring preapproval by USCIS and accompanying processing times, a visa appointment can be obtained in 7 days. Should processing times drive the strategy?

In practice, many consular posts do have procedures allowing for expedited appointments. Many business immigration attorneys share strategies on recent experiences and how to make requests to these posts. Bottom line: process may be the most essential aspect of making decisions when multiple options are available.

Page 318 (§ 3.03[C]): Add this statute to Problem 3-2 Essential Materials:

Consider Special Provisions for Australian Nationals:
INA § 101(a)(15)(E)(iii); 8 U.S.C. § 1101(a)(15)(E)(iii)
INA § 214(e)(6); 8 U.S.C. § 1184(e)(6)

Page 319 (§ 3.03[C]): Add the following paragraph after paragraph three in Note 1 to Problem 3-2:

Politics and policy fights over the breadth of the H-1B visa have continued. Under the Trump administration the DHS issued a rule that tightened the definition of a specialty occupation. 85 Fed. Reg. 63,918 (2020). Previously, employers only had to establish that the required degree for the specialty occupation was common in the industry. Under the new rule, employers had to show that the bachelor's degree was always required for the occupation as a whole. Furthermore, the rule rejected previous practice of allowing a general degree, such as business or liberal arts, to qualify for a specialty occupation. Instead, the rule mandated that the degree be directly related to the position. Stuart Anderson, *DHS Rule Aims to Make Qualifying for an H-1B Visa Impossible for Most*, Forbes (Nov. 9, 2020), https://www.forbes.com/sites/stuartanderson/2020/11/09/dhs-rule-aims-to-make-qualifying-for-an-h-1b-visa-impossible-for-most/?sh=14504c5f2aa4. In January 2021, the Biden White House issued a memorandum calling for the withdrawal of all rules that were pending at the Federal Register and not yet published. As the modified version of the rule was pending at the Federal Register, it was withdrawn. 86 Fed. Reg. 7,424 (Jan. 20, 2021); AILA, Featured Issue: DHS and DOL Rules Altering the H-1B Process and Prevailing Wage Levels (May 17, 2021), https://www.aila.org/advo-media/issues/all/dhs-dol-rules-altering-h1b-prevailing-wage-levels.

Page 320 (§ 3.03[C]): Add the following to the end of the first paragraph on Note 3 to Problem 3-2:

The 2017 memo acknowledged that the tech industry had evolved significantly since 2000. The memo also clearly stated the standard that was 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 stated that a position could not 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. Further, the memo reversed a long-standing policy which presumed a computer programmer to be a specialty occupation. In February 2021, the USCIS rescinded the 2017 policy memo and reinstated the 2000 policy memo. In rescinding the 2017 memo, the USCIS cited a Ninth Circuit decision that found the USCIS' refusal to issue a H-1B visa to a computer programmer to be arbitrary and capricious. USCIS, Policy Memorandum, PM-602-0142.1, Rescission of 2017 Policy Memorandum PM-602-0142 (Feb. 3, 2021), https://www.uscis.gov/sites/default/files/document/memos/PM-602-0142.1_RescissionOfPM-602-0142.pdf (citing *Innova Solutions v. Baran*, 983 F. Supp. 3d 428 (9th Cir. 2020)).

Page 320 (§ 3.03[C]): Change Note 4 after Problem 3-2 to the following:

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 required 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 sought 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).

President Biden revoked the Executive Order in January 2021. 86 Fed. Reg. 7,475 (Jan. 25, 2021).

Page 321 (§ 3.03[C]): Add new Notes 5 and 6 after Problem 3-2:

5. Suspension of Nonimmigrant Visas: In April 2020, President Trump issued a proclamation suspending immigrant visas from outside of the United States due to COVID-19. In June 2020, Trump issued a proclamation also suspending the entry of H-1B, H-2B, L-1, and certain J-1 visa holders from outside of the United States until December 31, 2020. He later extended the restrictions through March 31, 2021. The ban harmed H-1B holders who were abroad and expected to begin work in the United States. Danilo Zak, *President Trump's Proclamation Suspending Immigration*, National Immigration Forum (June 23, 2020), https://immigrationforum.org/article/president-trumps-proclamation-suspending-immigration/. In August 2020, the DOS announced that it would allow H-1B and L visa holders to either return to the United States to resume previously approved employment or apply for a national interest exception if their employer was fulfilling a critical infrastructure need in a designated industry. *State Department Broadens National Interest Exceptions to Nonimmigrant Entry Ban for H-1B and L-1 Employees*, Fragomen (Aug. 12, 2020), https://www.fragomen.com/insights/alerts/state-department-broadens-national-interest-exceptions-nonimmigrant-entry-ban-h-1b-and-l-1-employees. While President Biden revoked the April proclamation suspending immigrant visas in February 2021, the June proclamation suspending nonimmigrant visas remained in effect longer. Presidential Proclamation No. 10149, 86 Fed. Reg. 11,847 (Feb. 24, 2021); see also US. Dep't of State, *Presidential Proclamation on the Suspension of Entry as Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019* (updated May 12, 2021), https://travel.state.gov/content/travel/en/News/visas-news/presidential-proclamation-on-the-suspension-of-entry-as-nonimmigrants-of-certain-additional-persons-who-pose-a-risk-of-transmitting-coronavirus-disease-2019.html.

While the United States is not currently (summer of 2023) preventing travel under a temporary visa due to the Coronavirus, the pandemic experience certainly demonstrated that some categories of nonimmigrants could find their ability to live and work in the United States disrupted if they were not physically within the country.

6. Does Being Australian Help? The E-3 category was created in 2005 and sets a special annual quota for special occupation E-3 workers at 10,300. The quota has never been reached. In our

problem Edgar's quest for new work authorization is not a quota issue because he is already in H-1B status. But is there an advantage if he were to switch to E-3? What about the length of stay? There is no cap on the number of two-year extensions. Consider the statutory right of a spouse to work. INA § 214(e)(6); 8 U.S.C. § 1184(e)(6).

Page 343 (§ 3.03[C]): Add the following to Note 3, after *In re Sea, Inc.*:

In October 2020, the DOL issued an interim rule that significantly increased the prevailing wage levels for H-1B visas, as well as H-1B1, E-3, and PERM visas. 85 Fed. Reg. 63,872 (2020). The rule made it more difficult for those with lower wages to apply for these visas. Several district courts struck down the rule, stating that it violated the APA by bypassing notice and comment rulemaking. *Purdue Univ. v. Scalia*, 2020 U.S. Dist. LEXIS 234049 (D.D.C. Dec. 14, 2020); *Chamber of Commerce v. DHS*, 2020 U.S. Dist. LEXIS 224974 (N.D. Cal. Oct. 19, 2020); *ITServe Alliance Inc. v. Scalia*, 2020 U.S. Dist. LEXIS 227049 (D.N.J. Oct. 16, 2020). In January 2021, the DOL revised and reissued the rule with lower prevailing wage minimums than the 2020 rule. 86 Fed. Reg. 3,608 (2021); In May 2021, the DOL announced that it would delay the effective date of rule until November 2022. 86 Fed. Reg. 26,164 (May 13, (2021).

Relatedly, the USCIS attempted to implement a rule in January 2021 that would have eliminated the H-1B lottery process and given priority to applicants with higher wages. In February 2021, the USCIS announced that it would delay implementing the wage-based selection process until December 31, 2021. 86 Fed. Reg. 8,543 (Feb. 8, 2021); USCIS, DHS Delays Effective Date of H-1B Selection Final Rule (Feb. 4, 2021), https://www.uscis.gov/news/alerts/dhs-delays-effective-date-of-h-1b-selection-final-rule.

This rule was not implemented and problems with the H-1B selection in 2023 may lead to more regulatory changes.

Page 349 (§ 3.03[C][3]): Change the last paragraph on Section [3] Third Party Placement to read as follows:

In 2018, USCIS issued a policy memo 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 sought to consolidate previous guidance and to align the H-1B program with the directive in President Trump's Buy American and Hire American Executive Order to protect the interests of U.S. workers. It required U.S. employers to include contracts, work orders and itineraries for employees who would be working at third-party locations. Itineraries must have included the dates and locations of the services to be provided. The U.S. employer must also have been able to show "by a preponderance of the evidence" that the foreign national would 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 could have been submitted to or requested by the USCIS. Letters signed by an authorized official of each ultimate end-client could have been required as well. The employer must also have been able to show that an employer-employee relationship would be maintained throughout the period requested, and that the petition would 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 retained the discretion to limit employment to the period of time the employer was able to demonstrate that it met these requirements. Petitioners seeking to extend the foreign national's H-1B stay needed to 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/document/memos/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf. In June 2020, the USCIS rescinded the policy memo, announcing that it would no longer require specific day-to-day assignments or contracts, and would apply the itinerary requirement on a limited basis. The USCIS stated that it would continue to limit validity periods to shorter than three years when applicable. USCIS, Policy Memorandum, PM-602-0114, Rescission of Policy Memoranda (June 17, 2020), https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf. In March 2021, the USCIS announced that it may reopen or reconsider H-1B applications that had been denied because of the rescinded policy memo. USCIS, USCIS May Reopen H-1B Petitions Denied Under Three Rescinded Policy Memos (Mar. 12, 2021), https://www.uscis.gov/news/alerts/uscis-may-reopen-h-1b-petitions-denied-under-three-rescinded-policy-memos.

We highlight these many regulatory changes to emphasize how highly politicized some categories of nonimmigrant visas have become.

Page 354 (§ 3.03[D][2]): Change the last paragraph on page 354 to read as follows:

Previously, H-1B visa applicants submitted their petition into a lottery system. In 2020, the USCIS began to require U.S. employers to register their H-1B applicants online in March. Only applicants who are selected can then file a complete H-1B petition for the lottery in April. USCIS, H-1B Electronic Registration Process (Mar. 4, 2021), https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process. At the end of the filing period, the USCIS conducts a computer-generated random lottery to select the petitions that will be processed and notifies U.S. employers that their petition(s) have been selected for review. Selection does not guarantee the petition will be approved or that the prospective employee will receive H-1B status. Selection means only that the petition will be reviewed by the USCIS, which may approve it, ask for additional information (frequently referred to as a "Request for Evidence" or RFE), or deny it. Approval is prospective. As petitions are being filed in anticipation of the start of the upcoming fiscal year, the H-1B visa and concurrent status will not become available to the foreign national beneficiary until the next federal fiscal year begins on October 1.
See the prior discussion related to text page 292 of the chaos of the 2023 selection process and new investigations of possible fraud in gaming the H-1b lottery.

Page 357 (§ 3.03[E]): EAD Backlogs

EAD processing times have increased, ballooning processing times in the process. *See* USCIS, *Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year*, https://egov.uscis.gov/processing-times/historic-pt. The USCIS provides processing times for four categories of I-765 applications: (1) those based on an approved, concurrently filed Deferred Action for Childhood Arrival (DACA) application; (2) those based on a pending asylum application; (3) those based on a pending I-485 adjustment of status application; and (4) all others. *Id.* Median processing times for I-765 applications based on asylum applications rose from 1.7 months in FY 2017 to 7.1 months in FY 2022. *Id.* Median processing times for I-765 applications based on adjustment of status applications rose from 3 months in FY 2017 to 7.2 months in FY 2022. *Id.* Processing times for other categories of I-765 applications have not increased significantly between FY 2017 and FY 2022. *Id.*

The processing times posted for FY 2023 appeared to have reduced the waiting periods but anecdotal evidence shared by practicing attorneys and advocates is to the contrary. In January of 2023, the American Immigration Council filed a class action due to the excessive delays in many forms of adjudication. https://www.americanimmigrationcouncil.org/news/class-action-filed-against-uscis-extreme-processing-delays-leave-american-families-stranded

Page 357 (§ 3.03[E]): USCIS announced a temporary final rule, effective May 4, 2022, that increases to up to 540 days the automatic extension period for work authorization and Employment Authorization Documents (EADs) available to certain EAD renewal applicants. 87

Fed. Reg. 26,614 (May 4, 2022). The USCIS estimates that it will benefit approximately 87,000 workers who have filed for renewal of their work authorization and whose 180-day automatic extension periods have expired or are about to expire. *Id.* at 26618. The temporary rule does not extend beyond October of 2023 as of this writing in July of 2023.

Page 357 (§ 3.03[E]): Expedited Work Permits for Healthcare Workers
In 2022 USCIS announced that qualified healthcare workers who have pending employment authorization document (EAD) renewal applications and EADs that will expire in 30 days or less, or that have already expired, can request expedited processing of the EAD application. USCIS, "How to Make an Expedite Request" (see "Alert: If you are a healthcare worker"), https://www.uscis.gov/forms/filing-guidance/how-to-make-an-expedite-request.

Page 363 (§ 3.03[G]): Change the last paragraph in Note 3 after Problem 3-2-2 to read as follows:

In response to President Trump's Buy American and Hire American Executive Order, the DHS proposed a rule to rescind work authorization for H-4 spouses in February 2019. The change would have hurt an estimated 90,000 foreign nationals, mostly women from India. Laura D. Francis, *White House Poised to End Work Permits for H-1B Spouses,* Bloomberg Law, Feb. 21, 2019, https://news.bloomberglaw.com/daily-labor-report/white-house-poised-to-end-work-permits-for-h-1b-spouses-2. The DHS withdrew the proposed rule in January 2021.

In 2021, the DHS announced that L-2 and E spouses are authorized to work incident to status and that some H-4 spouses could receive work authorization and extensions. See https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/employment-authorization-for-certain-h-4-dependent-spouses.

Pages 366-67 (§ 3.03[H]): Remove the "Buy American and Hire American" parts in Note 3 after Problem 3-3 to read as follows:

3. Functional Manager. A 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/document/memos/APPROVED_PM-602-0148_Matter_of_G-_Inc._Adopted_AAO_Decision.pdf (designating *Matter of G-Inc*. as an Adopted Decision, 2017-05 (A.A.O. 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 (A.A.O. Nov. 8, 2017).

Page 414 (§ 3.05[A]): In Note 2, delete the broken link regarding R-1 processing times and replace with the following:

Generally, you can learn about historical USCIS processing times by visiting https://egov.uscis.gov/processing-times/historic-pt. You will need to know the name of the form for the specific nonimmigrant petition. Most are found on form I-129. The waits vary dramatically among the types of petitions, and only some are eligible for priority processing.

The Biden administration has been expanding premium processing if the petitioner pays special fees. The Trump administration had ended most categories of premium processing and the USCIS budget was directly impacted because the agency's operating expenses come from user fees. Read more in the proposed rule to increase fees: https://www.federalregister.gov/documents/2023/01/04/2022-27066/us-citizenship-and-immigration-services-fee-schedule-and-changes-to-certain-other-immigration. 88 Fed. Reg. 42 (Jan. 24, 2023).

Page 415 (§ 3.05[B]): Exceptional Categories for Victims of Crimes

Add to Essential Materials.

In June 2021, the USCIS issued a policy memorandum that said it would increase resources to adjudicate backlogged U status applications and that work authorization would be granted after an initial bona fide examination of the petition. USCIS, Policy Alert: Bona Fide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners, PA-2021-13, (June 14, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210614-VictimsOfCrimes.pdf.

The DHS also formally announced a recognition that victims of employment related fraud or labor exploitation should also qualify for prosecutorial discretion. https://www.dhs.gov/enforcement-labor-and-employment-laws

The announcement explains that a victim can qualified for deferred action and potentially receive work authorization. Here is a brief quote from the DHS announcement:

"Deferred action is a form of prosecutorial discretion to defer removal action (deportation) against a noncitizen for a certain period of time. Although deferred action does not confer lawful status or excuse any past or future periods of unlawful presence, a noncitizen granted deferred action is considered lawfully present in the United States for certain limited purposes while the deferred action is in effect. DHS can terminate deferred action at any time, at its discretion.

Under existing regulations, a noncitizen granted deferred action may apply for and obtain employment authorization for the period of deferred action if they demonstrate "an economic necessity for employment."

Both federal and state agencies can help certify that the non-citizen has been victimized and help them secure prosecutorial discretion. Here is an example of the New York State Department of Labor announcement: https://dol.ny.gov/prosecutorial-discretion

Here is a link to a State Department "Know Your Rights Video" to help find labor trafficking or exploitation. https://youtu.be/qyZOvTVUIno

Page 424 (§ 3.06): Add a new section on Temporary Protected Status

In General:

The Immigration Act of 1990 codified procedures to give "temporary protected status" (TPS) to certain noncitizens in the United States who would face a threat to life or liberty if they were required to return to their home countries. Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978, 5030 (adding INA § 244A, 8 U.S.C. § 1254a). This program is designed to provide temporary safe haven to noncitizens who may be unable to successfully seek asylum or other forms of relief from removal. DHS, after consultation with other agencies, may designate a foreign state for TPS and thereby make nationals of that country eligible for TPS. DHS may designate a country only where it finds that:

- There is an ongoing armed conflict within the state and, due to such conflict, requiring the return of noncitizens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;

- There has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected; or

- There exist extraordinary and temporary conditions in the foreign state that prevent noncitizens who are nationals of the state from returning to it in safety, unless the government finds that permitting the noncitizens to remain temporarily in the United States is contrary to the national interest of the United States.

INA § 244(b)(1), 8 U.S.C. § 1254(a)(b)(1).

To be eligible for TPS under 8 C.F.R. § 244.2, an applicant must demonstrate that they:

- are a national of a country designated for such benefits (or a person habitually residing in the designated country, but having no nationality);

- have been continuously physically present in the United States since the effective date of a TPS designation;

- have continuously resided in the United States since the designated date, and

- are otherwise admissible as an immigrant, except for certain noncriminal and nonsecurity grounds of inadmissibility that do not apply or that may be waived.

A person granted TPS status is considered as being in, and maintaining, lawful status. INA § 244(f)(4), 8 U.S.C. § 1254a(f)(4). Beneficiaries are given work authorization during the period of their TPS. 8 C.F.R. § 244.12(a). A person granted TPS is not subject to removal during the period of the grant. However, a grant of TPS does not authorize a termination of removal proceedings. INA § 244(3)(C), 8 U.S.C 1254a(a)(3)(C).

As of July 10, 2023 here are the countries with active TPS designations:
Source: https://www.uscis.gov/humanitarian/temporary-protected-status

Country	**Designation Date**
[note the specifics of the date of entry and designation date are not identical for all nationalities]	
Nicaragua	1/5/1999
Nepal	6/24/20
El Salvador	3/9/2001
Honduras	1/5/1999
Yemen	01/03/2023
Somalia	7/19/2021
Venezuela	3/9/2021
Syria	7/29/2022
Burma	9/26/2022
Haiti	12/5/2022
South Sudan	3/3/2022
Afghanistan	3/16/2022
Sudan	3/1/2022
Ukraine	4/19/2022
Cameroon	6/7/2022
Ethiopia	12/12/2022

The Department of Justice Executive Office for Immigration Review page has links to current designations for TPS and updates on litigation challenging extensions, redesignations or terminations of TPS: https://www.justice.gov/eoir/temporary-protected-status

Supreme Court Decision 2022 on TPS as an "admission."

In 2021, the Supreme Court resolved a circuit split and held that a Temporary Protected Status recipient is not eligible for lawful permanent resident (LPR) status solely because of the lawful nonimmigrant status granted to them through TPS. *Sanchez v. Mayorkas*, 593 U.S. __, 141 S. Ct. 1809 (2021). The Court noted that under INA § 244, 8 U.S.C. § 1255, an admission in the United States is necessary for an applicant to be eligibility for LPR status. 141 S. Ct. at 1813. Given that

the concepts of admission and status are distinct in immigration law, a grant of TPS does not eliminate the statutory requirement that an applicant be admitted to be eligible for LPR status. *Id.*

What's New in this Chapter?

Updated *Visa Bulletin* data

Three New Hypotheticals to demonstrate the problems with existing quotas and the waiting periods of immigrant visa numbers.

Dramatic Changes in State Department allocation of quota numbers for special Immigrant Juvenile Status application.

Update on Deferred Action for Childhood Arrivals—litigation posture and proposals for alternative protections.

How adjustment of status filing rules are relaxed for people granted asylum or those admitted as refugees.

A brief exploration of the bars to judicial review of the denial of adjustment of status pursuant to the Supreme Court ruling in *Patel v. Garland* (2022).

A brief discussion of humanitarian parole and TPS and how those categories impact eligibility for adjustment of status to lawful permanent resident.

Some TPS holders have cured the lack of formal admission by seeking advance parole permission to travel with their TPS status and their admission with parole does qualify the individual for adjustment of status This complex discussion of admission and parole is covered in Chapter 4 in the discussion of Adjustment of Status in the text at **page 509 § 4.04 [C] Adjustment of Status**.

Chapter 4: Immigrants and Paths to Permanent Resident Status

Updates begin next page

Page 425 (§ 4.01) Introduction: Choosing a Strategy
As has been mentioned throughout this text, the reality of delays in the agency processing of various visa petitions and requests for immigration benefits, can be one of the most significant hurdles to achieving immigrant status.

When you are new to this area of law, the array of categories and procedures can be a bit overwhelming.

For a thorough and a bit depressing read that captures many years of data about immigrant visa processing visit the Cato Institute article, David J. Bier, "Why Legal Immigration Is Nearly Impossible: U.S. Legal Immigration Rules Explained," Policy Analysis no. 950, Cato Institute, Washington, DC, June 13, 2023. You can read the report in the interactive blog or download the PDF. The graphs and flow charts will be very helpful to you as your navigate the problems and strategies in this Chapter. https://www.cato.org/policy-analysis/why-legal-immigration-nearly-impossible

As you have read, when people are immigrating in a category subject to a numerical limitation (all of the preference immigrants in INA § 203(a) and (b) but not immediate relatives) being able to predict how long the wait will be until a person can have a current priority date becomes really critical.

The pandemic closed immigrant visa processing in many ways and the unused family based visas were added to the employment based categories in fiscal year 2022. Here is a USCIS Q and A note posted about the allocations being used in fiscal year 2023:

> Q. How many family-sponsored or employment-based immigrant visas did USCIS and DOS use during FY 2022?
>
> A. The Department of State (DOS) determined that the FY 2022 employment-based annual limit was 281,507 – more than double the typical annual total – due to unused family-based visa numbers from FY 2021 being allocated to the next fiscal year's available employment-based visas. By the end of the fiscal year on Sept. 30, 2022, the agencies used all of these employment-based immigrant visas, apart from 6,396 EB-5 visas that Congress has allowed to carry over to the next fiscal year. Of these, USCIS and the Executive Office for Immigration Review (EOIR) approved more than 220,000 employment-based adjustment of status applications for individuals already present in the United States.
>
> DOS determined that the FY 2022 family-sponsored annual limit was 226,000. By the end of the fiscal year on Sept. 30, 2022, the agencies had used 168,917 of the available visas. Of these, USCIS and EOIR approved more than 12,000 family-

> sponsored adjustment of status applications for individuals already present in the United States. The approximately 57,000 unused family-sponsored visa numbers from FY 2022 are added to the FY 2023 employment-based limit. (Updated 03/22/2023)

Source: https://www.uscis.gov/green-card/green-card-processes-and-procedures/fiscal-year-2023-employment-based-adjustment-of-status-faqs

Page 432, (§4.01[G]) Family Based and Employment Based Preference Categories and Understanding the Visa Bulletin, page 432:
To help you understand how oversubscribed some visa categories are consider just three examples:

Family Based Fourth Preference—Brothers and Sisters of U.S. citizens.
Assume that Marlene Gutierrez, wife of Bill, the CEO of Aztec, originally immigrated through marriage to Bill in 1980. She became a U.S. citizen in 1996, she waited because she was unsure she wanted to become a citizen. She filed for her married sister, Beatrice and her family in the Fourth Preference because her sister expressed an interest in migrating to the United States. Marlene's sister is a citizen of Colombia and so is her spouse. If Marlene filed for her sister on April 1, 2007, the sister could begin the process of securing her immigrant visa. From August of 2023 to April of 2007 is a wait of **21 years and 4 months**.

If we look at the historical waits when Marlene filed back in 2007, the current priority date then was for people who filed before May 1, 1996, or an estimated wait of around 11 years. Neither Marlene nor her sister Beatrice could have anticipated the quota line would be so long. If Beatrice's children have married or are over the age of 21 they cannot now secure an immigrant visa as following to join immigrant under INA § 203(d). [There are some special statutory provisions that also some additional time under the Child Status Protection Act. The calculus looks at the time spent waiting for agency adjudication to add a few more days or months. See https://www.uscis.gov/green-card/green-card-processes-and-procedures/child-status-protection-act-cspa.

Note at the end of this chapter a special new program for Colombian nationals with approved family-based petitions that may allow some people to wait inside the United States.

Now change the nationality of the sister to India, China, Mexico or the Philippines. What is the current priority date?
You can find past *Visa Bulletins* at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html

Family Based Second Preference—Unmarried, Over 21 years old, Adult Children of an LPR[11]

Mahmoud, an Afghan citizen, immigrated to the United States as a mathematics teacher sponsored through employment. He became an Lawful Permanent Resident in 2005. Five years later he became a U.S. citizen and sponsored his mother, Sarah, as an immediate relative. The bureaucratic delays took time and his mother immigrated to the United States in 2013. She did not want to leave her adult unmarried daughters, Rava and Emal, behind but they told her to go and live with her son in comfort. In 2015, Sarah filed a family based second preference petition to sponsor Amal and Esin. Their priority date is November of 2015.

In November of 2015 the quota had reached adult unmarried children of lawful permanent residents if they filed before February 8, 2009. So, the family estimated this would be a 6 to 7 year wait.

Sarah does not read English and has not sought U.S. citizenship.

The Afghanistan government fell with the U.S. withdrawal in the summer of 2021. Asal and Esin were able to secure evacuation to the United Kingdom. They applied for B-1 visitor visas to visit their mother Sarah in January of 2023. The consulate refused their applications saying that their priority date for an immigrant visa was too close to current. As of August of 2023, Sarah has been waiting **eight** years to be reunited with her adult daughters.

The Family Based Second Preference for the unmarried adult children of lawful permanent residents is currently at September 22, 2015. This priority date has not moved one day for over two years. The priority date in September of 202 for processing was July 8, 2015. Almost three years later the category has only moved 3 months and one week. Is the wait for Asal and Esin only a few more weeks or is it likely that it could be months or even years of waiting?

What would have happened if either daughter married?
What would have happened to the priority dates if Sarah naturalized?
Should there be a temporary visa to allow these family members to live in the United States while awaiting a current priority date?

Employment Based Second Preference for Individual with Advanced Degrees[12]

Jacobo is a 35-year-old man from Mexico. He has a MBA from Yale. After he completed his degree in 2022, he received a grant of one year of practical training or OPT that would end on

[11] Editor Note: I have changed the names but this hypothetical is based on real facts. LB

[12] Editor Note: I again changed names, but the facts are almost identical to a real person employed by a major tech company who consulted me. LB

June 30, 2023. He was hired by Az-Tech to work in their marketing division in New York. He began working for Az-Tech in August of 2022. The company tried to qualify as an H-1B petitioner in the lottery but their entry for Jacobo was not accepted. They learned this in late March of 2023.

The company evaluated seeking an O-1 visa for Jacobo because he has several publications and has spoken at several international business conferences despite his young age. Prior to studying at Yale, he successfully created and managed two start-ups in Taiwan and one in Mexico that he sold to larger firms. Outside counsel for Az-Tech suggested it was a long shot and recommended instead that Az-Tech and Jacobo pursue an Employment Based Second Preference petition.

Az-Tech instructed their outside counsel to work with Jacobo to begin work on an Employment Based Second Preference petition. They filed a petition to qualify Jacobo as a foreign national whose employment would benefit the national interest. Jacobo has a record of job creation and strong project management skills. They filed the petition on February 20, 2023. The USCIS issued a receipt, but the petition has not been adjudicated.

It is now late July of 2023, Az-Tech management has asked for a meeting with outside counsel because they are upset that a plan was not in place for Jacobo. The company transferred Jacobo to their operations in Mexico. They have sent the following questions:

1. Why didn't we explore options other than the H-1B to allow us to keep Jacobo employed Our H.R. department said they notified you that Jacobo was a key part of our marketing management team in September of 2022.
2. If we send him to our Mexico operations how long will he have to remain there before we can bring him back on either an L-1A or an Employment Based First Petition?
3. Why did you wait to file the Employment Based Second Preference petition and the national interest waiver until February. We can see that until December of 2023 there was no backlog in this category and now the backlog is worse. From March until August of 2023 the date for final action has not moved at all. When can we expect the category to move?
4. Are we correct that not filing when the category was current means that Jacobo could not have filed for adjustment of status and work authorization pursuant to that application until his priority date from his petition is current?
5. Can we bring Jacobo back to the United States on a TN visa now that we have sponsored him for an employment based second preference petition?

These questions are not atypical of those facing thousands of hopeful H-1B employees and companies in 2023. Consider the policy implications of the difficulty of hiring and retaining foreign nationals who have graduated from U.S. educational institutions. Even if the individual can secure the H-1B status, the waiting periods in the employment-based categories, especially for those people chargeable to the China and India quotas, range from one to two years to more than 15 years.

In the summer of 2023, Canada created a special path to working and permanently residing in the United States that is available to people who hold H-1B status in the United States and wish to relocate to Canada. Read the Canadian Government pitch "Canada Wants Top Talent" at https://www.canada.ca/en/immigration-refugees-citizenship/campaigns/high-skilled-workers.html (July 2023).

For a 2022 summary of the impact of the quotas, particularly on Chinese and Indian nationals see William A. Kandel, et al., Congressional Research Service, "U.S. Employment Based Immigration Policy", R 47164 (June 22, 2022) available at https://crsreports.congress.gov/

Here is a brief excerpt from that report:
The most recent publicly available USCIS data indicate that 438,377 foreign nationals possessed approved employment-based petitions and were waiting for an available EB visa number as of September 2021 ….120 Indian nationals, with 357,720 approved petitions (82%), and Chinese nationals, with 46,926 approved petitions (11%), together account for 93% of the EB queue. By preference category, EB2 and EB3 petitioners represented 73% and 16% of the queue, respectively. *Id.* At page 25

Page 434-35 (§ 4.01[G][1]) Understanding the Visa Bulletin:

Replace the last paragraph at the end of page 434 and add the following two charts to page 435:

Since FY2014, there was a "surge" in applications for the Special Immigrant Juveniles who are charged to 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.

The growth in these petitions corresponds with the number of unaccompanied children apprehended at the Southwest border.

Compare the excerpts from the *Visa Bulletins* for October 2015, 2016, 2017, 2018, 2019, and 2020 below:

October 2019

Employment Based	All Charge-ability Areas	China — Mainland born	El Salvador, Honduras, Guatemala	India	Mexico	Philippines
4th	C	C	15AUG16	C	C	C

October 2020

Employment Based	All Charge-ability Areas	China — Mainland born	El Salvador, Honduras, Guatemala	India	Mexico	Philippines

4th	C	C	01FEB18	C	C	C

October 2021

Employment Based	All Charge-ability Areas	China — Mainland born	El Salvador, Honduras, Guatemala	India	Mexico	Philippines
4th	C	C	015Mar19	C	O1Mar20	C

October 2022

Employment Based	All Charge-ability Areas	China — Mainland born	El Salvador, Honduras, Guatemala	India	Mexico	Philippines
4th	C	C	05Mar18	C	15Sep20	C

In March of 2023, many advocates and scholars were stunned when the State Department announced that they had been "misinterpreting" the quota limits on the per country cap for El Salvador, Honduras, and Guatemala (nicknamed by State as Northern Central America (NCA) countries. The publication in the Federal Register explained that no country should be subject to the 7% cap based solely on high demand in a single category. Further, the demand for visa numbers for children adjusting status under the Special Immigrant Juvenile Petitions should be allocated against the number set for all 4th Preference immigrants not by country demand. Se 88 Fed. Reg. 18252(Mar. 28, 2023). Suddenly with the *Visa Bulletin* for April of 2023, all countries had a quota delay in the 4th Preference.

April 2023

Employment Based	All Charge-ability Areas	China — Mainland born	El Salvador, Honduras, Guatemala	India	Mexico	Philippines
4th	01Sep18	01Sep18	01Sep18	01Sep18	01Sep18	01Sep18

How would you explain the movement of the quota to young people you might be representing?

Several members of Congress did introduce legislation to exempt Special Immigrant Juveniles from any quota allocation. To learn more https://www.sijsbacklog.com/

Page 437-438 (§ 4.01[G][3]) Test Your Skills Can you Predict the Visa Movement?:
Add the following new problems after problem (5):

(6) Eduardo is a 17-year-old boy from Guatemala. He has no family members in the United States except for his uncle, who has agreed to be his guardian. Eduardo recently filed an I-360 petition for special immigrant juvenile, which was approved. He is looking into filing an adjustment of status application in the employment-based fourth (EB-4) preference category as a special immigrant juvenile. Can you estimate around how long his wait will be? Eduardo is also wondering if he can add his mother to his adjustment of status application. Can he do that?

Reread INA § 101(a)(27)(J) for the definition of who qualifies as a special immigrant juvenile.

(7) Graciela is a 20 year old girl who lives in Colombia with her grandmother. Her mother, Maria, immigrated to the United States and now has lawful permanent resident status. One year ago she filed an I-130 petition to sponsor Graciela as an unmarried child of a lawful permanent. The quota delays are not the obstacle as the demand in this category has been low, but the U.S. consulate post has a very long delay in scheduling people for an immigrant visa interview.

Would you recommend that Maria sponsor Graciela under the new special parole provision for Colombian beneficiaries of relative petitions discussed at the end of the supplement for Chapter 3? What happens if Graciela turns 21 before she enters the United States.
Graciela wants to marry her current boyfriend. What happens if she marries before she enters?

Essential Materials:
https://www.federalregister.gov/documents/2023/07/10/2023-14472/implementation-of-a-family-reunification-parole-process-for-colombians
INA § 203(a)(2); 8 U.S.C. § 1153(a)(2).

Page 465 (§ 4.02[C]) Conditional Lawful Permanent Resident Status Generally:
The U.S. Census estimates that 8% of the U.S. marriages are between people of mixed nativity—A U.S. citizen married to a person born abroad.
Here are some FY 2022 data on admissions of people in the categories subject to family Conditional Lawful Permanent Resident Status:[13]

	Conditional LPR	**No Conditions** (Married over 2 years)
Immediate relative spouses	10,163	76,399
Immediate relative children < 21	1,412	39,638

Same but adjusted status:	218,889 (both regular and conditional)
Children who adjusted status as Immediate relative	14,555

[13] The Dept of State admissions data separates conditional admissions and those not subject to the conditions.

Lawful permanent resident spouses and children under age 21	76,002 (both regular and conditional)[14] (visa process)
Adjustment of status all in Second preference	7,773

These numbers are less than in the prior fiscal years due to delays in agency processing.

Adding the various sources together Citizens and Lawful Permanent residents secured admission or adjustment of status for 385,412 people. There were also over 132,000 parents of U.S. citizens who were admitted to permanent residence in FY 2022.

Page 477 (§ 4.02[D][3]): Add the following section and shift down the current sections 3 to 5:

[3] Public Charge

From 2019 until 2021, the DHS considered stricter limitations on immigration based on the public charge ground of inadmissibility. The regulations were vigorously opposed and litigation stopped the implementation. The Biden Administration through the DOJ announced that it will no longer pursue appellate review of decisions that invalidated or enjoined the public charge and will revert to the 1999 interim field guidance on the public charge instead of the 2019 public charge rule. DHS, DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility.

Page 491 (§ 4.03[C][1]): Add the following to the last paragraph on National Interest Waivers, before Problem 4-5:

The Ninth Circuit held that it does not have jurisdiction to review a USCIS denial of a national interest waiver. *Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019). This is a growing trend in cases litigating the adjudication of visa petitions in the federal courts. In several cases the government has succeeded in characterizing the adjudication as one committed to agency discretion and due to restrictions found in INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) not subject to judicial review.

Page 508 (§ 4.04[B]): Add a Section 4 to the bottom of the page:

[4] Challenges

[14] Data as reported does not segregate the spouses from minor children's adjustments of status in the Second preference family-based category 2A.

In April 2020, President Trump issued a proclamation suspending most employment and family-based immigration from outside of the United States due to COVID-19. In June 2020, President Trump extended and expanded this freeze until December 31, 2020. Those exempt from the proclamation included EB-5 visa applicants and spouses and unmarried minor children of U.S. citizens. The proclamation did not apply to green card applicants in the United States. *See* Danilo Zak, *President Trump's Proclamation Suspending Immigration*, National Immigration Forum (June 23, 2020), https://immigrationforum.org/article/president-trumps-proclamation-suspending-immigration/. While the proclamations were challenged in *Gomez v. Trump*, the District Court for the District of Washington D.C. did not find the proclamations unlawful and only provided limited relief to diversity visa holders. *Gomez v. Trump*, 485 F. Supp. 3d 145 (D.D.C. Sept. 30, 2020). Other similar lawsuits were filed trying to preserve eligibility for the fiscal year 2020 diversity lottery visa winners. In the *Gomez* case five other suits were consolidated. While a class action was certified, qualifying for immigration was not guaranteed. A practice advisory about this litigation can be read at: https://innovationlawlab.org/cases/gomez-v-trump/.

President Biden revoked the proclamations in February 2021. Proclamation No. 10149, 86 Fed. Reg. 11,847 (Feb. 24, 2021). But the revocation did not resolve all of the issues for the people who were denied entry during the years the proclamation was in effect.

The State Department posted notices about the diversity lottery class treatment at: https://travel.state.gov/content/travel/en/News/visas-news/diversity-visa-2020-and-2021-updates.html

As of 2023 the pace of visa issuance and other adjudications before USCIS has increased but still remains at historic levels of delay. Many business attorneys are now filing mandamus petition to force adjudication. A mandamus petition does not mean a case will be approved; it simply results in a court order to complete adjudication.
See a report summarizing litigation trends around Mandamus litigation.
https://trac.syr.edu/reports/717/

Page 509 (§ 40.04[C] add a paragraph before [2]:

In the spring of 2023, the USCIS announced that people who are granted asylum either at the Asylum Office of USCIS or in immigration court, may file for adjustment of status to permanent resident *before* they have held asylee status for at least one year. The same early filing procedure is authorized for those admitted as refugees. INA § 209 provides for adjustment of refugees and asylees once they have one year of physical presence within the United States.

While the USCIS will not complete the adjustment of status application to lawful permanent resident before the one-year anniversary of the grant of asylee or refugee status, the early filing rule allows applicants to avoid some of the delays that are a part of the adjustment of status process. The typical waiting times for a § 245 adjustment vary depending on the category of visa and location within the United States but can range from twelve months to several years. Filing

earlier, may mean that the asylee and refugee can become a full lawful permanent resident sooner. *See* USCIS Policy Memorandum issued February 2, 2023 amending the Volume 7 of the Policy Manual available under updates at https://www.uscis.gov/policy-manual/volume-7-part-m-chapter-2.

Here is an illustration to help you understand the significance of this new approach:

Miriam was paroled into the United States as an Afghan escaping the collapse of the government in September of 2021. Her parole was authorized for two years and she had work authorization. In September of 2022 the USCIS asylum office granted her asylum. In the past Miriam would have had to wait until September of 2023 with no physical absences from the territory of the United States before she could seek adjustment of status to lawful permanent resident. Both the grant of asylee status and the application for adjustment of status allow for continued work authorization but Miriam should not travel without a grant of advance parole. She should also not travel to Afghanistan for that would contradict the grant of asylum protection from her country.

In the past, Miriam could not have sought adjustment until September of 2023 and she would have then waited another twelve months or more before her case could be granted.

Page 524 (§ 4.05[C][10]): Delete this paragraph just before **section 11**:
Deferred Action for Childhood Arrivals

In August of 2022, the DHS issued new regulations related to DACA. In part 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. See 87 Fed. Reg. 5302 (Aug. 30, 2022) (effective Oct. 31, 2022) creating new regulations at 8 CFR § 236.23 governing accepting new applications and extending prior grants of DACA.

The litigation over the new rule created new injunctions and while the USCIS is accepting new applications, they are being held. https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/daca-litigation-information-and-frequently-asked-questions

As of this writing in July of 2023, the litigation over the validity of the DACA rule is not over. One of the editors of this text, joined by many others, wrote a letter in the spring of 2023 urging the DHS to prepare for alternatives to DACA including "deferred enforced departure" with work authorization to protect the nearly 700,000 people with DACA benefits. You can find the letter at: https://static1.squarespace.com/static/6160a38f44d6a328d59c3e3d/t/64186a9dc39bcd4b2608d743/1679321759261/2023.03.20.PUBLISHED.DED4DACA.LawProf_Letter.pdf

Page 425 (§ 4.01[A]): Add the following to the end of this subsection:

One factor in considering eligibility for any adjustment of status application is whether the person was properly admitted to the United States. In 2021, the Supreme Court resolved a circuit split and held that a Temporary Protected Status recipient is not eligible for lawful permanent resident (LPR) status solely because of the lawful nonimmigrant status granted to them through TPS. *Sanchez v. Mayorkas*, 593 U.S. __, 141 S. Ct. 1809, 21, L.Ed.2d 52 (2021). The Court noted that underINA § 244, 8 U.S.C. § 1255, an admission in the United States is necessary for an applicant to be eligibility for LPR status. 141 S. Ct. at 1813. Given that the concepts of admission and status are distinct in immigration law, a grant of TPS does not eliminate the statutory requirement that an applicant be admitted to be eligible for LPR status. *Id.* For more on TPS, see the end of the Chapter 3 supplement.

Page 430 (§ 4.01[F]): Add the following to the end of this subsection:

One factor in considering the strategy involving any employment-based immigrant visa petition is how long it will take. Starting in 2001, USCIS has offered premium processing, by which the agency will provide expedited processing for an additional, non-waivable fee. 8 C.F.R. § 106.4. On March 30, 2022, the USCIS published a final rule implementing the Emergency Stopgap USCIS Stabilization Act. 87 Fed. Reg. 18,227 (Mar. 30, 2022); Emergency Stopgap USCIS Stabilization Act, Pub. L. No. 116-159, 134 Stat. 738 (2020). Before this expansion, premium processing was only available to petitioners filing a Form I-129, Petition of Nonimmigrant Worker and certain petitioners filing Form I-140, Immigrant Petition for Alien Workers. INA § 286(u) (2019); 8 U.S.C. § 1356(u) (2019). The final rule expands premium processing services to additional Form I-140 petitioners as well as petitioners filing Form I-539 and Form I-765. 87 Fed. Reg. 18,227 (Mar. 30, 2022).

The USCIS continued to expand premium processing eligibility and now almost all petitions can be expedited if the petitioner pays the higher fees. Nonprofit petitioners may request a waiver of the fees. Fees change but the current I-140 fee is $700 and premium processing adds $2,500. https://www.uscis.gov/i-907. This page explains expedite requests.

Page 506 (§ 4.03[F]): Add the following to the end of the EB-5 subsection:

In March of 2022, Congress passed a law to reauthorize the EB-5 immigrant investor regional center program for five years through September 30, 2027. EB-5 Reform and Integrity Act of 2022, Pub. L. No. 117-103, 136 Stat. 49. The new law also increased the minimum EB-5 investment to $800,000 for investments in targeted employment areas and certain infrastructure projects. *Id.* The minimum for other projects is now $1,050,000. *Id.* USCIS will continue to adjudicate pending EB-5 applications that were suspended after the program expired on June 30, 2021. *Id.* USCIS will audit regional centers at least every five years. *Id.* Third-party agent fees and involvement must be disclosed. *Id.* The act took effect on May 14, 2022. *Id.*

On May 24, 2022, a group of EB-5 regional center investment firms sued DHS, arguing that by categorically decertifying more than 600 existing EB-5 regional centers and requiring them to recertify, USCIS "eviscerated" the program and determined that a wholly new regional center program was created rather than following congressional intent to reauthorize the program with a few changes and allow existing regional centers to continue their work. This is the second lawsuit challenging USCIS's claim that all regional centers must be redesignated. The litigation resulted in a settlement in the fall of 2022. Read more at 3 IMMIGRATION LAW AND PROCEDURE § 39.07.

Page 506 (§ 4.04[A]): Add the following to the end of this subsection:

As noted above, processing times at USCIS have ballooned over the last several years. On March 29, 2022, the USCIS announced a series of efforts to reduce backlogs in processing and improve processing times. USCIS, USCIS Announces New Actions to Reduce Backlogs, Expand Premium Processing, and Provide Relief to Work Permit Holders (Mar. 29, 2022), https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work.

The agency established new internal cycle time goals to guide backlog reduction efforts by the agency. USCIS, Reducing Processing Backlogs (Mar. 29, 2022), https://egov.uscis.gov/processing-times/reducing-processing-backlogs. USCIS also intends to start implementing a DHS final rule expanding premium processing premium processing. *See* 87 Fed. Reg. 18,227 (Mar. 30, 2022). The USCIS is also streamlining many EAD processes, including extending validity periods for certain EADs and providing expedited work authorization renewals for healthcare and childcare workers. 87 Fed. Reg. 26,614 (May 4, 2022).

Page 509 (§ 4.04[C]): Add the following to the start of this subsection:

On May 16, 2022, the Supreme Court ruled that federal courts lack jurisdiction to review facts found as part of discretionary-relief proceedings under the adjustment of status provisions of 8 U.S.C. § 1255. *Patel v. Garland*, __ U.S. __, 142 S. Ct. 1614 (2022). The Court resolved a circuit split and held that "[w]ith an exception for legal and constitutional questions, Congress has barred judicial review of the Attorney General's decisions denying discretionary relief from removal." *Id.* at *7. This bar precludes judicial review of factual findings that underlie a denial of relief. *Id.*
The case was a 5 to 4 opinion. It arose in the context of Mr. Patel seeking adjustment of status. Because the USCIS denied his application as a matter of discretion, he was unable to seek judicial review.

Justice Gorsuch joined by the other dissenters writes:

> It is no secret that when processing applications, licenses, and permits the government sometimes makes mistakes. Often, they are small ones—a misspelled name, a misplaced application. [***30] But sometimes a bureaucratic mistake can have life-changing consequences. Our case is such a case. An immigrant to this country applied for legal residency. The government rejected his application. Allegedly, the government did so based on a glaring factual error. In circumstances like that, our law has long permitted individuals to petition a court to consider the question and correct any mistake. At *29-30.

Page 525 (§ 4.04[C][11]):
Provisional Waivers of Unlawful Presence for Certain Immediate Relatives: I-601A Waivers
At the end of the discussion bottom of page 525 add:

Bars to adjustment of status may mean that you cannot immigrant due to the 3 and 10 year overstay bars. In a recent case, the BIA ruled that a person who acquired more than a year of unlawful presence which was triggered by his departure, but who then returned with inspection by using a legitimate border crossing card, was eligible to seek adjustment of status due to his marriage to a U.S. citizen because more than ten years had passed since his second entry. *See Matter of Duarte-Gonzales*, 28 I&N Dec. 688 (BIA 2023). This case is also mentioned in Chaper 5.

Page 526 (§ 4.04[12]): Add a new subsection on **Humanitarian Parole**

In General:

Although not specifically defined in any regulation, the United States has frequently granted humanitarian parole to noncitizens who need to travel to the United States for emergent reasons. Humanitarian parole is commonly sought by noncitizens needing urgent medical treatment in the United States or by noncitizens experiencing exceptional hardship. Humanitarian parole has been greatly expanded with some nationalities qualifying for special parole programs. While parole itself is not a nonimmigrant status, admission with parole is an inspected entry that qualifies an individual to meet INA § 245(a) requirements.

The statutory authority to grant humanitarian parole is derived from INA § 212(d)(5); 8 U.S.C. § 1182(d)(5), which provides that:

> (A) The Attorney General may except as provided in subparagraph (B) or in section 214(f) [8 U.S.C. § 1184(f)], in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States…

Read more about the forms of parole and new special parole programs in the supplement to Chapter 3.

For more information on humanitarian parole, see IMMIGRATION LAW AND PROCEDURE § 62.04.

Compare Parole and TPS

In Chapter 3 we supplemented the text by adding a section on Temporary Protected Status or TPS. TPS is much more protective of an individual's right to live, work, and remain within the United States. Someone granted TPS after an irregular entry without inspection still can't seek adjustment of status because the Supreme Court said TPS is not a grant of admission. *Sanchez v. Mayorkas*, 593 U.S. __, 141 S. Ct. 1809(20 21). But if that person secures TPS status after a parole or lawful admission, they could argue they are in nonimmigrant status due to the TPS. TPS holders can also seek work authorization and thus, at least in theory, seek adjustment of status without the bars found for a lapse of status in INA § 245(c)(7). Each case needs careful evaluation of all admissions and authorized periods of stay to make a full assessment. The agency processing delays may mean that people worked without authorization and might be subject to adjustment bars. Review INA § 245(k) for employment-based cases; INA § 245(c) for immediate relatives.

Chapter 5: Inadmissibility: In Every Context

What's New in this Chapter:

Update on statistics or lack thereof from the Department of State findings of inadmissibility.

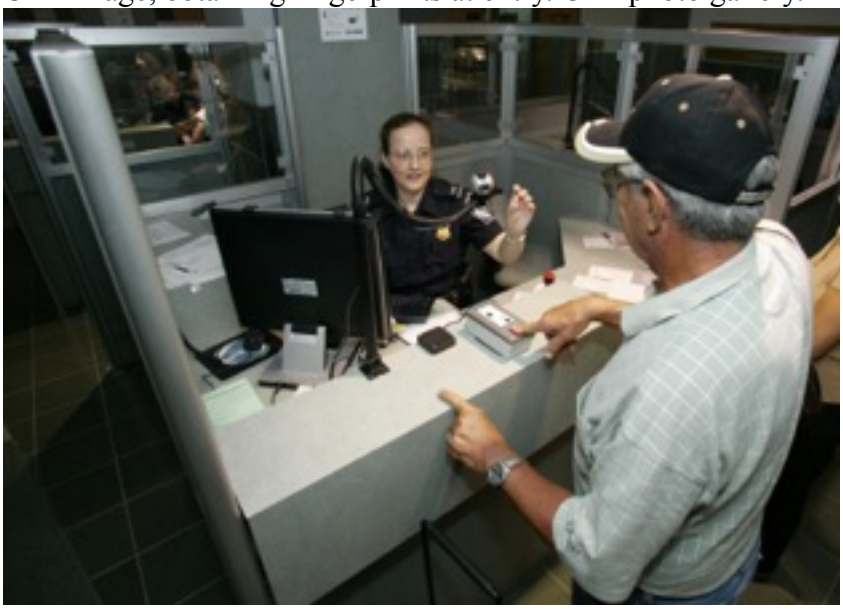
Revocation of the 2017 Travel Bans by President Biden that were the subject of *Trump v. Hawaii*

Understand how marijuana use or convictions can impact admissibility.

Update on a BIA case holding that a person is not subject to the ten-year bar under INA § 212(a)(9)(b) by waiting to apply for an immigrant visa more than ten years after a departure yet while still present in the United States.

Inclusion of a Third Circuit opinion exploring whether a conviction involves a crime of moral turpitude.

CBP image, obtaining fingerprints at entry. CBP photo gallery.



Updates Begin Next Page

Page 527 (§ 5.01) Inadmissibility: An Introduction: Add near the bottom of this page:

Each year the State Department release statistics about visa issuance and details about categories of refusals based on findings of inadmissibility under INA § 212; 8 U.S.C. § 1182. In FY 2021 the data was released but noted that the pandemic affected both visa issuance and findings. The FY 2022 data is the only table missing in the fiscal year reports on the Department of States website.

It can be very instructive to read the report and see which of the grounds of inadmissibility are used most frequently by consular officers. For nonimmigrants, in FY 21 the most common grounds used are failure to prove nonimmigrant intent (INA § 214(b)) or ineligible under INA §222(g) because the person failed to maintain status in the United States and must apply at their home consulate. The overstay 3 and 10 year bars are usually a major category in ordinary years. *See* INA § 212(a)(9)(b); 8 U.S.C. § 1182(a)(9)(b).

For FY 20202 the State Department data for the number of people found to be inadmissible:

	Immigrants	Non-Immigrants
Total Grounds of Ineligibility:	170,399	1,699,630
Grounds overcome:	153,713	400,547

The data is available at https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2020AnnualReport/FY20AnnualReport-Table%20XIX.pdf.
The Fiscal Year 2021 data are incomplete and 2022 Data Tables on inadmissibility are missing.

Page 529 (§ 5.02): Add simplified chart on grounds of inadmissibility under INA § 212(a) before [A]:

INA Section	**Ground of Inadmissibility**
§ 212(a)(1)	Health related grounds
§ 212(a)(2)	Criminal and related grounds
§ 212(a)(3)	Security and related grounds
§ 212(a)(4)	Public charge
§ 212(a)(5)	Labor certification and qualifications for certain immigrants
§ 212(a)(6)	Illegal entrants and immigration violators

§ 212(a)(7)	Documentation requirements
§ 212(a)(8)	Ineligible for citizenship
§ 212(a)(9)	Aliens previously removed
§ 212(a)(10)	Miscellaneous

For more information, see https://fam.state.gov/fam/09FAM/09FAM030104.html.

Page 541 (§ 5.03[C]: Editors' Note. The INA provisions are not included in the text of the Supreme Court decision in *Trump v. Hawaii*. The key provision at issue was INA § 212(f), codified at 8 U.S.C. § 1182(f). Attorneys in the field usually refer to this provision granting broad executive authority as Section 212(f). Also at issue in the case was INA § 202(a)(1)(A), codified at 8 U.S.C. § 1152(a)(1)(A), which prohibits discrimination on several explicit bases. The statute does not mention religious based discrimination.

In 2021, the House of Representatives passed legislation that would reform both provisions to limit executive authority and to explicit prohibit religious discrimination. The National Origin-Based Antidiscrimination for Nonimmigrants Act, H.R. 1333, 117th Cong. (2021). But the session of Congress ended without Senate adoption. It is unlikely that the current Congress elected in the fall of 2022 will pass such legislation.

Page 554 (§ 5.03[C]): Add the following as new **Note 10**:

Following *Hawaii v. Trump*, the Trump administration issued another expanded ban in February 2020. Proclamation No. 9983, 85 Fed. Reg. 6699 (Feb. 5, 2020). This ban expanded travel restrictions to apply to certain nationals from six new countries: Kyrgyzstan, Nigeria, Myanmar, Sudan, Eritrea, and Tanzania. *Id*. The February 2020 expansion of the ban was controlled by *Hawaii v. Trump*.

The Presidential Proclamation upheld in *Hawaii v. Trump* was implemented much earlier through orders issued by the Supreme Court on December 4, 2017. This shadow docket decision was issued despite the Hawaii and Maryland courts blocking the Proclamation, and despite there being no ruling by the appellate courts and no specific guidance by the implementing agencies. The 'shadow docket' was regularly used in the Trump administration and refers to a body of orders and decisions issued by the Supreme Court without briefing by the parties or deliberation by the judiciary. For more information, see https://www.scotusblog.com/category/special-features/symposium-on-the-supreme-courts-shadow-docket/.

On January 20, 2021, during the first day of his presidency, President Joe Biden issued a presidential proclamation ending the travel bans and repealing the Trump administration

executive orders and proclamations that established and expanded the bans. President Biden's proclamation revoked President Trump's Executive Order 13780 and Proclamations 9645, 9723, and 9983. Proclamation No. 10141, 86 Fed. Reg. 7005 (Jan. 25, 2021); *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/#content.

The State Department issued guidance on President Biden's January 20, 2021, proclamation rescinding P.P. 9645 and 9983, stating that the Department could immediately resume visa processing from the countries that had been affected by the travel bans. Further, the State Department has stated that all immigrant visa applicants who were denied an immigrant visa on or between December 8, 2017, and January 19, 2020, on the grounds of P.P. 9645 and 9983 are exempt from paying a new fee for their immigrant visa application, upon certain conditions being met. *See* U.S. Dep't of State, Immigrant Visa Fee Exemption for Applicants Previously Refused under Presidential Proclamations 9645 and 9983 (update Jan. 19, 2022), https://travel.state.gov/content/travel/en/News/visas-news/iv-fee-exemption-for-applicants-previously-refused-under-pps-9645-and-9983.html.

Page 554 ((§ 5.03[C]]): Add the following as a new Note 11:

During the onset of the COVID-19 pandemic, the Trump administration issued a number of coronavirus travel suspensions by presidential proclamation. These travel suspensions restricted entry to certain individuals who were physically present in China, Iran, the Schengen Zone, the United Kingdom, Ireland, or Brazil within fourteen days before their anticipated entry into the United States. Proclamation No. 9984, 85 Fed. Reg. 6709 (Feb. 5, 2020); Proclamation No. 9992, 85 Fed. Reg. 12855 (Mar. 4, 2020); Proclamation No. 9993, 85 Fed. Reg. 15045 (Mar. 16, 2020); Proclamation No. 9996, 85 Fed. Reg. 15341 (Mar. 18, 2020); Proclamation No. 10041, 85 Fed. Reg. 31933 (May 28, 2020). In these proclamations, President Trump cited authority under INA section 212(f) as a basis for these suspensions. For more information on the COVID-19 related travel suspensions, see Katharina Pistor, *Law in the Time of COVID-19* (2020), https://scholarship.law.columbia.edu/books/240.

On October 25, 2021, President Biden announced a Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic, which moves away from restrictions placed on specific countries, and instead adopts an air travel policy relying on vaccination. Proclamation No. 10294, 86 Fed. Reg. 59603 (Oct. 28, 2021).

On May 9, 2023, President Biden revoked the Proclamation No. 10294 as part of the end of the Covid restrictions. https://www.whitehouse.gov/briefing-room/presidential-actions/2023/05/09/a-proclamation-on-revoking-the-air-travel-covid-19-vaccination-requirement/

Page 556
Add after Problem 5-1-3 Overstay Bars on Readmission

Matter of Jorge Alberto DUARTE-GONZALEZ, Respondent

Decided February 14, 2023

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Noncitizens who are inadmissible for a specified period of time pursuant to section 212(a)(9)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(i), due to their previous unlawful presence and departure are not required to reside outside the United States during this period in order to subsequently overcome this ground of inadmissibility.

BEFORE: Board Panel: HUNSUCKER and LIEBOWITZ, Appellate Immigration Judges; BROWN, Temporary Appellate Immigration Judge.

HUNSUCKER, Appellate Immigration Judge:

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's April 3, 2019, decision denying him adjustment of status under section 245(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1255(a).[15] The Department of Homeland Security opposes the appeal. The appeal will be sustained, and the record will be remanded.

The respondent was admitted to the United States in June 2000 and was authorized to remain in the United States for a temporary period not to exceed 30 days. However, the respondent did not depart the United States until August 2001. The respondent was subsequently admitted to the United States later in August 2001 on a nonimmigrant visa (border crossing card) with authorization to remain in the United States for a temporary period not to exceed 30 days. Since that admission, the respondent has remained in the United States without any further authorization to remain. The respondent conceded that he is subject to removal from the United States under section 237(a)(1)(B) of the INA, 8 U.S.C. § 1227(a)(1)(B), as charged in his notice to appear.

The Immigration Judge considered whether the respondent is eligible for adjustment of status under section 245(a) of the INA, 8 U.S.C. § 1255(a), because his United States citizen son, who was 21 years old at that time, could file a visa petition for his benefit as an immediate relative under section 201(b)(2)(A)(i) of the INA, 8 U.S.C. § 1151(b)(2)(A)(i). The Immigration Judge

[15] The Immigration Judge also denied the respondent's claim for cancellation of removal under section 240A(b)(1) of the INA, 8 U.S.C. § 1229b(b)(1). The respondent does not meaningfully challenge the Immigration Judge's denial of cancellation of removal. Accordingly, we deem the issue waived. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (holding that when a noncitizen fails to substantively appeal an issue addressed in the Immigration Judge's decision, that issue is deemed waived). The Immigration Judge granted the respondent's alternative request for voluntary departure under section 240B(b) of the INA, 8 U.S.C. § 1229c(b).

concluded that the respondent is not eligible for adjustment of status because he did not remain outside the United States during the entire 10-year period of inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II). The Immigration Judge stated that allowing the respondent to satisfy the 10-year period of inadmissibility while unlawfully present in the United States would undermine the purpose of section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II), to deter unlawful presence. Additionally, the Immigration Judge reasoned that requiring the respondent to be outside the United States for the 10-year period is analogous to the requirement that noncitizens applying for consent to reapply for admission after deportation or removal remain outside the United States for the time period for which they are inadmissible unless the application for consent to reapply for admission is granted during that period of inadmissibility. *See* 8 C.F.R. § 1212.2(a). The Immigration Judge also found that the respondent is ineligible to apply for a waiver of inadmissibility because he does not have a qualifying relative. *See* section 212(a)(9)(B)(v) of the INA, 8 U.S.C. § 1182(a)(9)(B)(v).

The respondent argues that the Immigration Judge erred in determining he is ineligible for adjustment of status because he is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II). Specifically, the respondent argues that, based on a plain reading of the statute, it is not required that a noncitizen remain outside the United States for the 10-year period of inadmissibility.

Section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II), provides: "Any alien (other than an alien lawfully admitted for permanent residence) who . . . has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible." The term "admission" refers to adjustment of status from within the United States as well as a lawful entry at the border. *Matter of Rodarte*, 23 I&N Dec. 905, 908 (BIA 2006). On its face, the statute does not state whether a noncitizen subject to the 10-year bar must remain outside the United States during that entire period of inadmissibility.

The Board has previously interpreted section 212(a)(9)(B) of the INA, 8 U.S.C. § 1182(a)(9)(B), as creating temporary 3- and 10-year bars (in sections 212(a)(9)(B)(i)(I) and (II), respectively) to a noncitizen's admissibility following a departure from the United States after having been unlawfully present in the United States for more than 180 days, or 1 year or more, respectively. *See generally Matter of Rodarte*, 23 I&N Dec. at 90809. We contrasted section 212(a)(9)(B)'s periods of "temporary inadmissibility" with the "permanent inadmissibility" created in section 212(a)(9)(C)(i) for noncitizens who enter or attempt to reenter unlawfully after previous immigration violations. *Id*. at 909. However, the Board has not addressed in a precedent decision whether a noncitizen must remain outside the United States for the relevant period of inadmissibility. We conclude that the plain language of section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II), does not require the respondent to remain outside the United States during the 10-year period of inadmissibility.

We have a duty to follow the plain and unambiguous language of the statute. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("If the statute is clear and unambiguous '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.'" (citation omitted)). In interpreting statutory language, we determine if its meaning is plain by referring "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). A plain-text reading of section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II), indicates that the period of ineligibility runs from the date of departure from the United States and does not require a noncitizen to remain outside the United States for the entire 10-year period of inadmissibility. *See Neto v. Thompson*, 506 F. Supp. 3d 239, 251 (D.N.J. 2020) (observing that counting time spent in the United States toward the 10-year inadmissibility period could be considered bad policy but does not amount to an absurdity that would warrant departure from the statute's plain meaning); *see also Kanai v. U.S. Dep't of Homeland Sec.*, No. 2:20-cv05345-CBM-(KSx), 2020 WL 6162805, at *3 (C.D. Cal. Aug. 20, 2020) (rejecting argument that 10-year inadmissibility period is tolled during presence in the United States).[16] "We cannot read ambiguity into a statute that is not there." *Matter of A. Vazquez*, 27 I&N Dec. 503, 508 (BIA 2019) (citation omitted).

Our interpretation of section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II), is buttressed by the fact that an adjacent subsection in section 212(a)(9) contains a provision specifying that a noncitizen must spend time "outside the United States" in other circumstances. Section 212(a)(9)(C)(ii) of the INA, 8 U.S.C. § 1182(a)(9)(C)(ii). "[A] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006).

The Immigration Judge cited 8 C.F.R. § 1212.2(a), which requires a period of time "outside of the United States" for noncitizens who have been deported or removed. However, this regulation does not support a conclusion that section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II), requires the same. The regulation was not promulgated to implement section 212(a)(9) of the INA and does not correspond to any provision of section 212(a)(9) of the INA. *Matter of Torres-Garcia*, 23 I&N Dec. 866, 874 (BIA 2006). Moreover, the plain language of the regulation requires that a noncitizen remain outside the United States for a time period after deportation or removal, and the respondent here was neither deported nor removed from the United States.

We conclude that noncitizens who are inadmissible for a specified period of time pursuant to section 212(a)(9)(B)(i) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i), due to their previous unlawful presence and departure are not required to reside outside the United States during this period in

[16] We are not bound by these district court cases, but we find their reasoning useful for consideration in our analysis. *See generally Matter of K-S-*, 20 I&N Dec. 715, 718-20 (BIA 1993) (holding that the Board is not bound to follow the published decision of a United States district court in cases arising within the same district).

order to subsequently overcome this ground of inadmissibility.[17] Accordingly, as the respondent departed the United States in August 2001 and more than 10 years have elapsed since that departure, the respondent is not inadmissible under section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II), and is not prohibited under this section from seeking adjustment of status.[18]

The respondent has filed new, previously unavailable evidence on appeal, including documentation showing he is now the beneficiary of an approved visa petition that was filed on his behalf by his adult United States citizen son. Given this evidence, we will remand the record for the Immigration Judge to assess the respondent's eligibility for adjustment of status in the first instance. *See Matter of L-A-C-*, 26 I&N Dec. 516, 526 (BIA 2015). On remand, as appropriate, the Immigration Judge should consider whether the respondent merits adjustment of status as a matter of discretion.

In light of our disposition, we need not address the respondent's remaining argument that, even if he were inadmissible under section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II), he is eligible for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the INA, 8 U.S.C. § 1182(a)(9)(B)(v). *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976). On remand, the parties may update the evidentiary record. By remanding, we express no opinion regarding the ultimate outcome of this case.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Questions:

1. How might you use the holding of this case to assist someone like Sherry Kit in the problem to "wait out" the unlawful presence bar?

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[17] The United States Citizenship and Immigration Services ("USCIS") has recently issued policy guidance stating that "a noncitizen who again seeks admission more than 3 or 10 years after the relevant departure or removal, is not inadmissible under INA 212(a)(9)(B) even if the noncitizen returned to the United States, with or without authorization, during the statutory 3-year or 10-year period." USCIS Policy Alert, PA-2022-15 (June 24, 2022) (regarding "INA 212(a)(9)(B) Policy Manual Guidance"). While we are not bound by such guidance, we reach the same conclusion as USCIS regarding this issue. *See Matter of C. Valdez*, 25 I&N Dec. 824, 826 n.1 (BIA 2012) (noting that a USCIS policy memorandum, though not binding, is persuasive).

[18] Although the respondent was inadmissible under the plain terms of section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II), when he sought admission later in August 2001 because the 10-year waiting period had not yet elapsed, the respondent is not currently inadmissible because he was nevertheless admitted then and has not since departed the United States.

2. Why wasn't Mr. Duarte-Gonzalez, in the case above subject to grounds of inadmissibility for misrepresentation at this second admission with a border crossing card? Did he have to disclose that he was subject to the overstay bars and should not be admitted? Does his marriage to a U.S. citizen change the situation?

3. Carefully read the statutory waiver provision in §212(a)(9)(b)(v). Which relatives help an individual qualify for a waiver of the overstay bar? Do you understand why Mr. Duarte-Gonzalez did not require this waiver?

Page 566 (§ 5.03[H][3]):
Add at bottom of page: **FAM Crimes Involving Moral Turpitude**

The State Department's Foreign Affairs Manual (FAM) has a list of common crimes that are considered crimes involving moral turpitude. The section of the FAM, found in 9 FAM 302.3-2(B)(2), lists the most common offenses which involve moral turpitude as: (1) fraud; (2) larceny; or (3) intent to harm persons or things. The FAM further includes the following crimes as other common crimes which involve moral turpitude: (1) crimes committed against property; (2) crimes committed against governmental authority; (3) crimes committed against persons, family relationship, and sexual morality; and (4) intentional distribution of controlled substances. The FAM also notes that attempt, aiding and abetting, accessories, and conspiracy of crimes involving moral turpitude are themselves crimes of moral turpitude. U.S. Dep't of State, 9 Foreign Affairs Manual (FAM) § 302.3-2(B)(2), https://fam.state.gov/fam/09FAM/09FAM030203.html#M302_3_2_B_2.


Image from CBP website, Cannabis Sativa.

Page 572 (§ 5.03 [H]): Add the following case before *Notes and Questions*:

Larios v. Attorney General
978 F.3d 62 (3d Cir. 2020)

KRAUSE, *Circuit Judge.*

To determine if a noncitizen convicted of a state offense is subject to immigration consequences prescribed in federal law, the Supreme Court has instructed courts to compare whether the elements of the state offense define a crime that is the same as or narrower than the generic federal offense. *See Descamps v. United States*, 570 U.S. 254, 257 (2013). This analysis, which has come to be known as the "categorical approach," sounds simple in theory but has proven difficult (and often vexing) in practice, necessitating a "modified categorical approach" and generating an evolving jurisprudence around when the categorical or modified categorical approach applies. That difficulty is borne out in the convoluted history of this case. Here, in what is now Lazaro Javier Larios's third petition for review from prior reversals, the Board of Immigration Appeals (BIA) applied the categorical approach and held Larios ineligible for cancellation of removal under [INA § 240A(b)(b)(1);] 8 U.S.C. § 1229b(b)(1) for having been convicted of "a crime involving moral turpitude." [INA § 212(a)(2)(A)(k)(I);] 8 U.S.C. § 1182(a)

(2)(A)(i)(I). Because we conclude the crime at issue—New Jersey's terroristic-threats statute, N.J. Stat. Ann. § 2C:12-3(a)—should have been analyzed under the modified categorical approach, and, under that approach, the particular offense of which Larios was convicted is not a crime involving moral turpitude, we will grant the petition for review.

I. Factual and Procedural History

For nonpermanent residents who meet the eligibility criteria outlined in 8 U.S.C. § 1229b(b)(1), cancellation of removal is a discretionary form of relief that "allows [them] to remain in the United States despite being found removable." *Barton v. Barr*, __ U.S. __,140 S. Ct. 1442, 1445 (2020). But those who have "been convicted of an offense under section 1182(a)(2)," 8 U.S.C. § 1229b(b)(1)(C)—which includes "a crime involving moral turpitude" (CIMT), id. § 1182(a)(2)(A)(i)(I)— are ineligible for cancellation of removal.

Larios, an El Salvadoran national, entered the country without inspection in 1986. In 1998, Larios was approached by someone outside of a bar and, allegedly because he believed he would be robbed, pulled out a knife and caused the person to flee. Larios pleaded guilty to "threaten[ing] to commit any crime of violence with the purpose to terrorize another . . . or in reckless disregard of the risk of causing such terror" in violation of N.J. Stat. Ann. § 2C:12-3(a). Some years later in 2006, he was served a Notice to Appear and entered removal proceedings. Since then, Larios has been seeking cancellation of removal.

The IJ and the BIA in 2008 determined that Larios's crime of conviction was a categorical match for a CIMT, rendering him ineligible for cancellation of removal.

In 2008, Larios filed his first of three petitions for review to this Court and argued that his crime could not qualify as a CIMT because, under the categorical approach, the elements of a state statute must define an offense not broader than the federal statute, whereas here, "the least culpable conduct necessary to sustain a conviction under the [New Jersey] statute," *Partyka v. Att'y Gen.*, 417 F.3d 408, 411 (3d Cir. 2005)—a threat to commit "simple assault"—did not meet the criteria to qualify as "turpitudinous" under § 1182(a)(2)(A)(i)(I) and the relevant case law, *Larios v. Att'y Gen.*, 402 F. App'x 705, 708–09 (3d Cir. 2010). We agreed that, because it swept in simple assault, the statute encompassed both turpitudinous and non-turpitudinous conduct, and based on our understanding of the categorical approach at the time, we held the statute was divisible. See id. at 709. That understanding changed a few years later with Descamps v. United States, 570 U.S. 254 (2013), but our divisibility analysis then focused on whether a statute comprised both turpitudinous and non-turpitudinous conduct, rather than whether it comprised different, alternative elements (one or more of which may be turpitudinous). Regardless, the purpose of the modified categorical approach has always been to determine which portion of the statute formed the basis for the petitioner's conviction. Thus, we remanded for the agency to apply the modified categorical approach to determine whether Larios had been convicted of the turpitudinous or the non-turpitudinous part of the statute. *See id.*

On remand, however, the IJ declined to apply the modified categorical approach and instead concluded that the categorical approach applied after all. The IJ reasoned that simple assault, under New Jersey law, N.J. Stat. Ann. § 2C:1-4(b), was not a "crime" at all, only "a disorderly persons offense [or] . . . a petty disorderly persons offense," id. § 2C:12-1(a). See A.R. 675–76 (citing *State v. MacIlwraith*, 782 A.2d 964, 966 (N.J. App. Div. 2001)). And because New Jersey's terroristic-threats statute covers only threats to "commit a[] crime of violence," N.J. Stat. Ann. § 2C:12-3(a) (emphasis added), the IJ explained, a threat to commit simple assault was not covered by that statute, excluding the only non-turpitudinous application and, hence, the need for the modified categorical approach.

Applying the categorical approach yet again, the IJ relied on BIA precedent that statutes criminalizing "the intentional transmission of threats of violence are categorically CIMTs," A.R. 676 (citing *Matter of Ajami*, 22 I. & N. Dec. 949, 952 (BIA 1999)), and the New Jersey Model Jury Charge's description of a terroristic threat as one "convey[ing] menace or fear," id. (citing New Jersey Model Criminal Jury 6 Charge, § 2C:12-3(a), at 2), to conclude that the statute covered only turpitudinous offenses and was therefore a categorical match with § 1182(a)(2)(A)(i)(I).

The BIA affirmed, summarizing the IJ's analysis but, for its own part, stating only that it agreed that the actus reus, simple assault, was not a "crime of violence" under New Jersey law. That explanation left unclear whether the BIA had compared the mens rea of the state offense —"purpose" or "reckless disregard," N.J. Stat. Ann. § 2C:12-3(a)—to the generic offense, and under that analysis, whether the New Jersey statute was still a categorical match for § 1182(a)(2)(A)(i)(I)'s generic offense. So after Larios filed his second petition for review, we granted the Government's motion to remand "to allow the Board to clarify whether its analysis was properly limited to the 'crime of violence' element of the statute, or, alternatively, to allow the Board to consider the mental state element." A.R. 54. This time on remand, the BIA held the mens rea element, too, was a categorical match, treating both purpose and reckless disregard as "an intentional or vicious state of mind," A.R. 5, and treating a threat with that mens rea as an "act committed with an appreciable level of consciousness or deliberation," id. at 4 (quoting *Partyka*, 417 F.3d at 414). So it again rejected Larios's cancellation-of-removal application. We now consider Larios's third, timely filed petition for review.

II. [Jurisdiction and Standard of Review discussion omitted]

III. Discussion

For Larios, the sticking point in terms of his eligibility for cancellation of removal is whether his conviction for making a terroristic threat under N.J. Stat. Ann. § 2C:12-3(a) is a CIMT. First, we explain why § 2C:12-3(a) should be analyzed under the modified categorical approach rather than the categorical approach, and, second, we apply the modified categorical approach to the particular alternative under which Larios was convicted: "threaten[ing] to commit any crime of

violence with the purpose to terrorize another . . . or in reckless disregard of the risk of causing such terror." N.J. Stat. Ann. § 2C:12-3(a).

A. The Modified Categorical Approach Applies Here

When a state conviction is subject to federal criminal or immigration consequences, we use the now-familiar categorical approach or modified categorial approach to determine whether a petitioner's crime of conviction matches the generic federal offense—here, whether N.J. Stat. Ann. § 2C:12-3(a) is a categorical match for § 1182(a)(2)(A)(i)(I) and thus qualifies as a CIMT.

In the ordinary case, we analyze state statutes under the categorical approach. Under that framework, we consider whether the "least culpable conduct hypothetically necessary to sustain a conviction under the statute" would also be covered by the federal statute. *Moreno*, 887 F.3d at 163 (quoting *Jean Louis v. Att'y Gen.*, 582 F.3d 462, 471 (3d Cir. 2009)). A categorical match occurs if a state statute's elements define a crime identical to or narrower than the generic crime because "anyone convicted under that law is necessarily . . . guilty of all the [generic crime's] elements." *Descamps*, 570 U.S. at 261 (alterations in original) (internal quotation marks and citation omitted). But if the state offense covers more conduct, then it is overbroad and does not match the generic offense. The approach is "categorical" because we look only to the elements of the state offense, "not to the particular facts underlying th[at] conviction[]." Id. at 161 (internal quotation marks and citation omitted).

This analysis is straightforward enough for an indivisible state offense with a single set of elements. But where the statute is divisible—that is, "(1) the statute of conviction has alternative elements, and (2) at least one of the alternative divisible categories would, by its elements, be a 9 match with [the] generic federal crime," a CIMT—then, the so-called "modified categorical approach" applies instead. *Hillocks v. Att'y Gen.*, 934 F.3d 332, 339 (3d Cir. 2019) (internal quotation marks and citation omitted). The modification is a small one, allowing the court to review "a limited set of documents" for the sole purpose of identifying whether the petitioner was convicted of a CIMT or non-CIMT alternative. Id. at 338. This modification serves "not as an exception, but instead as a tool . . . [for] preserv[ing] the categorical approach's basic method: comparing [statutory] elements with the generic offense's," while disregarding the particular facts of the crime the petitioner committed. *Descamps*, 570 U.S. at 263.

When the modified categorical approach is "[a]pplied in [this] way—which is the only way [the Supreme Court has] ever allowed," id., it retains its proper focus on the elements of the crime: the actus reus, mens rea, and causation. These are what "the State must prove . . . beyond a reasonable doubt" to sustain a conviction, *State v. Tindell*, 10 A.3d 1203, 1217 (N.J. Super. Ct. App. Div. 2011), or, "at a plea hearing, . . . what the defendant necessarily admits when he pleads guilty," *Mathis v. United States*, 579 U.S. 500, 136 S. Ct. 2243, 2248 (2016) (partial citation omitted). Disjunctives in statutes often provide "textual clue[s]" of divisibility, *Hillocks*, 934 F.3d at 343, but they are not dispositive because statutes that merely "enumerate[] various factual

means of committing a single element" are not in fact divisible, *Mathis*, 579 U.S. at 612, 136 S. Ct. at 2249.

Here, the parties dispute whether N.J. Stat. Ann. § 2C:12-3(a) is divisible and requires application of the modified categorical approach. On de novo review, *see Moreno*, 887 F.3d at 163, we agree with Larios that the BIA erred in treating the statute as indivisible and applying the categorical approach.

In relevant part, New Jersey's terroristic-threats statute provides:

> A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience. N.J. Stat. Ann. § 2C:12-3(a) (1981)

In view of the numerous disjunctives, we look to state law to see whether these are alternative elements delineating separate offenses, or merely alternative means to commit one offense. *See*, *e.g.*, *Hillocks*, 934 F.3d at 339. "Whe[re] a ruling from an 'authoritative source[] of state law' resolving this means-or-elements question 'exists, a . . . judge need only follow what it says,'" *Singh v. Att'y Gen.*, 839 F.3d 273, 283 (3d Cir. 2016) (second and third alterations in original) (*quoting Mathis*, 136 S. Ct. at 2256), and here, fortunately, we have that authoritative source in a New Jersey Superior Court decision. In *State v. Tindell*, 10 A.3d 1203 (N.J. Super Ct. App. Div. 2011), the court made clear that § 2C:12-3(a) incorporates three alternatives, each of which has the same actus reus, i.e., "threatens to commit any crime of violence," N.J. Stat. Ann. § 2C:12-3(a), and a mens rea incorporating either "purpose . . . or . . . reckless disregard of the risk," id., but a different, alternative causation element: (1) "to terrorize another," (2) "to cause evacuation," or (3) "to cause serious public inconvenience[.]"

In sum, N.J. Stat. Ann. § 2C:12-3(a) requires the modified categorical approach because it has "alternative elements," and the Government does not dispute that "at least one of the alternative divisible categories would, by its elements, be a match with a generic federal crime." Hillocks, 934 F.3d at 339 (internal quotation marks and citation omitted). We turn now to applying this approach to Larios's crime of conviction.

B. Larios's Crime of Conviction is Not a CIMT

Under the modified categorical approach, we must first consider "what crime, with what elements, a defendant was convicted of" and then "compare that crime, as the categorical approach commands, with the [CIMT] generic offense." *Mathis,* 136 S. Ct. at 2249.

1. *Larios's Crime of Conviction*

[T]he transcript of Larios's plea colloquy reveals that he was convicted "under subsection (a), [of a] threat to commit . . . a crime of violence." A.R. 384. During the colloquy, the judge also confirmed that Larios was pleading guilty to "threatening to commit an assault upon a person . . . by—causing [him] to be in fear." A.R. 391. Thus, in full, the alternative offense that formed the basis for Larios's conviction is "threaten[ing] to commit any crime of violence with the purpose to terrorize another . . . or in reckless disregard of the risk of causing such terror." N.J. Stat. Ann. § 2C:12-3(a). The remaining question before us is whether that alternative is a CIMT.

2. *CIMT Analysis*

To determine whether Larios's alternative is a categorical match, we must first ascertain the elements of the generic offense. There is no statutory definition of a crime involving moral turpitude, so we draw on "long-established BIA principles and decisions of our Court," *Knapik v. Ashcroft*, 384 F.3d 84, 89 (3d Cir. 2004) (internal citation omitted), for its elements: (1) an actus reus of "a reprehensible act . . . . that is inherently base, vile, or depraved contrary to the accepted rules of morality and the duties owed to other persons, either individually or to society in general"; and (2) a mens rea of "an appreciable level of consciousness or deliberation," signifying "a vicious motive or a corrupt mind," *Javier v. Att'y Gen.*, 826 F.3d 127, 130–31 (3d Cir. 2016) (citations omitted); *see Francisco-Lopez v. Att'y Gen.*, 970 F.3d 431, 435 (3d Cir. 2020).

With this generic construction in mind, we home in on the elements of Larios's crime of conviction: an actus reus of "threaten[ing] to commit any crime of violence," a mens rea of "purpose . . . or [] reckless disregard," and a causation element of "terroriz[ing] another." N.J. Stat. Ann. § 2C:12-3(a). We have already settled that "a threat to: [] commit any crime of violence with intent to terrorize another" is a CIMT. Javier, 826 F.3d at 131 (alteration in original); *see also Ajami*, 22 I. & N. Dec. at 952 (stating that "the intentional transmission of threats is evidence of a vicious motive or a corrupt mind"). The particular alternative offense of which Larios was convicted is the same in all respects, except it requires a mens rea of only recklessness. Our focus, then, is whether the "least culpable conduct hypothetically necessary to sustain a conviction," *Moreno*, 887 F.3d at 163, for that alternative offense is turpitudinous.

Our precedent provides guidance on when recklessness constitutes a turpitudinous mental state and, conversely, when it does not. We deemed a mens rea of recklessness turpitudinous for both New Jersey's second-degree aggravated assault offense, *Baptiste v. Att'y Gen.*, 841 F.3d 601, 623 (3d Cir. 2016), and New York's reckless endangerment offense, *Knapik*, 384 F.3d at 93, explaining that there were two "aggravating factors" in the each statute: "serious bodily injury" to another, N.J. Stat. Ann. § 2C:12-1b(1), or "grave risk of death to another person," N.Y. Penal Law § 120.25, and "extreme indifference to the value of human life," N.J. Stat. Ann. § 2C:12-1b(1), or "a depraved indifference to human life," N.Y. Penal Law § 120.25. *See Baptiste*, 841 F.3d at 622; *Knapik*, 384 F.3d at 90. Although these statutes required a mens rea of only recklessness, the two aggravating factors ensured the least culpable conduct encompassed by

these statutes was still "inherently base, vile, or depraved." *Baptiste*, 841 F.3d at 621; *see Knapik*, 384 F.3d at 89.

In contrast, we concluded recklessness was not turpitudinous in Pennsylvania's reckless endangerment statute because there was not even one statutory aggravating factor.

Here, the BIA did not articulate what, if any, aggravating factors it identified in § 2C:12-3(a), and we perceive none. Whereas the statutes at issue in Baptiste and Knapik targeted conduct that risks death or serious injury to another person, New Jersey's terroristic-threats statute criminalizes threats that merely carry the risk of "convey[ing] menace or fear of a crime of violence" to another person, New Jersey Model Criminal Jury Charge, § 2C:12-3(a), at 2; and whereas those statutes required a mental state exhibiting "extreme" and "depraved" indifference to a person's life, New Jersey defines recklessness to include "heedless[ness]," "foolhardi[ness]," or "scorn for the consequences" of causing fear in another, id. at 3. New Jersey's terroristic-threats statute, therefore, lacks the type of aggravating factors that we have previously recognized would make an offense inherently vile and depraved.

The Government contends otherwise, pointing us to two purported statutory aggravating factors. In addition to the required mental state of "purpose" or "reckless disregard," the Government argues, there must both be a "threat" and "a crime of violence" that is the subject of that threat. Resp't Br. 25 (internal quotation marks omitted). The argument comes up short.

As to the first factor, the Government reads into the lone word "threat" an "additional, intentional 'layer' to the mens rea requirement" because it "suggests that the perpetrator must initially commit a purposeful act." Resp't Br. 32–33. But we already rejected that argument when reviewing Pennsylvania's terroristic-threats statute in *Bovkun v. Ashcroft*, 283 F.3d 166 (3d Cir. 2002). There, we held a "threat[] to commit a crime of violence" was simply the actus reus, id. at 170 (alteration in original) (quoting 18 Pa. Cons. Stat. § 2706), and did not carry its own implicit mens rea, independent of that specified in the statute. We reaffirm that holding here: Where a statute specifies the mens rea, courts ordinarily interpret it as applying throughout the statute, *see Rehaif v. United States*, __ U.S. __, 139 S. Ct. 2191, 2196 (2019), and here, nothing in the text, New Jersey law, or our precedent suggests we should stray from that ordinary construction

The Government's second factor fares no better. Although we agree that the term "crime of violence" does not encompass simple assault under New Jersey law, it does encompass other crimes lacking in the vileness and depravity required for a statutory aggravating factor. See *Baptiste*, 841 F.3d at 621. Neither New Jersey law nor the Model Penal Code defines "crime of violence," but we draw on the federal definition of that term, as we did in Bovkun: "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Bovkun*, 283 F.3d at 169 (quoting 18 U.S.C. § 16(a)). So the least culpable conduct under § 2C:12-3(a) would be a threat to commit an offense involving the use of physical force against a person's property in reckless disregard of the risk of terrorizing that person—conduct the Government contends is necessarily vile and depraved.

Yet New Jersey's criminal code demonstrates otherwise: The offense of criminal mischief, for example, involves "tamper[ing] with tangible property of another so as to endanger person or property" and causing "pecuniary loss of $500 or more," N.J. Stat. Ann. § 2C:17-3(a)(2), so a threat to commit that particular "crime of violence" would include a threat to "chip[] away at the patio bricks around the porch of [a neighbor's] property," *State in Interest of A.H.*, 697 A.2d 964, 965 n.1 (N.J. Super. Ct. 1997). No doubt, threats to engage in this type of conduct would be unwelcome and un-neighborly, but they do not rise to the level of depraved or extreme indifference to the risk of causing serious bodily injury or death.

In sum, Larios's crime of conviction has a minimum mens rea of recklessness but lacks any statutory aggravating factors, so the least culpable conduct is a reckless threat to commit a violent property crime, which under *Baptiste*, *Knapik*, and *Mahn*, is not turpitudinous. Larios's offense of conviction therefore does not qualify as a CIMT under the modified categorical approach. *See Javier*, 826 F.3d at 130–31; *Hillocks*, 934 F.3d at 339.

IV. Conclusion

After more than a decade of litigation, Larios has finally established he was not convicted of a crime involving moral turpitude, and the BIA erred in finding him ineligible for cancellation of removal on that basis. Accordingly, we will grant the petition for review and remand to the agency for proceedings consistent with this opinion.

Notes and Questions

1. Why Are the Grounds of Inadmissibility Relevant in a Cancellation of Removal Case? As this chapter has tried to make clear, the grounds of inadmissibility are cross referenced in many areas of immigration law. In *Larios*, above, the individual is seeking a form of relief from deportation called cancellation of removal, discussed in more detail in Chapter 7. However, to be eligible for this relief, he cannot be barred by a conviction meeting the definition for inadmissibility found in INA § 212. Attorneys must constantly be aware of how the grounds of inadmissibility may arise in every aspect of an immigration case.

2. Is it Time to Revise the Crime Involving Moral Turpitude Standard? What are the pros and cons of using this type of vague reference in the INA? If you wanted to make it easier for the DHS to manage the statutory application, would you make the INA language more specific or would you make the terms more general? For example, any conviction resulting in a punishment of greater than six months incarceration could be a ground of inadmissibility. What approach would you suggest for ease of administration? What approach for ensuring greater equity in the consideration of inadmissibility? For more on understanding how the BIA reads criminal convictions see 6 IMMIGRATION LAW AND PROCEDURE § 63.03. The Circuit Courts of Appeal do not apply uniform standards and it is essential to carefully research the law governing the

circuit where the foreign national resides or is in removal proceedings to determine the approach the IJ or USCIS will use in making its adjudications.

Page 572 (§ 5.03[I]): Change the numbering on **Notes 1 and 2 to 3 and 4** to reflect the new Notes added above.

Page 573 (§ 5.03[I]): Add the following as a new paragraph to the end of the section:

Recent years have seen many states and the District of Columbia legalize marijuana, for medical use and/ or for recreational use. However, for immigration purposes, it is not the state laws that apply to the noncitizen, but federal law. So, even though the state that the noncitizen is residing in has legalized marijuana, if a noncitizen admits to possessing marijuana, they can be found inadmissible or denied entry to the United States. Under certain circumstances, lawful permanent residents can be found removable for possessing marijuana, even if they are residing in a state that has legalized it. For more information, see https://www.ilrc.org/sites/default/files/resources/immigrants_marijuana_may_2021_final.pdf.

On April 1, 2022, the House of Representatives passed legislation that would decriminalize marijuana at the federal level by removing marijuana from the list of controlled substances under the Controlled Substances Act. The Marijuana Opportunity Reinvestment and Expungement Act (MORE Act), H.R. 3617, 117th Cong. (2022). Specifically, this legislation would prohibit denying immigration benefits and protections for marijuana related convictions or conduct. As of May 27, 2022, the bill died in the Senate.

The DHS continues to use federal standards to find that marijuana use and convictions are subject to the grounds of inadmissibility relating to a "controlled substance." Note that a conviction is NOT required for some grounds of inadmissibility. See INA § 212(a)(2)(a)(i)(II) "a violation" of a controlled substance; INA § 212(a)(1)A)(iv) "drug abuser"; or § 212(a)(2)(C) whom a consular office has reason to believe is an illicit trafficker of any controlled substance or aided…no conviction required.

Driving under the influence of alcohol can also trigger visa stamp cancellation and a ground of inadmissibility under the health grounds as a drug or alcohol abuser. See 9 FAM 403.11-5(B)(c) "Either Post or the Department has the authority to prudentially revoke a visa on the basis of a potential INA 212(a)(1)(A) ineligibility when a Watchlist Promote Hit appears for an arrest or conviction of driving under the influence, driving while intoxicated, or similar arrests/convictions (DUI) that occurred within the previous five years. This does not apply when the arrest has already been addressed within the context of a visa application; i.e., the individual has been through the panel physician's assessment due to the arrest. This does not apply to other alcohol related arrests such as public intoxication that do not involve the operation of a vehicle. Unlike other prudential revocations, consular officers do not need to refer the case to the Department, but can prudentially revoke on their own authority."

Discussed in 2 IMMIGRATION LAW AND PROCEDURE § 12.06
see also 6 IMMIGRATION LAW AND PROCEDURE § 63.03 NOTING that" [i]n fiscal year 2019, 5,726 nonimmigrant visa applications and 566 immigrant visa applications were found to show inadmissibility based on controlled substance violations. Of that total, 2,553 nonimmigrants and 72 immigrant visa applicants overcame that ground of inadmissibility." [footnotes omitted]

Page 596 (§ 5.04[D]): Add the following as a new paragraph before [2]:

After the BIA clarification in *Arrabally* that a foreign national who has left and returned to the United States under a grant of advance parole has not made a departure for the purposes of inadmissibility under the ten-year unlawful presence bar, a federal district court explicitly defined *Arrabally*, noting that a foreign national who voluntarily departs without seeking advance permission or parole after accruing more than one year of unlawful presence is subject to the ten-year bar. *Ravelo v. Akins*, 2016 U.S. LEXIS 165183 (S.D. Fla. Nov. 30, 2016), *aff'd sub nom. Ravelo v. U.S. Citizenship & Immigration Servs.*, 706 Fed. Appx. 649,2017 U.S. App. LEXIS 25123 (11th Cir. 2017)(not a published decision for citations purposes).

Page 597 (§ 5.04[D]): Replace the last sentence ("As of July 2019…") with:

As of May 2022, the provisional waiver procedures remain the same.

Questions

1. **Should Congress repeal the overstay bars?** Are they effectively in deterring unlawful presence? Would paying a fine for violating immigration laws be more appropriate than needing to meet the extreme hardship standard of the narrow waivers?

2. **If a client did not qualify for a waiver of the overstay bar are there any paths to legal status in the United States?** Yes. Many of the pathways contain waivers, e.g., a grant of Temporary Protected Status, in some cases where a person was inspected marriage to a U.S. citizen or being a parent of an adult (over 21) U.S. citizen because the individual can adjust status and avoid the bars by not "departing." Also consider U or T status, seeking asylum, cancellation of removal…see Chapter 7 and 8. Is it unethical to advise a client to remain inside the United States if there is no clear future path to status.

What's New in this Chapter?

Update on statistics on grounds of removability and rates of representation.

Recent BIA case denying suppression of arrest statements after a traffic stop. *Matter of Fermin Mariscal-Hernandez*, 28 I&N Dec. 666 (BIA 2022).

Recent Supreme Court Decision Interpreting Obstruction of Justice as an Aggravated Felony. *Pugin v. Garland*, __ U.S. __, 2023 U.S. LEXIS 2634; 143 S. Ct. 1833 (2023).

Additional notes on BIA cases addressing aggravated felony allegations.

Update on Procedures Before the Immigration Courts and Workload of the EOIR

Attorney General Garlands issued precedent decisions reinstating the power of Immigration Judges to use administrative closure and/or terminate proceedings. *Matter of Cruz-Valdez*, 28 I. & N. Dec. 326 (Att'y Gen. 2021) and *Matter Of Coronado Acevedo*, 28 I&N Dec. 648 (A.G. 2022).

2022 Supreme Court rulings on the right to bond or release at various stages in removal proceedings.

Chapter 6: Deportability and the Removal Process

Updates begin next page

Page 602 (6.01[A]): Update to: "As of April of 2019, there are nearly 900,000 cases pending before the EOIR."

As of June of 2023, TRAC reports that there are 2.4 million cases pending before the EOIR.

The rate of new cases has dramatically increased. Despite adding more judges, a renewed ability to close cases for forms of prosecutorial discretion, the number of cases means that for most people it will take years before their immigration case is complete. As of Fiscal Year 2022, there were nearly 1.8 million cases pending before the EOIR. *Immigration Court Backlog Tool*, TRAC Reports, http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited June 15, 2022). The current tool is found at https://trac.syr.edu/phptools/immigration/backlog/.

The tools at TRAC can also be used to show the average time to case completion. While at first blush some courts may seem faster to close a removal case, in part, the differences are largely based on whether the non-citizen facing removal has counsel, is detained, or has any application for relief pending. In fiscal year 2022, the average length of time for the entire country was 852 days down from 934 days in the prior fiscal year. Here is a chart from the TRAC site listing the longest wait times. *See id.*

State	Average Days
Entire US	852
Virginia	1,161
California	1,026
Nebraska	1,015
Maryland	1,006
New Jersey	994
New York	977
Michigan	929
Oregon	928
Colorado	927
Washington	914
Illinois	899
Georgia	892
Texas	858
Missouri	842

To reduce the backlog and to focus on priority cases, the current administration has encouraged the Office of the Principal Legal Advisor (OPLA) within ICE to review and evaluate whether cases should be terminated as a low priority matter or one where relief may be pending but is delayed due to quota limitations. The greater use of prosecutorial discretion is deferred to our discussion in Chapter 7 on Relief from Removal.

Text page 602 updates:

While the DHS has publicly stated for many years that the agency's priority is national security and public safety, the vast majority of people placed into removal are charged with entry without inspection or with a visa allowing them to remain. Using the TRAC tools here are the last three years of Notices to Appear list by the general allegations of removability. [Note, it is not uncommon for DHS to charge overstay or unlawful entry even if there is a criminal matter because the government does not have to prove the criminal conviction as there is another ground of removability so the data may be a bit misleading.]

Charge on NTA	# FY 21	#FY 22	#FY23
Entry w/out inspection	232,005	527,907	798,889
Other	79,256	264,744	384,431
Criminal	3,108	3,648	3,711
Agg. Felony	2,792	2,324	2,117
Natl Security	26	28	30
Terror	12	9	8

Source: TRAC Data tools supra. Visited July 25, 2023

In June of 2023, there were several reports which built on years of study and prior analysis to reflect on some of the reasons for immigration court disfunction. The reports provided detailed

analysis and make recommendations about fundamental changes in both charging practices and forms of relief that might make the system operate with greater efficiency but also increase fairness.

See Don Kerwin and Evin Millet, The US Immigration Courts, Dumping Ground for the Nation's Systemic Immigration Failures: The Causes, Composition, and Politically Difficult Solutions to the Court Backlog, JOURNAL ON MIGRATION AND HUMAN SECURITY 1–34 (2023). Available at: https://cmsny.org/publications/jmhs-kerwin-millet-052523/

See also Muzaffar Chishti Doris Meissner Stephen Yale-Loehr Kathleen Bush-Joseph Christopher Levesque, RETHINKING U.S. IMMIGRATION POLICY INITIATIVE, Migration Policy Institute (June 2023) available at: https://www.migrationpolicy.org/sites/default/files/publications/mpi-courts-report-2023_final.pdf

Page 606 (6.01[C]): The Consequences of Greater Removal Enforcement
Update to: "As of late 2018, the DHS Office of Inspector General found that the number of 287(g) agreements had risen from 36 to 76, but warned that coordination and planning need to be improved."

During the Trump administration, from January 2017 until September 2020, the number of state and local law enforcement agencies with 287(g) agreements increased by more than 300%, from 35 to 150. U.S. Dep't of Homeland Sec., Off. of Inspector Gen., Lack of Planning Hinders Effective Oversight and Management of ICE's Expanding 287(g) Program (Sept. 18, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-09/OIG-18-77-Sept18.pdf.

To see the most current national map of 287(g) agreements, visit https://www.ilrc.org/national-map-287g-agreements.

Page 628 ([6.02][C] [Add to Note 4]):

4. The Alien Terrorist Removal Court. In 1996, Congress created the Alien Terrorist Removal Court as a special court and authorized the Chief Justice of the United States to designate five U.S. district court judges to review applications for the removal from the United States of alien terrorists. The provisions of the court were part of the Antiterrorism and Effective Death Penalty Act of 1996, codified at 8 U.S.C. § 1532, a broad legislative effort to combat international terrorism. The statute authorized the Attorney General to draft an application for removal of a suspected alien terrorist, and to submit the application to the removal court under seal. Upon granting a removal application, the court must hold a public removal hearing at which the accused has the right to be represented by counsel and the government bears the burden of proving that the accused is an alien terrorist.

As of 2022, the removal court has never received an application from the Attorney General for the removal of an alien terrorist and has therefore never conducted any proceedings. To read more on the subject, visit https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1079&context=nslb.

Page 629 (6.02[D]): Grounds Relating to False Documents and Misrepresentation

[1] ***False Documents at Work***

On October 12, 2021, the Department of Homeland Security Secretary (DHS) Alejandro Mayorkas, issued a short, three-page internal memorandum immediately halting immigration raids on workplaces and called on enforcement agencies to instead focus their efforts on "unscrupulous employers who exploit the vulnerability of undocumented workers." Memorandum from Alejandro N. Mayorkas, U.S. Sec'y of Homeland Sec., Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf. It also directed the federal immigration agencies to develop plans to protect workers who come forward with allegations of abuse or exploitation by employers. *Id.*

Page 630 [D][1] Add the following paragraph just before Problem 6-4:

President Trump's Executive Order No. 13768 (withholding grant money to states/localities that establish themselves as Sanctuary Jurisdictions) was revoked by President Biden in Executive Order 13993 on the Revision of Civil Immigration Enforcement Policies and Priorities on January 20, 2021. 86 Fed. Reg. 7051 (Jan. 25, 2021). This order called for relevant agencies and departments to review any agency actions that developed because of Executive Order 13768 and

issue revised guidance as appropriate. For an example of some of the guidance that was issued, *see* Memorandum, U.S. Immigr. and Customs Enf't, Interim Guidance: Civil Immigration Enforcement and Removal Priorities (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

Page 640 (6.04[D][2][Notes and Questions][Note 4]):

Add the following update to the case note, *In re Barcenas-Barrera, 25 I. & N. Dec. 40* (BIA 2009), pp. 646-649.

4. *In re Barcenas-Barrera* on Appeal. Olga Barcenas-Barrera sought review of her 2009 decision ordering her removal in the Fifth Circuit Court of Appeals. Barcenas-Barrera argued that the BIA erred by (1) conducting *de* novo review of the IJ's findings of fact and by engaging in its own fact finding, and (2) concluding that Barcenas-Barrera made a false representation of United States citizenship within the meaning of INA § 212(a)(6)(C)(ii). The Fifth Circuit held that the BIA's decision that Barcenas-Barrera was removable was not an abuse of discretion. The Fifth Circuit also held the BIA did not err in concluding that Barcenas-Barrera made a false representation of United States citizenship. The BIA concluded that Barcenas-Barrera's conduct amounted to a false representation of citizenship under that statute. In the absence of more specific guidance from the BIA, the court did not decide whether INA § 212(a)(6)(C)(ii) requires evidence of the alien's intent to falsely claim United States citizenship and, if so, how much evidence it requires. *In re Barcenas-Barrera*, 394 Fed. Appx. 100 (5th Cir. 2010).

Update to Page 642 Add a new paragraph to the end of Note 1 Is Suppression Possible in Immigration Removal Proceedings?

The BIA issued a precedent decision in 2022 rejecting a Respondent's motion to suppress statements obtained during a traffic stop by DHS officials. The officials were looking for a person for whom they had a final order of removal. They saw the Respondent in his car with his son and asked if they knew the person. Based on this stop, the DHS officers asked Mr. Mariscal-Hernandez if he and his son were authorized to be in California. Based on his answers, the DHS officers arrest both men and placed them into removal proceedings. Counsel for the Respondents sought to suppress the arrest alleging that the DHS officers must have relied on racial appearance rather than a suspicion of alienage. The BIA rejected the argument and, in the opinion, reasserted that while it is possible to suppress evidence obtained after an egregious violation of rights, the present facts did not contradict the officers statements that they believe Mr. Mariscal-Hernandez looked like the person they were seeking. *Matter of Fermin Mariscal-Hernandez*, 28 I&N Dec. 666 (BIA 2022).

Some of the Federal Circuit Courts of Appeal have been more willing to grant suppression. For example, after a traffic stop by a state trooper, a group of travelers were turned over to DHS when they could not produce identification. The Second Circuit found the arrest of the passengers was unsupported by probable cause and the statements made after arrest were suppressed. See *Millan-Hernandez v. Barr*, 965 F. 2d 140 (2d Cir. 2020); *cf. Medley v. Garland*, 75 F.4th 35 (2d. Cir. 2023)(denying suppression of arrest by city police and transport of individual to DHS custody; rejecting allegations of egregious violations of 5th and 4th amendment rights and racial profiling of a Jamaican man stopped at a minimarket). *Medley* provides a excellent review of procedural motions made in removal hearings and challenges to the compliance with agency regulations and statutory standards as well as the consideration of the motion to terminate the proceedings both with and without prejudice based on the alleged constitutional and regulatory violations made at the time of arrest.

Page 664 (§ 6.04 [E]Aggravated Felonies

Add this new Supreme Court case before Section [F] middle of page 664.

Pugin v. Garland

__ U.S. __, 2023 U.S. LEXIS 2634; 143 S. Ct. 1833 (2023)

JUSTICE KAVANAUGH delivered the opinion of the Court. [joined by Chief Justice Roberts, Thomas, Alito, Barrett and Jackson]

Federal law provides that noncitizens convicted of an "aggravated felony" are removable from the United States. The definition of "aggravated felony" includes federal or state offenses "relating to obstruction of justice." [INA § 101(a)(43)(S);] 8 U.S.C. § 1101 (a)(43)(S) [hereinafter §101(a)(43)(S)]. The question here is whether an offense "relat[es] to obstruction of justice" under §101(a)(43)(S) even if the offense does not require that an investigation or proceeding be *pending*. That question arises because some obstruction offenses can occur when an investigation or proceeding is not pending, such as threatening a witness to prevent the witness from reporting a crime to the police. We conclude that an offense may "relat[e] to obstruction of justice" under §101(a)(43)(S) even if the offense does not require that an investigation or proceeding be pending.

I

This case stems from two immigration proceedings. Fernando Cordero-Garcia is a citizen of Mexico. In 2009, Cordero-Garcia was convicted of several California offenses, including dissuading a witness from reporting a crime. Jean Francois Pugin is a citizen of Mauritius. In 2014, Pugin was convicted of the Virginia offense of being an accessory after the fact to a felony.

As relevant here, the U.S. Department of Homeland Security charged both Cordero-Garcia and Pugin as removable from the United States on the ground that they had convictions for aggravated felonies—namely, offenses "relating to obstruction of justice." See §101(a)(43)(S); INA § 237(a)(2)(A)(iii); 8 U.S.C. § 1227(a)(2)(A)(iii). In both cases, an Immigration Judge ruled for the Department, as did the Board of Immigration Appeals.

Cordero-Garcia and Pugin petitioned for review in the relevant Courts of Appeals. In Cordero-Garcia's case, the Ninth Circuit concluded, in pertinent part, that his state conviction for dissuading a witness from reporting a crime did not constitute an offense "relating to obstruction of justice" because the state offense did not require that an investigation or proceeding be *pending*. 44 F.4th 1181, 1188-1189 (9th Cir. 2022). In Pugin's case, by contrast, the Fourth Circuit concluded that his state conviction for accessory after the fact constituted an offense "relating to obstruction of justice" even if the state offense did not require that an investigation or proceeding be pending. 19 F. 4th 437, 450 (4th Cir. 2021); *see also Silva v. Garland*, 27 F. 4th 95, 98 (1st Cir. 2022).

This Court granted certiorari to resolve the conflict in the Courts of Appeals. 598 U. S. ___, 143 S. Ct. 645 (2023).

II

Under the Immigration and Nationality Act, noncitizens convicted of an "aggravated felony" are removable from the United States. INA § 237(a)(2)(iii); 8 U.S.C. §1227(a)(2)(A)(iii). The Act defines "aggravated felony" to cover a broad range of federal and state crimes. See §101(a)(43).

In 1996, Congress passed and President Clinton signed legislation that expanded the definition of "aggravated felony" to include offenses "relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year." §101(a)(43)(S) 8 U.S.C. §1101(a)(43)(S); 110 Stat. 1278; id., at 3009-628.

This Court has generally used the "categorical approach" to determine whether a prior conviction qualifies as an "aggravated felony" under §101(a)(43)(S). *Esquivel-Quintana v. Sessions*, 581 U. S. 385, 389(2017); *Moncrieffe v. Holder*, 569 U. S. 184, 190(2013). Under that approach, courts look to "the elements of the statute of conviction, not to the facts of each defendant's conduct." *Taylor v. United States*, 495 U. S. 575 (1990). The Court's role here is not to fashion a separate federal obstruction offense, but rather to determine which federal or state offenses "relat[e] to obstruction of justice."

The question in this case is whether an offense "relat[es] to obstruction of justice" under §101(a)(43)(S) even if the offense does not require that an investigation or proceeding be *pending*. Dictionary definitions, federal laws, state laws, and the Model Penal Code show that the answer is yes: An offense "relat[es] to obstruction of justice" even if the offense does not require that an investigation or proceeding be pending.

To begin, dictionaries from the time of §101(a)(43)(S)'s enactment in 1996 demonstrate that obstruction of justice generally does not require a pending investigation or proceeding. To take an illustrative formulation, obstruction of justice covers "the crime or act of willfully interfering with the process of justice and law," including "by influencing, threatening, harming, or impeding a witness, potential witness, juror, or judicial or legal officer or by furnishing false information in or otherwise impeding an investigation or legal process." Merriam-Webster's DICTIONARY OF LAW 337 (1996). The offense "captures every willful act of corruption, intimidation, or force that tends somehow to impair the machinery of the civil or criminal law." B. Garner, A DICTIONARY OF MODERN LEGAL USAGE 611 (2d ed. 1995); *see also* BLACK'S LAW DICTIONARY 1077 (6th ed. 1990) ("obstructing the administration of justice in any way"); *cf. Esquivel-Quintana*, 581 U. S., at 391-392 (relying on same dictionaries to interpret a different offense in §101(a)(43)(S).

Notably missing from those dictionary definitions is a requirement that an investigation or proceeding be pending. The dictionaries demonstrate that obstruction of justice *includes* offenses where an investigation or proceeding is pending, but is not *limited to* offenses where an investigation or proceeding is pending.

In accord with the dictionary definitions, Title 18 of the U. S. Code has long proscribed various obstruction offenses that do not require a pending investigation or proceeding. Entitled "Obstruction of Justice," Chapter 73 of Title 18 houses many such offenses. For example, the federal witness tampering statute covers various offenses, such as killing or threatening a witness with an intent to prevent the person from testifying at an official proceeding. See 18 U.S.C. §§1512(a)(1)(A), (b)(1). That statute provides that "an official proceeding need not be pending or about to be instituted at the time of the offense." §1512(f)(1). Likewise, §1519 forbids assorted means of destroying, altering, or falsifying records with an intent to obstruct certain investigations or proceedings. That provision covers acts intended to impede a federal investigation or proceeding, "including one not even on the verge of commencement." *Yates v. United States*, 574 U. S. 528, 547 (2015) (plurality opinion); *see also* 18 U.S.C. § 1518 (proscribing acts to obstruct the communication of certain information to criminal investigators).[1]

***

[1] To be sure, one of those offenses—18 U.S.C. § 1319—was enacted after the passage of §101(a)(43)(S) in its current form in 1996. But § 1519, too, reflects the longstanding ordinary understanding of obstruction of justice—and no one here suggests that the ordinary understanding in the years after 1996 somehow differed from the ordinary understanding in 1996***.

For obstruction offenses, the Model Penal Code also generally does not require that an investigation or proceeding be pending. *See generally* ALI, *Model Penal Code §240.0(4)*, p. 3 (1980) ("'official proceeding[s]'" include those which "may be heard"). ***

That extensive body of authority—dictionaries, federal laws, state laws, and the Model Penal Code—reflects common sense. Individuals can obstruct the process of justice even when an investigation or proceeding is not pending. For example, a murderer may threaten to kill a witness if the witness reports information to the police. Such an act is no less obstructive merely because the government has yet to catch on and begin an investigation. As the Solicitor General persuasively states, one can obstruct the wheels of justice even before the wheels have begun to move; indeed, obstruction of justice is often "most effective" when it prevents "an investigation or proceeding from commencing in the first place." Brief for Attorney General 15.

Importantly, if an offense "relating to obstruction of justice" under §101(a)(43)(S) required that an investigation or proceeding be pending, then many common obstruction offenses would not qualify as aggravated felonies under that provision. We decline to interpret §101(a)(43)(S) to *exclude* numerous heartland obstruction offenses. "We should not lightly conclude that Congress enacted a self-defeating statute." *Quarles v. United States*, 587 U. S. ___, ___, 139 S. Ct. 1872(slip op., at 8); ***

One final point bears emphasis: To the extent any doubt remains about whether §101(a)(43)(S) requires that an investigation or proceeding be pending, the phrase "*relating to* obstruction of justice" resolves the doubt. *Cf. Mellouli v. Lynch*, 575 U. S. 798, 811-812, n. 11(2015). The phrase "relating to" ensures that this statute covers offenses that have "a connection with" obstruction of justice—which surely covers common obstruction offenses that can occur when an investigation or proceeding is not pending. *** By contrast, in defining certain other aggravated felonies in this statute, Congress did not employ the broad phrase "relating to." See, *e.g.*, INA § 101(a)(43)(A) ("murder, rape, or sexual abuse of a minor").

For all of those reasons, an offense "relating to obstruction of justice" under *§1101(a)(43)(S)* does not require that an investigation or proceeding be pending.[2]

III

Pugin and Cordero-Garcia offer four main arguments in response. None is persuasive.

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[2] As interpreted by this Court, a few obstruction statutes require that an investigation or proceeding be reasonably foreseeable. *** Those decisions interpreted specific statutory language and did not rule that obstruction offenses in general have a foreseeability requirement (which would have been incorrect, in any event). Moreover, the Solicitor General explains that offenses "relating to obstruction of justice" require an intent to interfere with the legal process. ***. That *mens rea* requirement targets the same basic overbreadth concern as a foreseeability requirement and ensures that § 101(a)(43)(S) will not sweep in offenses that are not properly understood as offenses "relating to obstruction of justice." For example, the Solicitor General concedes that federal misprision of felony is not an offense "relating to obstruction of justice" because, in the Government's view, the crime does not require an intent to interfere with the legal process. See 18 U.S.C. § 4***. In short, we see no justification for engrafting a separate foreseeability requirement onto the broad and general language of § 101(a)(43)(S).

First, Pugin and Cordero-Garcia point to 18 U.S.C. §1503(a), which among other things prohibits persons from endeavoring "to influence, obstruct, or impede" the "due administration of justice." According to Pugin and Cordero-Garcia, that specific prohibition requires that an investigation or proceeding be pending. *** But even if they are correct about that point, §1503(a) is only one obstruction offense among the many obstruction offenses in Title 18. And many federal obstruction offenses—like many state obstruction offenses—proscribe obstruction when an investigation or proceeding is not pending. Moreover, if Congress wanted to define offenses "relating to obstruction of justice" to have the same coverage as §1503(a), Congress knew how to do so: Congress could have cross-referenced §1503(a) in §101(a)(43)(S) in the same way that Congress cross-referenced numerous other statutes in § 101(a)(43). *See*, *e.g.*, §§ 101(a)(43)(B)-(F). But Congress included no such cross-reference. ***

Second, Pugin and Cordero-Garcia cite a few authorities from the 1700s and 1800s and assert that obstruction of justice historically required that an investigation or proceeding be pending. But the historical record cited by Pugin and Cordero-Garcia does not back up their broad claim. *** More to the point, as we have explained at length, the widespread and contemporary understanding of obstruction of justice at the time Congress enacted §101(a)(43)(S) in 1996 did not require that an investigation or proceeding be pending. ***

Third, Pugin and Cordero-Garcia argue that offenses "relating to obstruction of justice" require a pending investigation or proceeding; otherwise, they maintain that those offenses would be redundant with other offenses covered by §101(a)(43)(S)—in particular, offenses "relating to . . . perjury or subornation of perjury, or bribery of a witness." But Pugin and Cordero-Garcia fail to explain how requiring a pending investigation or proceeding for obstruction offenses would resolve the claimed redundancies with perjury or bribery offenses. After all, perjury and bribery offenses often "relat[e] to obstruction of justice." In any event, "redundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication." *Barton v. Barr*, 590 U. S. ___, ___, 140 S. Ct. 1442 (2020) (slip op., at 16). As a result, "the better overall reading of the statute" sometimes "contains some redundancy." *Ibid.* ***. §101(a)(43)(S) illustrates the point: Congress listed a large number of offenses that would qualify as aggravated felonies, likely to avoid unintended gaps. So it is not surprising to find some overlap. To take one example, the definition of "aggravated felony" covers "murder, rape, or sexual abuse of a minor" and separately covers "crime[s] of violence." § 101(a)(43)(A, (F).[3]

[3] The same point applies to § 101(a)(15)(U)(iii), which lists both "obstruction of justice" and "witness tampering." Neither Pugin nor Cordero-Garcia cites that provision—presumably because the provision appears in a different part of the statute and contains different language. Moreover, Congress took the same belt-and-suspenders approach in § 1010(a)(15)(U)(iii) that it did in§101(a)(43)(S). See § 101(a)(15)(U)(iii) (covering among other things "being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment" as well as "any similar activity in violation of Federal, State, or local criminal law").

Fourth, Pugin and Cordero-Garcia invoke the rule of lenity. But even assuming that the rule of lenity can be invoked in this particular civil immigration context, the rule applies only if "after seizing everything from which aid can be derived," there remains "grievous ambiguity." *Ocasio v. United States*, 578 U. S. 282, 295, n. 8(2016) (internal quotation marks omitted). Here, applying the traditional tools of statutory interpretation, we have concluded that an offense "relating to obstruction of justice" does not require that an investigation or proceeding be pending. So we have no basis for resorting to the rule of lenity. *See, e.g.*, *Shaw v. United States*, 580 U. S. 63, 71 (2016); *Salman v. United States*, 580 U. S. 39, 51(2016); Abramski v. United States, 573 U. S. 169, 188, n. 10, (2014); *cf. Kawashima v. Holder*, 565 U. S. 478, 489(2012).

***

In sum, we conclude that an offense "relating to obstruction of justice" under §101(a)(43)(S) does not require that an investigation or proceeding be pending. We therefore disagree with the argument raised by Pugin and Cordero-Garcia for excluding their obstruction offenses from the broad coverage of §101(a)(43)(S). We affirm the judgment of the U. S. Court of Appeals for the Fourth Circuit. We reverse the judgment of the U. S. Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE JACKSON, concurring.

I agree with the Court that the Ninth Circuit wrongly embraced a pending-proceeding requirement when it assessed what types of prior offenses qualify as "offense[s] relating to obstruction of justice" under 8 U.S.C. § 101(a)(43)(S), for purposes of determining the "aggravated felon[ies]" that render noncitizens deportable, § 237(a)(2)(A)(iii). This means, of course, that I also agree with the Court's conclusion that the Fourth Circuit rightly rejected any such pending-proceeding requirement.

I write separately to highlight one (possibly sufficient) reason why a predicate offense need not have a nexus to a pending or ongoing investigation or judicial proceeding in order to qualify as "an offense relating to obstruction of justice" within the meaning of this immigration statute. The reason is that, when Congress inserted the phrase "offense relating to obstruction of justice" into §101(a)(43)(S), it might well have been referencing a specific and previously designated category of offenses—the offenses that are grouped together in Chapter 73 of Title 18 of the U. S. Code, under the heading "Obstruction of Justice." 62 Stat. 769, codified at 18 U.S.C. §1501 et seq. And not all of the offenses that are addressed in Chapter 73 contain a pending-proceeding requirement.

***

What counts as "an offense relating to obstruction of justice" within the meaning of §101(a)(43)(S) is nothing more, or less, than what Congress intended that phrase to mean when it enacted that statute. The Immigration and Nationality Act (INA) "does not expressly define" the phrase,

so we apply the "normal tools of statutory interpretation" to "'see what Congress probably meant'" by it. *Esquivel-Quintana v. Sessions*, 581 U. S. 385, 391 (2017) ***. In my view, our job in this regard is a limited one: We are called upon to understand and implement whatever Congress meant by that unadorned phrase.

When Congress selected the words "offense relating to obstruction of justice" and inserted them into the INA in 1996 ***, Congress's longest standing and most significant use of the phrase "obstruction of justice" in the Statutes at Large was its description of Chapter 73 of Title 18 as concerning "obstruction of justice." 62 Stat. 769; see also 104 Stat. 4861 (describing Chapter 73 as "relating to obstruction of justice" when adding an offense to that Chapter in 1990). To me, this is a powerful contextual clue that Congress may have simply—and solely—been drawing on its own existing understanding of which particular offenses are properly characterized as such. Accord, *Flores v. Attorney General*, 856 F.3d 280, 287-289 (3d Cir. 2017) (refusing to "look beyond Chapter 73" to "determine whether an alien's prior offense 'relat[es] to obstruction of justice'" because§101(a)(43)(S)'s "text . . . indicates Congress's intention to reference Chapter 73"). In deciding the cases before us, I would not want to rule out (even inadvertently) the possibility that Chapter 73 is Congress's actual benchmark with respect to what qualifies as an "offense relating to obstruction of justice for §101(a)(43)(S) purposes, rather than just a mere clue to some platonic, judicially divined meaning of Congress's chosen words.

I believe that hewing closely to Congress's will in this regard is especially important where (as here) making the determination of which offenses qualify implicates the "drastic" deportation sanction.*** In our constitutional system, the Legislature makes legal policy judgments regarding the particular circumstances that trigger the consequences that are associated with criminal convictions. *** And it seems at least plausible that Congress's description of certain "aggravated felon[ies],"§ 237(a)(2)(A)(iii)., as "offense[s] relating to obstruction of justice," §101(a)(43)(S), may embody its judgment to peg that subset of aggravated felonies to Chapter 73, not an intent to leave the category without form for future judicial refinement. Of course, *if* Congress has already thus decided which obstruction-related convictions so trigger the INA's aggravated-felony provision, this Court need not, and indeed should not, cobble together a "generic" offense definition from nonstatutory sources (which risks sweeping in offenses that Congress did not mean to capture).

Here, the Court correctly emphasizes Chapter 73's importance in the course of analyzing whether a possible predicate offense must have a nexus to a pending proceeding in order to qualify as an aggravated felony. *Ante*, at 4. But these parties have not fully ventilated the arguments for and against the possibility that Chapter 73 might define (in substance) the universe of offenses that "relat[e] to obstruction of justice," §101(a)(43)(S), as Congress meant that phrase to be interpreted. Nor would running that issue to ground here change the outcome.[*] As the Court notes, multiple Chapter 73 offenses require no pending proceeding. §1512(f); see also 102 Stat. 4397-4398 (1988 Congress describing an amendment to §1512 as an "obstruction of justice

[*] Before this Court, Pugin did not root his arguments in the Chapter 73-focused paradigm that I sketch here. I agree with the Court that the arguments he *did* make do not require reversing the Fourth Circuit.

amendmen[t]" (boldface deleted)). That suffices to resolve the question before us even under a Chapter 73-focused approach. The issue of whether such an approach best tracks Congress's intent can be reserved for future consideration in a case where the parties joust in earnest on the question.

Dissent:

JUSTICE SOTOMAYOR, with whom JUSTICE GORSUCH joins, and with whom JUSTICE KAGAN joins as to all but Part III, dissenting.

From early American laws, to dictionaries, to modern federal and state obstruction statutes, interference with an ongoing investigation or proceeding is at the core of what it means to be "an offense relating to obstruction of justice," §101(a)(43)(S). The Court circumvents this ample evidence only by casting a wide net and then throwing back all but the bycatch. That approach "turns the categorical approach on its head," *Esquivel-Quintana v. Sessions*, 581 U. S. 385, 393 (2017), and subverts the commonly understood meaning of "obstruction of justice" when Congress enacted §101(a)(43)(S) in 1996. I respectfully dissent.

I

The Immigration and Nationality Act (INA) defines "aggravated felony" by enumerating a long list of offenses. §101(a)(43). Some are federal criminal offenses, but others are undefined generic offenses, such as "burglary,"§ 101(a)(43)(G), and "obstruction of justice," §101(a)(43)(S), which is relevant here.

To assess whether someone's conviction is covered by a generic offense, our precedents dictate that courts use the "categorical approach." *Esquivel-Quintana*, 581 U. S., at 389. That approach disregards facts about the conviction and instead "compare[s] the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood." *Descamps v. United States*, 570 U. S. 254, 257(2013). If the elements of the underlying crime of conviction are narrower than or the same as the elements of the generic offense, then there is a "categorical match," *Moncrieffe v. Holder*, 569 U. S. 184, 190 (2013), and the underlying offense is an aggravated felony. If there is no categorical match, then the conviction is not an aggravated felony, no matter the underlying facts.

Before a court can engage in this categorical comparison, however, it must discern the "basic elements" of the relevant "generic" offense. *Taylor v. United States*, 495 U. S. 575, 599 (1990). Courts accomplish this task by looking for "evidence about the generic meaning" of the offense at the time of the statute's enactment. *Esquivel-Quintana*, 581 U. S., at 395. This means looking for the "generally accepted contemporary meaning" of the generic offense, while setting aside more unusual "nongeneric" variants that are "defin[ed] . . . more broadly." *Taylor*, 495 U. S., at 596, 599. In *Taylor*, for example, this Court concluded, after surveying various sources of meaning, that for purposes of 18 U.S.C. § 924(e), "generic burglary" encompasses any crime "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." 495 U. S., at 599. In reaching that conclusion, the

Court purposefully excluded burglary convictions in a handful of States that "defin[ed] burglary more broadly" by "eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings." *Ibid*. Expanding the definition to include those statutes would have strayed too far from "the generic definition of bribery . . . intended by Congress." *Id.*, at 595 (internal quotation marks omitted).

The question presented in these cases—whether "an offense relating to obstruction of justice,"§ 101(a)(43)(S)., necessarily involves a pending investigation or proceeding—is a question about the "basic elements" of "generic" obstruction of justice. *Taylor , 495 U. S., at 599*. That is, it is a question about how obstruction of justice was "commonly understood," *Descamps*, 570 U. S., at 257, in 1996 when Congress enacted § 101(a)(43)(S). Answering that question requires focusing on the core, "generally accepted contemporary meaning," *Taylor*, of obstruction of justice, rather than on more unusual "nongeneric" variants that are "define[d] . . . more broadly," **.

The Court loses sight of this fundamental point. Instead of focusing on whether a pending investigation or proceeding is part of the heartland of obstruction of justice, it wanders off into an array of obstruction-adjacent federal and state laws that do not require a pending investigation or proceeding. The Court then announces that those offenses are core obstruction of justice, even though the evidence it relies on, taken as a whole, reveals they are not. The result is predictable. By defining offenses that do not require a pending investigation or proceeding as core obstruction of justice, the majority forces through the conclusion that a pending investigation or proceeding is not required to qualify as generic obstruction of justice.

A reexamination of the sources relied upon by the majority, with the appropriate focus on discerning the trunk of obstruction of justice, rather than its various branches or offshoots, leads to the opposite result: To qualify as "an offense relating to obstruction of justice" under § 101(a)(43)(S), a predicate offense must require a pending investigation or proceeding.

[the remainder of the dissent is omitted but is quite extensive and critiques the statutory analysis and reasoning of the majority at length].

Notes and Questions:

1. Compare the majority reasoning of J. Kavanaugh with that of the concurrence by Jackson. Which persuades you more?

2. Should Congress amend the aggravated felony statute to be more express? What would be the negative consequences of being more precise?

3. What is the main concern of J. Sotomayor's dissent?

4. Given the outcome of this case, can defense counsel be sure that a state or federal conviction will not be characterized as an "aggravated felony?"

5. For a recent BIA case interpreting INA § 101(a)(43)(G) a theft offense resulting in a sentence greater than one year *see Matter of Pougatchev*, 28 I&N Dec. 719 (BIA 2023) (precedential) where the BIA applied a categorial approach to find that a state conviction did not meet the definition of theft. Here is a brief quote:

> Second degree burglary under New York law is also not an aggravated felony theft offense. The Supreme Court, the courts of appeals, and this Board have accepted a generic definition of theft as the "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007) (citation omitted); *see also Matter of Garcia-Madruga*, 24 I&N Dec. 436, 438 (BIA 2008). Second degree burglary under New York law involves the intent to commit a crime, and there is no requirement that a burglar take property or otherwise exercise control of property without consent. *See* N.Y. Penal Law § 140.25. Accordingly, the respondent has not been convicted of an aggravated felony within the meaning of section 101(a)(43)(G) of the INA, 8 U.S.C. § 1101(a)(43)(G).

However[!] the BIA found that Mr. Pougatchev was removable for a different aggravated felony under 101(a)(43)(F) a crime of violence because the statute under which he was convicted included "brandishing or displaying" a weapon under NY penal law. The BIA majority concluded that the proper characterization of his NY conviction would be as a crime of violence for which the sentence was greater than one year.

> We thus conclude that a conviction for displaying what appears to be a pistol, revolver, rifle, shotgun, machine gun, or other firearm while committing burglary under section 140.25(1)(d) of the New York Penal Law necessarily involves the use, attempted use, or threatened use of physical force against the person or property of another and therefore constitutes an aggravated felony crime of violence. The respondent is therefore removable from the United States. Termination of his removal proceedings is not appropriate. *Id.* At 729.

One member of the Board dissented saying that the issues was not argued before the Immigration Judge.

Page 677 (6.03[C][Notes and Questions][Note 3]): Ineffective Assistance of Counsel in the Criminal Courts

In a recent Third Circuit Court of Appeals decision, three judges applied a two-part test to measure ineffective assistance of counsel: (1) "competent counsel have acted otherwise;" and (2) was the respondent "prejudiced by counsel's performance." *Ford v. Attorney General*, 34 F.4th 201 (3d Cir. 2022). The Third Circuit held that the failure of an attorney to review an asylum application with the respondent, the failure to submit any documentation about the political party activities of the respondent, and the inadequate preparation for a final individual immigration hearing constituted "ineffective assistance of counsel." *Id.* The Third Circuit stated that former counsel's failure to provide *any* objective evidence about Haiti's political conditions could not be reasonably viewed as a tactical decision and was therefore ineffective assistance. *Id.* The court also concluded that the IJ incorrectly focused on the lack of information about the respondent's engagement with a particular political party. *Id.* The panel stated there was a "reasonable probability" that if this readily available evidence had been presented, the IJ would have granted cancellation of removal. *Id*.

Page 679 (6.04[B][1][c]): Immigration Proceedings

As of this writing, the EOIR continues to revise how immigration court operates. During the pandemic many proceedings moved to a WEBEX platform. The EOIR is also increasing the use of written pleadings and seeking to make other changes that can reduce in-person court appearances.

Note on New Interim Final Rule (IFR) Effective May 31, 2022: In an attempt to streamline certain removal cases, persons entering § 240 removal from expedited removal proceedings will now be subject to a different set of regulations. These new regulations come from the IFR that took effect on May 31, 2022. 87 Fed. Reg. 18,078 (Mar. 29, 2022). Individuals subject to these regulations now have a fast-tracked removal process that still affords the same appeal rights and protections as other facing regular § 240 removal proceedings. See the update for Chapter 2 for more information on the new IFR and its changes to those entering § 240 removal proceedings from expedited removal.

The 2022 streamlined procedure mirrors some streamlined pilot projects that the EOIR implemented in the past. Many of the new changes set firm hearing, motions, and adjudication deadlines, and create special rules for continuances to establish a "good cause" standard. *See generally* 8 C.F.R. § 1240.17.

However, most of the 2022 rules trying to fast track asylum cases are paused due to a lack of asylum officers who can conducted the Asylum Merits Interviews. Other regulations issued in May of 2023 were enjoined on July 25, 2023. While the government is appealing, the rate of asylum applications has exponentially grown both within the EOIR system and at the Asylum Office. While exact numbers are difficult to pinpoint, it appears that as of the end of calendar year 2022, the EOIR had close to a million asylum cases pending and the Asylum Office reported around 660,000 affirmative cases. By July of 2023, the numbers appear to be 1.4 million asylum cases pending at EOIR and over 850,000 before the Asylum Office. See the discussion in Chapter 8 for sources and more context.

Note on Biden Administration's Dedicated Dockets: In May 2021, the EOIR issued a policy memorandum establishing a "dedicated docket" for family immigration cases where the families have been admitted to the United States pending removal proceedings. Executive Office for Immigration Review, Dedicated Docket, PM 21-23, 1 (May 28, 2021), https://www.justice.gov/eoir/book/file/1399361/download. While dedicated dockets have been tried before, this program was implemented in ten cities: Denver, Detroit, El Paso, Los Angeles, Miami, Newark, New York City, San Diego, San Francisco, and Seattle. Adults placed on these dockets are admitted with parole to the United States and subjected to alternative forms of supervised release instead of using detention.

This dedicated docket sought to reduce the adjudication time to 300 days instead of the average 4.5 years removal proceedings usually take. Immigrants' Rights Policy Clinic, The Biden Administration Dedicated Docket, 1 (May 2022), https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Dedicated_Docket_in_LA_Report_FINAL_05.22.pdf. A May 2022 report prepared by the UCLA Immigrants' Rights Policy Clinic found that despite the efforts of the EOIR, there has still been a lack of fair and timely proceedings. *Id.* In particular, the report highlights the lack of available qualified immigration counsel who are willing to represent people in rushed procedures. The report also highlighted the low rates of asylum applications: "Only 13.6% of families on the L.A. dedicated docket filed applications for asylum; of those that filed asylum

applications, 96.9% had legal representation." Most of the people on the docket were admitted as family groups and 45.5% were children. *Id.*

Evolving Procedures at EOIR

Between January 2021 and June 2022, the EOIR adopted 17 new policy memoranda, many which repeal priorities and processing rules issued under the Trump administration. In addition, the Office of the Executive Director of the EOIR has issued six memoranda covering topics such as guidance on granting continuances and increasing pro bono participation in the courts.

The EOIR has also made some improvements in moving toward electronic submissions and greater transparency for attorneys to see court schedules. The EOIR is far behind the federal judiciary and most state judicial systems. And while some new developments in electronic submission and video hearings can allow immigration courts to operate more efficiently, physical appearances are still required for people who do not have counsel. Respondents without counsel may have to travel to the court and appear in a facility where both the IJ and the government's counsel are remote.

People representing themselves cannot submit records in the courts electronic filing system creating local and national confusion on how and where to file applications and motions for the large number of unrepresented people. Using the TRAC EOIR tools here is some data on representation for cases begun in the last three years:

Year	Notice to Appeal Date	Unrepresented
FY 2021	317,348	176,227
FY 2022	798,889	537,818
FY 2023	903,164	801,081

As the cases age, in many locations, more people find counsel. Because no free counsel is provided, most immigration judges give one or more continuances to allow the person an opportunity to retain counsel.

In additional to the published Immigration Court Procedures Manual, individual immigration courts usually have local "standing orders." After interviewing six practicing attorneys and

several judges, Professor Lenni Benson found that most agreed that "every judge and every case is different." In some cases, the technological advances helped all of the parties, but in many more cases counsel found that submissions did not reach the court or that cases had been rescheduled without sufficient time to prepare or provide actual notice to the respondent.

As is noted in Chapter 7, the DHS has begun implementing dismissal of long pending removal cases in an exercise of prosecutorial discretion, however, in some cases, the individual judges have dismissed the proceedings without first allowing the Respondent an opportunity to object to the dismissal. For many people who have been waiting years for the adjudication of an application for relief such as cancellation of removal or asylum, a dismissal may leave them without a path to status.

Terminations can also complicate qualifying for continued work authorization and can end eligibility for limited public benefits in some states. ICE argues that it is solely within the control of the government to determine which cases should go forward, citing 8 C.F.R. § 239.2(a)(7). However, advocates argue that once a Notice to Appear has been lodged with the court, the respondent is entitled to object to a dismissal and the immigration judge must consider the views of both sides. 8 C.F.R. § 1239.2(c). sit:

The EOIR has increased its use of materials aimed at educating the public and to assist the pro se or self-represented individuals in removal proceedings. The agency created a series of videos to explain "Master Calendars" and what to expect at court. Visit: https://www.youtube.com/@eoir4890 This is the EOIR channel with several videos explaining the nature of hearings and some mock hearings.

One area of concern is the rapidly rising rate of in absentia order is growing rapidly. In New York alone, the in absentia rate increased to 33% of all removal cases as opposed to 22% the prior fiscal year. There are many factors that may be contributing to the increase of these orders:

a. Pressure on the Immigration Judges to complete cases
b. Inability to find affordable or free counsel
c. Defects in the notices sent to Respondents or presented to them at the border with incomplete information or erroneous locations.
d. Confusion over where to file applications and change of address forms.
e. Many Notice to Appear not being lodged with the court after release from the border, putting the onus on the respondent to continuously check the EOIR website to learn if their cases has been scheduled.

f. Confusion over how to prioritize removal cases and a system that relies on placing every individual into court proceedings rather than pre-screening before filing as is the norm in most enforcement regimes.

Page 680 (6.04[B][1][a]): The Workload of the Immigration Court
Add the following paragraph after the last paragraph in Section [a], The Workload of the Immigration Court:

In *Matter of Cruz-Valdez*, 28 I. & N. Dec. 326 (Att'y Gen. 2021), Attorney General Garland reversed the decision of former Attorney General Sessions in *Matter of Castro Tum*, 27 I. & N. Dec. 271 (Att'y Gen. 2018), which ended the power of immigration judges to grant administrative closures. Several federal courts had also rejected *Castro Tum*, stating that immigration judges have inherent authority to manage their dockets.

Attorney General Garland also reversed a decision by Attorney General Sessions that prevented an Immigration Judge from terminating a removal case without DHS consent. See *Matter Of Coronado Acevedo*, 28 I&N Dec. 648 (A.G. 2022).

Page 697 (6.05[B and C] [Problem 6-6: Notes and Questions]

[Add Update to Note 1 *Padilla v. Immigration & Customs Enf't*]): Litigation continues to swirl around the limits of immigration judges to issue bond during removal proceedings. In March 2020, the Ninth Circuit affirmed in part and vacated and remanded in part a district court's preliminary injunction, affirming plaintiffs' due process right to bond hearings and remanding for further findings with respect to the particular process due plaintiffs. *Padilla v. Immigration & Customs Enf't*, 953 F.3d 1134 (9th Cir. 2020).

On August 24, 2020, the government filed a petition for a writ of certiorari to the Supreme Court. The Supreme Court issued an order granting the government's petition on January 11, 2021, vacating the Ninth Circuit decision, and remanding for further consideration in light of *Department of Homeland Security v. Thuraissigiam*. *Immigration & Customs Enf't v. Padilla*, 141 S. Ct. 1041 (2021).

Ultimately the Ninth Circuit vacated its prior injunction after the Supreme Court ruled in *Garland v. Aleman Gonzalez*, 596 U.S. __ ,142 S.Ct. 2057 (2022) that lower courts could not issue an injunction in this context.

The right to bond remains quite complex and the scope of the jurisdictional limits discussed in *Aleman Gonzalez* are unclear. Bond is no longer routinely available to noncitizens detained as part of the asylum process; however, DHS does use its discretion to release people on conditional parole and require that they comply with ICE "check-ins" and attend removal proceedings.

Page 698 (6.05[B]) [Note 3]): 3. Special Settlement for Children.

[Include the following paragraph after the last paragraph in Section [B] discussing the elimination of the *Flores* settlement and regulations issued by DHS and HHS]:

Shortly after the final rule was published, the district court enjoined enforcement of the regulations issued by the Department of Homeland Security and the Department of Health and Human Services, which would allow the U.S. government to indefinitely hold migrant parents and children in detention.

In December 2020, a Ninth Circuit panel affirmed in part and reversed in part the judgment of the district court. *Flores v. Rosen*, 984 F.3d 720 (9th Cir. 2020). The Ninth Circuit rejected the government's argument that the *Flores* Settlement Agreement was terminated simply because the regulations were published. Additionally, the Ninth Circuit rejected the government's argument that a change in circumstances, namely an increase in unlawful migration by UACs and FMUs, warranted termination of the Flores Settlement Agreement. Accordingly, the Ninth Circuit upheld the injunction prohibiting certain aspects of the Trump administration's regulations from taking effect and rejected the Department of Justice's attempt to terminate the Flores Settlement Agreement.

After two years of negotiations, the parties reached a detailed settlement continuing protections for children held in federal government detention. Customs and Border Protection Settlement Agreement, Flores v. Garland, Case No. 2:85-cv-4544 (C.D. Cal.) was submitted to Judge Gee for approval on May 21, 2022. As of early June of 2022, the proposed order is still pending.

Page 698 (6.05[A][Problem 6-6: Notes and Questions][Add Note 4]: Detention Relating to Removal Proceedings

4. Limiting the Availability and Scope of Judicial Review in Removal Proceedings. In a 5-4 decision issued in May 2022, the Supreme Court held that federal courts lack jurisdiction to review factual findings made by the executive branch during deportation proceedings. *Patel v. Garland*, _ U.S. _, 212 L. Ed. 2d 685 (2022). Congress severely restricted the scope and content of judicial review in 1996. In general, decisions about the grant of discretionary relief are immune from judicial review. However, there are many cases where the circuit courts of appeal continued to review the legal determinations of whether an individual was eligible for the relief.

While Pankajkumar Patel's application for adjustment of status was pending at the DHS, Patel filed an application to renew his Georgia driver's license and marked the box "U.S. citizen" even though he was eligible for a driver's license under Georgia law despite not being a U.S. citizen. *Id.* at 693. He was denied adjustment and later placed in deportation proceedings before an IJ. *Id.* The IJ denied Patel's application for adjustment of status as a defense to removal, concluding he intentionally marked "U.S. citizen" on his application, despite Patel's testimony that he made a mistake and did not intend to mark the box. *Id.* Patel sought to have a federal court review the IJ's factual finding, specifically, whether he intentionally or mistakenly checked the citizen box. *Id.* The government argued that one provision, INA § 242; 8 U.S.C. 1252(a)(2)(B)(i), bars federal courts from reviewing "any judgment regarding the granting of relief" under five specific immigration remedies, including adjustment. *Id.* at 964.

Justice Amy Coney Barrett held that federal courts lack jurisdiction to review facts found as part of adjustment of status proceedings and other discretionary-relief proceedings enumerated in section 1252(a)(2)(B)(i). *Id.* at 701. She reasoned that the statute should be read broadly to include "any judgment *relating to* the granting of relief," including factual findings. *Id.* at 696 (emphasis in original).

Justice Neil Gorsuch dissented, joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Justice Gorsuch led with the danger of administrative power and the consequences of the court's opinion for immigrants: "Today, the Court holds that a federal bureaucracy can make an obvious factual error, one that will result in an individual's removal from this country, and nothing can be done about it. No court may even hear the case. It is a bold claim promising dire consequences for countless lawful immigrants." *Id.* at 701.

Page 698 (6.05[C]): Detention Relating to Removal Proceedings

From 1994 to 2022, the frequency of physical detention of immigrants grew dramatically. Several journalists worked together to create an exploration of forms and location of this civil detention. For interactive charts, graphs and video interviews about the growth of civil detention related to immigration, see Emily Kassie, *Detained*, The Marshall Project (Sept. 24, 2019), https://www.themarshallproject.org/2019/09/24/detained.

Page 728 Following *Jennings v. Rodriguez* (6.05[A][Update on Detention:

Detention Related to Removal Proceedings

1. Release on Bond for Noncitizens in Immigration Detention. In *Garland v. Aleman-Gonzalez*, plaintiffs, who are non-U.S. citizens subject to a removal order challenged their continued detainment over the course of six months without individualized bond hearings before an IJ. The federal district courts found for the plaintiffs, holding that the Ninth Circuit's ruling in *Diouf v. Napolitano* required that detainees held for six months or more are entitled to a bond hearing before an immigration judge. As noted above the Court vacated the lower court injunctions as barred by the INA § 242(f). *See Garland v. Aleman-Gonzalez*, 596 U.S. ___, 142 S.Ct. 2057 (2022). This case continues to raise questions about the power of lower courts to issue injunctions in class actions and many courts have found that while it precludes injunctions, it does not preclude a declaratory judgment or a vacatur of regulations. The scope and limits of judicial review in immigration law is quite complex and deserving of deeper research.

In June of 2022, the Supreme Court also reversed the Third Circuit that had found a statutory right to release determinations when an individual could not be safely deported. In an almost unanimous opinion, the Court found that the post order of removal statute does not necessitate a release redetermination every six months. *See Johnson v. Arteaga-Martinez*, 596 U. S. ____, 142 S. Ct. 1827 (2022). Justices Thomas and Gorsuch wrote concurrences, Justice Breyer concurred but dissented in part. For an analysis of this case see https://www.scotusblog.com/2022/06/justices-reverse-lower-court-rulings-that-ordered-bond-hearings-for-noncitizens-in-lengthy-immigration-detention/

See also Release on bond or conditional parole—Criteria for detention or release—Release from custody under IIRAIRA, 1 IMMIGR. LAW AND DEFENSE § 7:12 (updated treatise).

Page 698 § 6.04[C] Detention and the Constitution

In fiscal year 2022, DHS detained more than 250,000 people making it one of the world's largest immigration detention systems in the world. While many states and local governments are

cancelling contracts with DHS and will no longer lease detention space, Congress continues to fund and mandate detention of many noncitizens. The website www.detentionwatch.org provides maps and background information including a helpful summary of the facts and law surrounding civil immigration detention at https://www.detentionwatchnetwork.org/issues/detention-101

ICE image Detention in Harlingen Texas image from https://www.ice.gov/detain/detention-facilities/el-valle-detention-facility.

Many of the ICE detention facilities are managed by private corporations such as CoreCivic or the Geo Group. Here is a link to its website with a statement of What They Do and Don't Do as a civil detention contractor. https://www.corecivic.com/hubfs/_resources/CC%20Immigrant%20Detention%20Facts.pdf

President Biden issued an executive order starting the wind down of private prisons for federal *criminal* detention, immigration facilities are not included in that order. Detention Watch reports

> In January 2021, President Biden issued an executive order phasing out the use of federal private prisons, including BOP and U.S. Marshals (USMS) facilities (but not privately operated ICE detention centers). As of September 2021, five CAR contracts have been terminated pursuant to the executive order, and the remaining contracts for CAR prisons are slated to end by November 2022. However, as of January 2022, ICE has reopened the former CAR prison Moshannon Valley Correctional Center in Philipsburg, Pennsylvania as an immigration detention center and plans to convert the D. Ray James Correctional Facility in Folkston, Georgia as well. The fate of the rest of these shadow prisons remains unclear.


Moshannon Valley Correctional Center in Pennsylvania, managed for ICE by the Geo Group. Image from https://www.ice.gov/detain/detention-facilities/moshannon-valley-processing-center

Note on A New Immigration Court System:

For many years, critics have questioned the use of administrative courts to adjudicate removal hearings. Given the life and death consequences at stake, the separation of U.S. citizens from non-citizen relatives, and the extraordinary power of the government to deport, scholars and advocates have asked Congress to create an Article I or statutory court, separate and apart from enforcement agencies such as the DOJ or DHS.

In January of 2021, Representative Jayapal introduced a bill that would detach the current immigration court system from the Department of Justice and create a standalone immigration court. H.R. Res. 64, 117th Cong. (2021). By establishing an independent immigration court, the bill's backers hope to promote a fairer, faster, and more humanitarian approach to immigration and border security. *Id.* The legislation did not pass.

Similar calls for an independent immigration court continue both in Congress, with the Federal Bar Association and other organizations, and in scholarship. *See, e.g.,* Kerwin and Millet *supra*.

Chapter 7: Relief from Removal

What's new in this Chapter?

Clarification of Three Forms of Cancellation of Removal

--LPR cancellation

--10-year presence and extreme and exceptional hardship

--VAWA hardship

Precedent decision *Matter of J-J-G* (BIA 2020) on proving extreme and exceptional hardship.

Ramos Da Silva v. Attorney General, 948 F.3d 629 (3d Cir. 2020) addressing VAWA cancellation eligibility and past arrests. More notes on how criminal convictions may bar applications for relief and the special limits on judicial review of the exercise of discretion under INA § 242.

Updates on the exercise of prosecutorial discretion and the litigation rejected for lack of standing brought by states seeking to stop the Biden Administration prosecutorial priorities.

Update on the status of Deferred Action for Childhood Arrivals (DACA).

Updates begin next page

Page 767: Rename § 7.01[F] to Cancellation of Removal Part A and B

At the beginning of the section add the following:

Cancellation of Removal Part A ;
The INA contains a form of defense to removal for people who already hold lawful permanent resident status. The statute INA § 240A(a); 8 U.S.C. § 1229b(a)is available to qualifying lawful permanent residents who are inadmissible of deportable from the United States if they have:
(1) been lawfully admitted for permanent residence for not less than five years,
(2) resided in the United States continuously for seven years after having been admitted in any status, and
(3) not been convicted of any aggravated felony.

There is no quota or limitation on the number of people who may be granted this discretionary form of relief. While the statute is silent, the individual must still show some type of personal hardship and a balance of factors that support the exercise of discretion. If granted the removal order is cancelled and the person retains their lawful permanent resident status. Review the text pages 757-765 discussing *Matter of Marin* and the factors that are part of the exercise of discretion.

The application for this relief is made on Form 42A and immigration judges usually refer to the relief using the form number. https://www.justice.gov/eoir/list-downloadable-eoir-forms (Form 42A last updated January of 2022).

For more information, see *Penn State Law Center for Immigrants' Rights Clinic, LPR Cancellation of Removal Toolkit (2016),* https://pennstatelaw.psu.edu/sites/default/files/Final_Toolkit_Public.pdf.

Contrast Cancellation under subpart(a) with the much higher standards and quota limits of subpart (b) for non-lawful permanent residents who are seeking relief from removal and adjustment of status to permanent status. The application for this form of relief is made on Form 42B and that is the nickname you will here used in the immigration courts. You can use the link above to find the form and see the basic outlines of the requirements. The applications require substantial supporting evidence.

Page 768: Add to the paragraph before the discussion of hardship.
How long is the wait for relief under Cancellation of Removal Part B? No one knows. One of the problems with the operation of the immigration courts is the lack of transparency about the number of cases approved for Cancellation Part B. Judges and attorneys cannot look at a published waiting list to understand how long it might be before the person is finally adjusted to the status of permanent resident. What might you do to determine the waiting period? How can you know how many people are ahead of your client? Basically, you cannot be sure. Most

attorneys explain that new numbers are available each October 1 and that if the case is not approved that year, it will likely be many more months. The EOIR does reserve a few numbers for emergency cases and detained applicants. For a detailed practice advisory visit: https://www.ilrc.org/sites/default/files/2023-03/VAWA%20Cancellation%20of%20Removal.pdf

While the individual is waiting in the queue, they do remain on a special docket and are eligible for work authorization. Travel internationally is not possible. The individual does not accrue time toward naturalization while waiting in this backlog either.

Page 783: add the following as a new **Note 3**:

3. Cumulative Facts To Establish Hardship

In March 2020, the BIA held that exceptional and extremely unusual hardship for cancellation of removal is based on a cumulative consideration of all factors. The precedential decision[19] is excerpted below:

Matter of J-J-G-

27 I. & N. Dec. 808 (BIA 2020)

MALPHRUS, Acting Chairman:

In a decision dated April 5, 2019, an Immigration Judge denied the respondent's applications for asylum, cancellation of removal, and withholding of removal pursuant to sections 208(b)(1)(A), 240A(b)(1), and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1229b(b)(1), and 1231(b)(3)(A) (2018), and for protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) ("Convention Against Torture"). The respondent has appealed from this decision. The appeal will be dismissed.

Factual and Procedural History

The respondent is a native and citizen of Guatemala who is present in the United States without being admitted or paroled. After he was placed in proceedings and found to be removable, he applied for relief from removal.

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[19] The BIA issues less than 1% of its annual decisions as precedents. This can be particularly egregious where judicial review of the decisions is curtailed by the jurisdiction stripping statute found in INA § 242. *See,* Faiza Sayed, "The Immigration Shadow Docket," 117 NW. U.L. REV. 893 (2023)(critiquing the lack of precedential decisions.)

The sole issue regarding the respondent's statutory eligibility for cancellation of removal at his hearing was whether his removal would result in exceptional and extremely unusual hardship to his qualifying relatives. The respondent presented evidence that he has six qualifying relatives— his five United States citizen children and his lawful permanent resident mother.

At the time of the hearing, his four oldest children were 12, 11, 8, and 5 years of age, and his youngest was 2 months old. The respondent testified that his children would remain in the United States if he is removed. However, his partner, the mother of his children, testified that the children would relocate to Guatemala and indicated that she would also accompany the respondent. She previously worked and helped to pay the family's rent.

The respondent's 8-year-old daughter has been diagnosed with hypothyroidism, a condition she has had since birth. She requires regular medication to treat this condition, and if she does not have it, she has problems regulating metabolic functions, like the temperature of her body. The medical costs of the respondent's children are covered by State benefits, and they receive food stamps.

The respondent claims that he would be unable to afford medication to treat his daughter's hypothyroidism in Guatemala. His partner stated that the medication costs $1,100 there, indicating that she obtained this information from the internet. However, the respondent's mother testified that she had received medical care in Guatemala free of charge and believes that it is still provided for free in that country.

The respondent's oldest child went to counseling for about 3 months in 2016 for "aggressive and defiant behavior," but there is no indication that he was diagnosed with any mental health or behavioral issues. The respondent's 11-year-old son attended the same counseling service for about 5 months in 2018 and was diagnosed with "Anxiety Disorder, unspecified" and "Attention-deficit hyperactivity disorder, unspecified." After the counselors provided this child with coping strategies to alleviate his anxiety, including watching fewer "scary movies" with his older brother, they concluded that the relevant treatment goals had been met and that he had "[s]uccessful[ly] complet[ed] therapy."

With regard to the hardship of his lawful permanent resident mother, the respondent testified that he provides support to her and that he, his partner, and his children all live with, and pay rent to, his mother. The respondent presented evidence that his mother has been diagnosed with hypertension, but the evidence also indicates that State benefits cover all of her medical expenses and that she is able to take the bus to medical appointments and pick up her own prescriptions. She receives Social Security benefits and has rented a room in her home for income in the past. The respondent's sister indicated that she could live with and take care of their mother, who would remain in the United States in the event that her son is removed.

The respondent claimed that if his children accompany him to Guatemala, they will face limited educational and economic opportunities in that country, especially in light of his son's

attention deficit disorder. He also argued that his mother and children will face emotional hardship in the event they are separated from him.

Discussion

To establish eligibility for cancellation of removal, the respondent must demonstrate, among other things, that his "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." Section 240A(b)(1)(D) of the Act. For the following reasons, we will affirm the Immigration Judge's determination that the respondent has not established that his removal would result in the requisite level of hardship to his qualifying relatives.

1. Hardship Based on a Qualifying Relative's Health

The respondent argues that his qualifying relatives would experience the requisite level of hardship for cancellation of removal, at least in part based on their medical conditions. He also asserts that medical care for these conditions is unavailable in Guatemala. It is well settled that for purposes of cancellation, we consider the "ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives." *Matter of Monreal*, 23 I&N Dec. 56, 63 (BIA 2001). The exceptional and extremely unusual hardship for cancellation of removal is based on a cumulative consideration of all hardship factors, but to the extent that a claim is based on the health of a qualifying relative, an applicant needs to establish that the relative has a serious medical condition and, if he or she is accompanying the applicant to the country of removal, that adequate medical care for the claimed condition is not reasonably available in that country.

Whether a qualifying relative suffers from a serious medical condition and whether adequate medical care for this condition is reasonably available in the country of removal are findings of fact that are made by an Immigration Judge and reviewed on appeal under a clearly erroneous standard. 8 C.F.R. § 1003.1(d)(3)(i) (2019). The applicant has the burden of establishing these facts. Section 240(c)(4)(B) of the Act, 8 U.S.C. § 1229a(c)(4)(B) (2018).

The hypothyroidism the respondent's daughter suffers may constitute a serious medical condition, particularly given the consequences if it is left untreated, but the record reflects that his daughter receives regular treatment for this condition in the United States, and there is no indication that she will be unable to continue treatment if the respondent is removed. Although the respondent's partner testified that she learned from the internet that treatment for hypothyroidism costs $1,100 in Guatemala, the Immigration Judge found that the respondent presented no evidence to corroborate her testimony. See section 240(c)(4)(B) of the Act (providing that an Immigration Judge may require the submission of corroborating evidence, even where the testimony of an applicant or witness is credible). The Immigration Judge also reasonably determined that the basis for her testimony was inadequate to establish her assertion.

Moreover, as the respondent concedes on appeal, his mother testified that she received free medical care in Guatemala and believes that it continues to be free there. In light of this testimony, the Immigration Judge was not required to accept the assertions made by the respondent and his partner regarding the cost and availability of treatment for hypothyroidism in Guatemala. See *Matter of D-A-C-*, 27 I&N Dec. 575, 579 (BIA 2019).

The respondent has submitted evidence reflecting that medical facilities in Guatemala provide a lower standard of medical care than facilities in the United States. However, this evidence does not show that treatment for hypothyroidism is not reasonably available in Guatemala. Moreover, it is well settled that evidence that a qualifying relative will experience a "lower standard of living" in the country of removal, including a lower standard of medical care, "will be insufficient in [itself] to support a finding of exceptional and extremely unusual hardship." *Matter of Monreal*, 23 I&N Dec. at 63–64; cf. *Matter of Correa*, 19 I&N Dec. 130, 134 (BIA 1984).

Further, although the Immigration Judge acknowledged that two of the respondent's children have received counseling for behavioral and emotional problems, and one of them has been diagnosed with anxiety and attention deficit disorders, there is no clear error in the Immigration Judge's findings that these are not serious ongoing medical conditions. Moreover, the record reflects that the younger child successfully completed counseling and was given coping strategies for his anxiety, and there is no indication that he has received further counseling or treatment for either his anxiety or attention deficit disorders.

There is also no clear error in the Immigration Judge's finding that if the children remain in the United States and need treatment for their conditions, they will be able to obtain it. The respondent does not argue that treatment for these conditions is unavailable in Guatemala. Nor does he meaningfully contest the Immigration Judge's finding that the son who suffers from anxiety will feel less anxious if he accompanies the respondent to Guatemala.

Finally, the Immigration Judge did not clearly err when she found that the hypertension of the respondent's mother was not serious and that she could continue to obtain treatment for this condition in the United States. The respondent's mother testified that the medical expenses stemming from her hypertension are covered by State benefits, she takes the bus to the doctor, and she is able to pick up her own prescriptions. There is also no indication that her hypertension prevents her from performing necessary tasks.

2. Other Hardship Concerns

With regard to the financial hardship that would allegedly result from his removal, the respondent does not contest the Immigration Judge's finding that he could financially support his family if his children and partner accompany him to Guatemala. Nor does he meaningfully challenge the Immigration Judge's finding that, in the event his children and partner remain in

the United States, his partner could return to work and help support the children. The respondent's mother testified that she receives Social Security benefits and has rented one of the rooms in her home for income in the past. She is currently renting space to the respondent and his family. The respondent's sister also stated that she could live with and care for the respondent's mother in the event the respondent is removed.

While the respondent's children may face fewer economic and educational opportunities in Guatemala than they would if they remained in this country, both in the short and long term, economic detriment is generally insufficient to support a finding of the required hardship. See *Matter of Andazola*, 23 I&N Dec. 319, 323 (BIA 2002). Difficulties of this nature are an unfortunate consequence of removal in many cases. The respondent has not shown that his children "would be deprived of all schooling or of an opportunity to obtain any education" in Guatemala. *Id*. Furthermore, since his children are citizens of the United States, they may return to this country later to pursue economic and educational opportunities.

Finally, we acknowledge the emotional hardship the respondent's relatives may experience as a result of their separation from him if they remain in the United States. However, we agree with the Immigration Judge that it does not rise to the level of exceptional and extremely unusual hardship.

Considering all of the hardship factors in this case cumulatively, including the hardships that may result from the medical, economic, and emotional factors, the respondent's qualifying relatives will not experience hardship that rises to the level of extremely and exceptionally unusual. The hardship must be "substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here." *Matter of Monreal*, 23 I&N Dec. at 65. In fact, the application of the exceptional and extremely unusual hardship standard must be "limited to 'truly exceptional' situations." *Matter of Monreal*, 23 I&N Dec. at 62 (quoting H.R. Conf. Rep. No. 104-828 (1996))[.]

Page 783: Add a new **Note 4** that reads as follows:

4. *Pereida v. Wilkinson*. In 2021, the Supreme Court held in *Pereida v. Wilkinson*, 592 U.S. __, 141 S. Ct. 754 (2021), that individuals seeking cancellation of removal as relief to removal must bear the burden of showing that they are not barred by a disqualifying criminal conviction.

Page 789 ((§ 7.01[G]): Add the following after **Note 3.**

The Third Circuit decided *Da Silva v. Attorney General* in January 2020 a case that concerns Cancellation of Removal for Battered spouses or child (VAWA) found in INA § 240A(b)(2). Footnotes have been omitted.

Ramos Da Silva v. Attorney General
948 F.3d 629 (3d Cir. 2020)

Appellant Ludimilla Da Silva petitions for review of her final order of removal. She contends that the Board of Immigration Appeals erred when it concluded that her convictions for assaulting her husband's mistress were not "connected to" the extreme cruelty she suffered, rendering her ineligible for cancellation of removal. We agree. For the reasons that follow, we will grant Da Silva's petition for review and vacate the BIA's removal order.

I.

Da Silva, a native of Brazil, was admitted to the United States in 1994 with a B-2 visa; she was then about two years old. She overstayed her visa and has never left the United States. Da Silva married a United States citizen, Aziim Leach, on April 30, 2012. Leach, a member of the armed services, subjected Da Silva to emotional, psychological, and physical abuse throughout their marriage. For instance, he refused to file immigration paperwork that would provide her with documented status and used her undocumented status as a method to control her. Leach also hit Da Silva's daughter and pushed Da Silva against a wall multiple times.

Most importantly to this appeal, Leach engaged in numerous extramarital affairs, including one particularly intense relationship with his coworker, L.N. On September 1, 2014, Da Silva discovered sexually explicit text messages between Leach and L.N. Da Silva questioned Leach about the messages and called L.N. to arrange a meeting at L.N.'s house so they could talk. When Da Silva arrived, L.N. got into Da Silva's car, and Da Silva confronted L.N. with the text messages. Da Silva claimed she feared that L.N. was about to hit her so she punched L.N. in the nose.

Next, L.N. proposed that they go to Da Silva's house, so they could talk with Leach. When they arrived, L.N. and Leach claimed the affair was over. Da Silva and L.N. then left to return to L.N.'s house but stopped at Da Silva's friend's house on the way, where there was a second confrontation regarding the affair. Da Silva testified that L.N. said Leach was still her "daddy," indicating that L.N. would continue the extramarital affair. In response, Da Silva "exploded" and, in "a blind rage," struck L.N. in the nose again. The IJ recognized that Da Silva had "been provoked by a woman who was [having] an affair with her husband," and the BIA noted her violent outburst was "an aberration." Da Silva was arrested the following morning.

On January 19, 2016, Da Silva pleaded guilty to two counts of assault in violation of 18 U.S.C. § 113(a)(4) and was sentenced to eighteen months' imprisonment. On July 31, 2017, the government served Da Silva with a Notice to Appear, charging her with removability for overstaying her visa pursuant to [INA § 240A(b)(2);] 8 U.S.C. § 1227(a)(1)(B). She sought cancellation of removal for battered spouses under the Violence Against Women Act (VAWA),6 but was denied relief by both the Immigration Judge and the BIA.

Petitioners are eligible for VAWA cancellation under [INA § 240A(b)(2);]8 U.S.C. § 1229b(b)(2)(A) if (1) they have been "battered or subjected to extreme cruelty" by a spouse who is a United States citizen, (2) they have been "physically present in the United States for a continuous period of not less than [three] years immediately preceding the date of such application," (3) they have been "a person of good moral character" during the past three years, and (4) "the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent."7 Da Silva concedes that she cannot satisfy the "good moral character" requirement because, as a result of her assault conviction, she was "confined . . . to a penal institution for an aggregate period of one hundred and eighty days or more." 8 However, she argues that she qualifies for the exception to the good moral character requirement, which provides that a petitioner is still eligible for VAWA cancellation if the "act or conviction was connected to the alien's having been battered or subjected to extreme cruelty" and cancellation is otherwise warranted.

***

III.

Our analysis proceeds in two parts. First, we address the government's motion to remand to the BIA and conclude that remand is not appropriate here. Next, we apply our principles of statutory interpretation to the term "connected to." We hold that the term has a clear and unambiguous meaning and that the BIA's construction of "connected to" was overly narrow and contrary to the plain language of the statute.

A. The Motion to Remand to the BIA is denied.

The government urges us to remand to the BIA so that it may re-interpret the term "connected to." The government does not concede that the BIA's construction of the term was improper but rather argues that remand is warranted to permit the BIA an opportunity to fully consider the "ambiguous" phrase "connected to." We decline the government's invitation to remand because the factors supporting remand are not present here. Indeed, we conclude that the phrase "connected to" is unambiguous, leaving no statutory gaps for the BIA to fill.

Remand is appropriate where an agency has yet to consider the issue presented to the court. For instance, in *I.N.S. v. Orlando Ventura*, the Supreme Court held that the Ninth Circuit "committed clear error" when it decided a question itself in the first instance rather than remanding to the BIA. Remand is also called for where there has been a change in law or an intervening event. Neither factor is present in this case.

The BIA has already interpreted and applied the term "connected to," and thus, we would not be conducting a de novo inquiry as in Ventura and its progeny. Moreover, there has been no change in law or intervening event that would affect the BIA's analysis. The government asked the BIA to summarily affirm the IJ's decision. If it wanted the BIA to conduct a re-analysis of "connected to," it should have asked the BIA to do so the first time around.

Accordingly, we will deny the government's motion to remand to the BIA to re-interpret "connected to."

B. "Connect to" is Unambiguous, and the BIA's Construction of the Term is at Odds with its Unambiguous Meaning.

We employ well-established principles of statutory interpretation to determine the meaning of "connected to," first asking whether the term has a plain and unambiguous meaning. If the statutory language is unambiguous, our inquiry ends because courts must presume that Congress "says in a statute what it means and means in a statute what it says there." In determining whether language is unambiguous, we "read the statute in its ordinary and natural sense."

To ascertain the ordinary meaning of words, "[w]e refer to standard reference works such as legal and general dictionaries." Dictionaries define the word "connected" similarly. Miriam-Webster defines it as "having the parts or elements logically linked together;" the Oxford English Dictionary defines it as "related, associated (in idea or nature);" and Black's Law Dictionary defines it as "to associate as in occurrence or in idea." Together, these definitions indicate that the term "connected to" means "having a causal or logical relationship."

The government argues that the plain meaning of "connected to" is too broad to be unambiguous; however, "a term in a statute is not ambiguous merely because it is broad in scope." Application of the plain, expansive meaning of "connected to" is called for as long as it is supported by the "broader context of the statute as a whole," and, indeed, the statutory context does support such application. Two other VAWA-based provisions in the INA are instructive because Congress expressly limited the broad scope of "connection" in those provisions. Under the first statute, battered spouses are exempt from a certain ground of inadmissibility if they can show, inter alia, that "there was a substantial connection between the battery or cruelty . . . and the alien's unlawful entry into the United States." A second statute, which applies to VAWA self-petitioners who are divorced from their abusive spouses, requires petitioners to demonstrate "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty." Both of these provisions reveal that Congress knew how to narrow the otherwise expansive term "connection"—either by including a modifier like "substantial" or a temporal requirement—but chose not to for VAWA cancellation of removal.

The government also cites the interpretive principle that statutory exceptions should be read narrowly so as not to "swallow" the general rule. Retaining the plain meaning of "connected to" in the exception to the good moral character requirement does not swallow the cancellation of removal statute; rather, it aligns with its purpose. VAWA cancellation of removal is "intended to ameliorate the impact of harsh provisions of immigration law on abused women." A narrow construction, like the one the BIA adopted here, would frustrate this statute's larger goal by limiting the exception to those who committed crimes at the direction of their abuser.

As the government notes, there are Supreme Court cases stating that the phrase "in connection with" is so broad that it is indeterminate; however, these cases do not compel the same holding here. In those cases, the application of "in connection with" conflicted with the purpose of the statutes at issue. Da Silva's case is distinguishable because, as discussed, a plain meaning application of "connected to" furthers, not undercuts, the objectives of the VAWA cancellation statute.

Lastly, the government cites a U.S. Citizenship and Immigration Services interoffice memorandum that addresses the meaning of "connected to." This memo does not affect our analysis. The memo first defines "connected to" as compulsion or coercion, but then conflates "connected to" with but-for causation. As an initial matter, this memo's interpretation is not binding on this Court or the BIA, and it is entitled to respect only to the extent it has the power to persuade. It is not persuasive. Its interpretation is at odds with the plain meaning of "connected to" to the extent that it requires compulsion and coercion rather than a causal or logical relationship. It is also internally inconsistent because compulsion/coercion and but-for causation are very different standards.

Thus, we hold that "connected to" is unambiguous and means "having a causal or logical relationship." Applying the plain meaning of "connected to" to this case, Da Silva has established that her convictions are connected to the extreme cruelty she suffered. The IJ and the BIA held that Leach's adultery was part of the extreme cruelty, and Da Silva assaulted L.N. while confronting Leach and L.N. about the affair. This meets the causal or logical relationship standard.

IV.

For these reasons, we will deny the government's motion to remand to the BIA to reconsider the term "connected to," grant the petition for review, vacate the BIA's order of removal, and remand for further proceedings consistent with this opinion.

Notes and Questions:

1. **Adoption of Holding as Agency Policy:** On February 10, 2022, USCIS issued an update to the USCIS Policy Manual, implementing the *Da Silva v. Attorney General* nationwide. Alert, U.S. Immigrations and Customs Enforcement, USCIS Updates Policy Guidance on VAWA Self-Petitions (Feb. 10, 2022), https://www.uscis.gov/newsroom/alerts/uscis-updates-policy-guidance-on-vawa-self-petitions.

2. **Criminal Convictions As Statutory Bars to Relief.** Should there be similar exceptions for other candidates for cancellation of removal who have criminal convictions? Why is the discretion of the immigration judge removed by Congressional statutory bars? Would a case by case decision by an judge be a better path?

3. **Limitations on judicial review.** There is a split in the federal circuit courts of appeal over whether a denial of cancellation is subject to judicial review because of the language found in INA § 242(a)((2)(B); 8 U.S.C. § 1252(a)(2)(B). In some circuits the issue of statutory eligibility for the relief provides an avenue for judicial review because the court is not considering the pure exercise of discretion.

Page798 (§ 7.01[I]): Add the following as a new **Note 9**:

On May 6, 2022, a new USCIS policy began that allows those with approved SIJS petitions to have their cases considered for a four-year grant of deferred action, solely if they are unable to apply for adjustment of status because a visa is not available. News Release, U.S. Immigrations and Customs Enforcement, USCIS Announces Policies to Better Protect Immigrant Children Who Have Been Abused, Neglected, or Abandoned (Mar. 07, 2022), https://www.uscis.gov/newsroom/news-releases/uscis-announces-policies-to-better-protect-immigrant-children-who-have-been-abused-neglected-or. According to the End SIJS Backlog Coalition, this policy will help to alleviate the SIJS backlog of individuals waiting for a green card. This policy allows individuals to apply for work authorization once granted deferred action, which otherwise would not be available to them until they can adjust status. National Immigration Project of the National Lawyers Guild, Frequently Asked Questions About USCIS's SIJS Deferred Action Policy (May 20, 2022), https://nipnlg.org/PDFS/2022_16May_CoalitionFAQs-USCIS-SIJS-Deferred-Action-Policy.pdf.

Page 804 (§ 7.02[A]): Add the following before Section [B]:

On January 20, 2021, President Biden revoked a Trump administration executive order that listed anyone with a removal order as an actual priority for removal, which was a sharp departure from how prosecutorial discretion had been applied in the past. Exec. Order No. 13993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 25, 2021).

On February 18, 2021, U.S Immigration and Customs Enforcement issued interim civil enforcement priorities. Memorandum, U.S. Immigrations and Customs Enforcement, Interim Guidance: Civil Immigration Enforcement and Removal Priorities (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf. Those priorities include 1) national security; 2) border security; and 3) public safety. The February memo includes requirements for data collection and also includes specific equities that should be considered in making discretionary decision, among them a serious medical illness or being elderly. For more information, see Shoba Sivaprasad Wadhia, *Prosecutorial Discretion in a Biden Administration Part 2*, Yale Journal on Regulation (Feb. 18, 2021), https://www.yalejreg.com/nc/prosecutorial-discretion-in-the-biden-administration-part-2-by-shoba-sivaprasad-wadhia/.

On March 5, 2021, ICE announced a case review process for individuals who believe that their case does not align with ICE's enforcement, detention, and removal priorities. The process "offers another channel through which noncitizens and their representatives can request that ICE exercise its prosecutorial discretion on a particular noncitizen's behalf, and to resolve questions and concerns, consistent with law, policy and the interests of justice." News Release, U.S. Immigrations and Customs Enforcement, ICE Announces Case Review Process (Mar. 5, 2021), https://www.ice.gov/ICEcasereview#.
https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf.

On September 30, 2021, DHS Secretary Mayorkas issued a new memo providing guidance on civil immigration law enforcement. Specially, the memo outlines three enforcement priorities for apprehension and removal. The priorities are 1) threats to national security; 2) threats to public safety; and 3) threats to border security. The memo further states that the Department will conduct assessments that will look at a "totality of the facts and circumstances," when determining whether to exercise prosecutorial discretion. *See* Memorandum from Alejandro N. Mayorkas, DHS Secretary, to Tae D. Johnson et al., *Guidelines for the Enforcement of Civil Immigration Law* (September 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.

On April 3, 2022, the Office of the Principal Legal Advisor (OPLA) issued a memo to all OPLA attorneys regarding the September 2021 memo. Memorandum from Kerry E. Doyle, Principal Legal Advisor, to all OPLA attorneys, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdfhttps://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf. The memo took effect on April 25, 2022. The memo elaborates on the priorities for OPLA attorneys to follow when assessing whether to remove a noncitizen. It instructs OPLA attorneys to assess each case independently to determine whether the case falls into one of the three enforcement priority categories. Priority A includes threats to national security, described as those who are "engaged in or [are] suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or who otherwise poses a danger to national security." Priority B includes threats to public safety, described as those "who pose[] a current threat to public safety because of serious criminal conduct," which is evaluated by a totality of the circumstances. And Priority C includes threats to border security, described as individuals who "are apprehended at the border or port of entry while attempting to unlawfully enter the United States," or those who "are apprehended in the United States after unlawfully entering after November 1, 2020." If the case is determined to be a nonpriority case, then OPLA attorneys should exercise discretion. Further, the memo includes guidance on stages where OPLA attorneys may exercise discretion, including but not limited to: not filing Notice to Appears, moving to administratively close cases, moving to dismiss removal proceedings, focusing appeals on priority cases, etc.

Litigation was immediately filed by the Attorney General of Texas, challenging the new enforcement guidelines. Texas, joined by Louisiana argued that the guidelines were issued without compliance with the notice and comment requirements of the Administrative Procedure Act. *Texas v. United States*, 2022 U.S. Dist. LEXIS 104521 (S.D. Tex. June 10, 2022)(injunction issues). The Fifth Circuit Court of Appeals refused to stay the injunction and the Supreme Court granted certiorari.

On June 23, 2023, the Supreme Court's decision in *U.S. v. Texas* found that Texas and Louisiana did not have legal standing to challenge the new enforcement guidelines that prioritized the arrest and removal of noncitizens who threatened national or public safety or those who have recently entered the country unlawfully. It is perhaps too soon to tell what the full impact of this ruling will be. As you have seen throughout this text, many of the challenges to federal immigration policy arise from States suing the Executive branch. In some situations the suits are brought to protect the rights of noncitizens or their families, e.g., the original litigation brought by the state of Hawaii to stop the Trump 2017 travel bans. *See Trump v. Hawaii*, 585 U.S. __ (2018) (reversing 9th Circuit and allowing travel bans for both immigrant and nonimmigrant visas from several predominantly Muslim countries to continue) discussed in Text at Chapter 5. It is possible that standing will exist for those people directly impacted. In other litigation, it has been State actors arguing that federal policy in the levels of immigration enforcement are harming the state. *See*, *e.g.*, Arizona v. United States, 567 U.S. 387 (2012) (finding portions of Arizona immigration statutes preempted by federal law and policy) discussed in chapter 1.

For more on the status of prosecutorial discretion see AILA, Featured Issue: Prosecutorial Discretion, (June 29, 2023) https://www.aila.org/advo-media/issues/featured-issue-prosecutorial-discretion.

In its July 2023 report on improving the operation of the immigration courts, a group of scholars with the Migration Policy Institute wrote:

> Prosecutorial discretion is central to the functioning of the immigration court system.122 For example, by encouraging the more than 1,250 ICE attorneys to focus on high-priority deportation cases, lower priority removal cases can be terminated. This speeds final resolution of priority cases, bringing faster removal for those found deportable and quicker relief for those who qualify.

See Muzaffar Chishti Doris Meissner Stephen Yale-Loehr Kathleen Bush-Joseph Christopher Levesque, RETHINKING U.S. IMMIGRATION POLICY INITIATIVE, Migration Policy Institute (June 2023) at 26.

Page 806 (§ 7.02[B]):
Replace **Note 4** with the following:

4. Status of DACA Today. The Trump administration tried to end DACA through a memorandum, but this was challenged in the courts. On June 18, 2020, the Supreme Court held

in *Dep't of Homeland Security v. Regents of the Univ. of California* that the way DACA was ended was "arbitrary and capricious" under administrative law and vacated the DHS memo rescinding DACA. Nearly six weeks after the Supreme Court decision in *Regents*, then Acting DHS Secretary Wolf issued a July 28, 2020 memorandum ("Wolf Memo"), seemingly ignoring the Supreme Court decision, by enacting a form of DACA that rejected first time applicants, effectively ended advance parole requests except in "exceptional circumstances;" and reduced renewal periods for existing DACA recipients from two years to one year.

In December 2020, a federal district court in New York held that the Wolf Memo was invalid and that DACA must be reinstated immediately, holding the Wolf Memo to be invalid. For more information see Shoba Sivaprasad Wadhia, *DACA Restored,* Medium (Dec. 5, 2020), https://shobawadhia.medium.com/daca-restored-10da2c888acc; Michael A. Olivas & Shoba Sivaprasad Wadhia, *Remove the Sword of Damocles from DACA*, Jurist (Aug. 12, 2020 7:00AM), https://www.jurist.org/commentary/2020/08/olivas-wadhia-daca-dhs-memo/. On July 16, 2021, a federal district court in Texas in a separate legal case concluded that DACA is unlawful. Texas v. United States, No. 1:18-CV-00068, 2021 U.S. Dist. LEXIS 133117 (S.D. Tex. July 16, 2021). The ruling does not affect current DACA recipients but does prevent the Department of Homeland Security from approving new DACA requests. *Id.*

On January 20, 2021, President Biden issued a Memorandum titled *Preserving and Fortifying Deferred Action for Childhood Arrivals*. Memorandum on Preserving and Fortifying Deferred Action for Childhood Arrivals, 2021 Daily Comp. Pres. Doc. 64 (Jan. 20, 2021).

On March 26, 2021, the Secretary of the Department of Homeland Security (DHS), Alejandro N. Mayorkas, released a statement announcing that DHS will issue DACA as a regulation under notice and comment rulemaking. Statement from Alejandro Mayorkas, Sec'y of the Dep't of Homeland Sec. (Mar. 16, 2021), https://www.dhs.gov/news/2021/03/26/statement-homeland-security-secretary-mayorkas-daca.

On September 28, 2021, the DHS's U.S. Citizenship and Immigration Services (USCIS) published a proposed rule that would codify the DACA 2012 policy. 86 Fed. Reg. 53736 (Sept. 28, 2021). The language of the proposed regulation is similar to DACA 2012. The proposed rule would differ on procedure by allowing a person to request deferred action without applying for work authorization (and by extension lowering the filing fee); by creating a new work authorization regulation specifically for DACA recipients; and by terminating work authorization automatically when a person's DACA has been terminated (assuming they also applied for and received work authorization). *Id.* For more information on the proposed regulation, see *https://www.presidentsalliance.org/wp-content/uploads/2021/09/2021-09-28-The-Proposed-DACA-Regulation-What-You-Need-to-Know.pdf* As of May 2022, the proposed rule has not been finalized.

As was noted in the Chapter 4 update, In August of 2022, the DHS issued new regulations related to DACA. See 87 Fed. Reg. 5302 (Aug. 30, 2022) (effective Oct. 31, 2022) creating new

regulations at 8 CFR § 236.23 governing accepting new applications and extending prior grants of DACA.

As of this writing in July of 2023, the litigation over the validity of the DACA rule is not over. One of the authors of this text, joined by many others, wrote a letter in the spring of 2023 urging the DHS to prepare for alternatives to DACA including "deferred enforced departure" with work authorization to protect the nearly 700,000 people with DACA benefits. You can find the letter at: https://static1.squarespace.com/static/6160a38f44d6a328d59c3e3d/t/64186a9dc39bcd4b2608d743/1679321759261/2023.03.20.PUBLISHED.DED4DACA.LawProf_Letter.pdf

Remove **Note 8** (No DACA Program for Parents).

Page 807 (§ 7.02[C]): Add new **subsection C, "Deferred Action for Parents"** before **§ 7.03**:

C. Deferred Action for Parents

On November 20, 2014, then-President Obama announced a new program known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), that would have allowed certain parents of U.S. citizens and lawful permanent residents to apply for temporary protection from removal as well as work permits. DAPA, however, never took effect. *See* U.S. Citizenship and Immigration Services, Archive: 2014 Executive Actions on Immigrations, https://www.uscis.gov/archive/2014-executive-actions-on-immigration#2. [Editor's Note: This is an Archive webpage and not all of the information is current.]

On January 25, 2017, then-President Trump issued Executive Order 13768, which canceled DAPA. *See* Exec. Order No. 13768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 (Jan. 30, 2017).

The Biden administration has not tried to restore this discretionary program. However, many long-term residents of the United States have the potential of securing prosecutorial discretion in removal proceedings if they are arrested or placed into removal. See the Doyle memo referenced above in connection with the update to page 804.

What's New in This Chapter:

As was noted in Chapter 2, since 2019 there have been repeated regulatory and policy shifts over how to address asylum seekers at the border. The text in this chapter has a brief history section and contains information about the Regulations adopted May 12, 2023, and litigation surrounding the Circumvention of Lawful Pathways rules.

A chart comparing asylum process depending on the location of the asylum seeker and the date of entry.

An excerpt from EOIR policy guidance about how Immigration Judges should conduct special truncated removal hearings called Asylum Merits Interview Review matters.

Updates since the 2019 text publication that indicates how Attorney General Garland rescinded some of the restrictive asylum interpretations of the prior administration and restored some of the arguments about gender, domestic violence, and family members as qualifying as members of a particular social group for asylum eligibility.

Chapter 8: Asylum and Relief for People Seeking Refuge

Updates begin next page

Page 820 (§ 8.01[A][2]): Add the following update after the Trump Presidential Memorandum for the Secretary of State, just before **Notes and Questions**:

In May 2021, President Biden increased refugee admissions for fiscal year 2021 from 15,000 to 62,500. 86 Fed. Reg. 24475 (May 7, 2021). In October 2021, he authorized the admission of up to 125,000 refugees for fiscal year 2022. Presidential Determination on Refugee Admissions for Fiscal Year 2022, 2021 Daily Comp. Pres. Doc. 827 (Oct. 8, 2021). In October of 22, he announced the allotment would remain at 125,000.
While the usual process to seek admission as a refugee requires a person to be outside of their country of origin, the proclamation expressly provides these exception in Fiscal Year 2023:

> Consistent with section 101(a)(42) of the Act (8 U.S.C. 1101 (a)(42)), and after appropriate consultation with the Congress, I also specify that, for FY 2023, the following persons may, if otherwise qualified, be considered refugees for the purpose of admission to the United States within their countries of nationality or habitual residence:
>
> a. Persons in Cuba;
> b. Persons in Eurasia and the Baltics;
> c. Persons in Iraq;
> d. Persons in El Salvador, Guatemala, and Honduras; and
> e. In certain circumstances, persons identified by a United States Embassy in any location.
>
> For more about the policy behind the allotment and the special exceptions see https://www.state.gov/report-to-congress-on-proposed-refugee-admissions-for-fiscal-year-2023/

Page 820 (§ 8.01[B]): Add new section before **§ 8.02** with the following information:

Asylum Merits Interviews New Procedures

In March 2022, the Biden administration issued a notice of proposed rulemaking that sought to revise rule promulgated in the last months of the prior Administration. The preamble to the rules stated that one of the purposes of the rules was to to streamline asylum applications. The interim final rule was published on March 29, 2022, and **took effect on May 31, 2022**. 87 Fed. Reg. 18078 (Mar. 29, 2022). The rule allows USCIS asylum officers to hear and decide asylum claims for noncitizens who have received a positive credible fear determination after being placed in expedited removal proceedings. In the past, even when a person established credible fear, the Asylum Officer had no jurisdiction to reach a full decision.

During the credible fear screening process, the rule states that the "significant possibility" standard is to be used for CAT and withholding of removal screenings, and screenings for asylum and withholding of removal is to occur without applying any bars. Noncitizens who are not granted asylum by an Asylum Officer are placed in a new form of streamlined proceedings before an Immigration Judge. In chapter 6 you learned about the regular removal process. These streamlined new proceedings are called the Asylum Merits Interview Review dockets.

In August of 2022 the head of the EOIR issued this guidance docket that gives insight to the process at the Asylum Office and how an IJ should proceed if the case is referred to the immigration court. We have edited the full directive and present it below:

> **THE ASYLUM PROCEDURES RULE** [August 26, 2022]
> **PURPOSE:** Provide guidance to adjudicators on a recently published interim final rule entitled "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers."
> **OWNER:** David L. Neal, Director [Executive Office for Immigration Review]
> **AUTHORITY:** 8 C.F.R. § 1003.0(b) **CANCELLATION:** None
>
> I. **Introduction** [omitted]
>
> **II. Initial Proceedings**
> Under the interim final rule, where a USCIS asylum officer or an immigration judge finds a noncitizen to have a credible fear of persecution or torture, USCIS has a choice how to proceed. USCIS can, as it has traditionally done, serve a Notice to Appear (NTA) on the noncitizen and file it with an immigration court, thereby placing the noncitizen in removal proceedings. *See* 8 C.F.R. § 208.30(f). Or USCIS can retain the case and decide the noncitizen's asylum eligibility in the first instance. Where USCIS retains the case, it construes the written record of the positive credible fear finding as an application for asylum, withholding of removal under the Immigration and Nationality Act (Act), and withholding or deferral of removal under the Convention Against Torture (CAT). *See* 8 C.F.R. § 208.3(a)(2). … An asylum merits interview (AMI) is scheduled before an asylum officer. Subject to certain exceptions, the AMI takes place between 21 and 45 days from the service of the record of the positive credible fear finding. See 8 C.F.R. § 208.9(a)(1). In contrast with USCIS's general practice for interviews on asylum claims, the AMI is recorded. *See* 8 C.F.R. § 208.9(f)(2).
>
> The asylum officer subsequently issues a written decision either granting or declining to grant the noncitizen's asylum application. *See* 8 C.F.R. § 208.14(b)(c). Where the asylum officer declines to grant the asylum application, the asylum officer also evaluates, in the decision, the noncitizen's eligibility for withholding of removal under the Act, and for withholding or deferral of removal under the

CAT. *See* 8 C.F.R. § 208.16(a). Where the asylum officer grants the noncitizen's asylum application, the case is finished and never arrives at an immigration court. Where the asylum officer declines to grant the noncitizen's asylum application, USCIS places the noncitizen in streamlined removal proceedings by serving an NTA on the noncitizen and filing it with an immigration court. This is done regardless of the asylum officer's findings as to the noncitizen's eligibility for withholding of removal under the Act, and for withholding or deferral of removal under the CAT. *See* 8 C.F.R. §§ 208.14(c)(1), 1240.17(a).

III. Streamlined Removal Proceedings

The interim final rule creates a new type of proceeding before the Executive Office for Immigration Review (EOIR) called streamlined removal proceedings. Streamlined removal proceedings are conducted on an expedited timeline, and certain procedures apply that do not apply in ordinary removal proceedings. The specific timeline and procedures are set out in the new 8 C.F.R. § 1240.17. As discussed below, in adjudicating claims for asylum and related protection in streamlined removal proceedings, immigration judges will have the benefit of the record created before USCIS. The expectation is that having the record will assist immigration judges to adjudicate these claims efficiently. That said, even though streamlined removal proceedings are conducted on an expedited timeline, they are governed by section 240 of the Act.

***

In general – In streamlined removal proceedings, the respondent may continue to seek asylum and related protection. If the respondent is eligible for another form of immigration relief, the respondent may apply for that relief as well. In addition, a respondent in streamlined removal proceedings, like any respondent in removal proceedings, may argue that they are not subject to removal as charged.

Both parties in streamlined removal proceedings may submit testimony or evidence for the immigration judge to consider. Should a party elect to do so, the evidence or testimony is excluded only if it is not relevant or probative, if its use is fundamentally unfair, or, subject to exceptions, if it is untimely. *See* 8 C.F.R. § 1240.17(g).

Record – No later than the initial master calendar hearing, DHS must serve the respondent and the immigration court with the written record of the positive credible fear determination, all nonclassified documentation considered by the asylum officer, a verbatim transcript of the AMI, the asylum officer's written decision, and the Form I-213, Record of Deportable/Inadmissible Alien, pertaining to the respondent. *See* 8 C.F.R. §§ 208.9(f), 1240.17(c). **The respondent is not required to file a Form I-589**, Application for Asylum and for Withholding of Removal; the written record of the positive credible fear determination is construed as the application for asylum, withholding of removal

under the Act, and withholding or deferral of removal under the CAT. *See* 8 C.F.R. § 1208.3(a)(2). [Emphasis added]

Schedule – [Omitted, the directive suggests a total of 30 days to schedule master calendar hearing and then 30 days for a status conference with the merits hearing no later than sixty days following. In many courts, these Asylum Merits Review dockets are managed by assigned judges to keep their calendars open to meet the timing goals.]*** The interim final rule anticipates that immigration judges will be able to resolve some cases without a merits hearing, and the rule sets forth criteria for judges to apply in determining whether a merits hearing is needed in a particular case. *See* 8 C.F.R. § 1240.17(f)(4). ***

Continuances and filing extensions –

The interim final rule contains detailed provisions addressing continuances and extensions of filing deadlines. The rule sets forth varying standards for when the immigration judge can continue a case or extend a filing deadline; the standard the judge applies depends on which party requested the continuance or extension and how long the case has already been delayed. *See* 8 C.F.R. § 1240.17(h)(1)-(3). Regardless of how long a case has already been delayed, an immigration judge may always grant a respondent's request for a continuance or filing extension if the respondent demonstrates that failure to grant the request would be contrary to statute or the Constitution. *See* 8 C.F.R. § 1240.17(h)(2)(iii). In addition, regardless of other factors, an immigration judge may continue a case, or extend a filing deadline, due to exigent circumstances. ***

Adjudications – In streamlined removal proceedings, as in all removal proceedings, the immigration judge must rule on any arguments that the respondent is not subject to removal as charged, and must adjudicate any claims to immigration relief the respondent makes. With respect to claims for asylum and related protection already considered by the asylum officer, the immigration judge adjudicates these claims de novo. *See* 8 C.F.R. § 1240.17(i)(1). The only exception is that, where the asylum officer found the respondent eligible for withholding of removal under the Act, or for withholding or deferral of removal under the CAT, and the immigration judge denies the respondent's asylum application, the judge must, unless certain, specified circumstances are present, give effect to the protections under the Act or the CAT for which the asylum officer found the respondent eligible. *See* 8 C.F.R. § 1240.17(i)(2).

In absentia – Subject to limited exceptions, where an asylum officer found the respondent eligible for withholding of removal under the Act, or for withholding or deferral of removal under the CAT, and the respondent subsequently fails to appear in court, the immigration judge must give effect to the applicable protection if the immigration judge orders the respondent removed *in absentia*. *See* 8 C.F.R. § 1240.17(d). The immigration judge otherwise handles

respondents' failure to appear in court the same as in standard, non-streamlined removal proceedings.

Appeals – An immigration judge's decision in streamlined removal proceedings is subject to appeal to the Board of Immigration Appeals. However, where an asylum officer found the respondent eligible for withholding of removal under the Act, or for withholding or deferral of removal under the CAT, and the immigration judge gives effect to this protection, DHS' authority to appeal is limited. *See* 8 C.F.R. § 1240.17(i)(2).

Exceptions – The interim final rule specifies situations in which certain of the rule's streamlining provisions do not apply. Examples include where the respondent has exhibited indicia of mental incompetency or the case has been reopened or remanded. Other examples include some cases where the respondent has made a prima facie showing that they are not subject to removal as charged, or that they are eligible for relief other than asylum, related protection, or voluntary departure. *See* 8 C.F.R. § 1240.17(k). ***

For EOIR adjudicators – All immigration judges, at both the trial and appellate level, and appropriate legal staff shall receive training on streamlined removal proceedings. … Immigration judges and legal staff should bear in mind that, though streamlined removal proceedings are novel in some respects, they are governed by section 240 of the Act. All rights guaranteed to parties by section 240 of the Act apply in streamlined removal proceedings. For example, respondents in streamlined removal proceedings have the right to be represented by counsel at no expense to the Government, and they have the right to a reasonable opportunity to present evidence and to examine DHS' evidence. *See* section 240(b)(4) of the Act. In addition, the normal burdens of proof under section 240 of the Act and 8 C.F.R. § 1240.8 apply in streamlined removal proceedings. For example, where a respondent in streamlined removal proceedings is charged as being in the United States without being admitted or paroled, DHS has the initial burden to establish the alienage of the respondent; where DHS does so, the burden on inadmissibility then flips to the respondent. *See* section 240(c)(2) of the Act; 8 C.F.R. § 1240.8(c). Where a respondent in streamlined removal proceedings applies for discretionary relief from removal, the respondent has the burden to establish that he or she is eligible and merits relief in the exercise of discretion. *See* section 240(c)(4)(A) of the Act.

IV. Conclusion ***

Full original available at: https://www.justice.gov/eoir/book/file/1538306/download
Footnotes in original omitted.

The DHS issued 11 months of data revealing how the Asylum Merits Interview and Review Process was proceeding. This table shows June 22 to Apr 23 totals:

Asylum Processing Rule: Outcome Summary	**Total**
AMI-Eligible Credible Fear Claim Outcomes	**5,881**
Positive Fear Findings[1]	3,023
Negative Fear Findings[2]	2,433
Admin Closed[3]	291
Pending Completion[4]	94
Other[5]	40
AMI USCIS Case Outcomes	**1,827**
Asylum Granted	297
IJ Referral	576
Admin Closed[6]	418
Pending Completion	536
AMI Cases Referred to EOIR - Comprehensive EOIR Case Outcomes	**494**
Relief[7]	87
Removal Orders[8]	187
Administrative Closing - Other	1
Dismissed by IJ	6
Terminated	11
Voluntary Departure	6
Pending[9]	196

Notes: Data in this report are organized by cohort based on the month of U.S. Customs and Border Protection (CBP) encounter, rather than by the date of each subsequent event. For example, data in the June 2022 column describe fear claims and case outcomes for the 593 people encountered in June 2022, regardless of when their fear claims or Asylum Merits Interview (AMI) cases

were adjudicated. U.S. Citizenship and Immigration Services (USCIS) data valid as of May 1, 2023. Department of Justice (DOJ) Executive Office of Immigration Review (EOIR) data valid as of April 30, 2023 and Immigration and Customs Enforcement (ICE) data valid as of April 30, 2023.

[1] Include positive fear determinations and negative fear determinations appealed to EOIR and vacated by an Immigration Judge (IJ).

[2] Include negative fear determinations not appealed to EOIR and negative fear determinations appealed to EOIR and upheld by an IJ.

[3] Admin closed reasons include dissolve, ineligible for Asylum Processing Rule (APR), language access, and other reasons.

[4] Pending completion with USCIS and/or EOIR.

[5] Cases with lifted detention and other unknown completion status.

[6] AMI admin close reasons include interview no-show, ineligible APR/AMI processing, outside of Jurisdiction, and other reasons.

[7] Relief categories include asylum, asylum withholding, Convention Against Torture (CAT) Withholding issued based on Status Conference or Immigration and Naturalization Act (INA) 240 proceedings, and other relief.

[8] Includes *in absentia* and not *in absentia* removal orders issued based on Status Conference or INA 240 proceedings.

[9] Includes Change of Venue and Transfer.

Source: DHS Office of Immigration Statistics analysis of USCIS, EOIR, and ICE data.

Critique

The 2022 asylum rule was a significant change from previous rules, which limited the role of asylum officers during the expedited removal process. To see a detailed flowchart that illustrates all the steps a foreign national might experience under the streamline Asylum Merits Interview process visit :https://immigrantjustice.org/staff/blog/asylum-seekers-have-right-fair-and-reliable-asylum-process-new-biden-rules-would-rush Read Azadeh Erfani's analysis of the impact of the Interim Final Rules and the National Immigrant Justice Center's full comment on the rules.

These special timelines have raised great concern in the field. According to Human Rights First, the rule has many improvements as well as areas of concern. Improvements include relieving the backlog of asylum cases, minimizing detention of asylum seekers, providing all asylum seekers with full asylum interviews with USCIS, and permitting immigration judges to grant asylum without a merits hearing. However, there are also concerns regarding the timelines and deadlines imposed by the rule. Some concerns include making it harder for noncitizens to obtain counsel and thoroughly prepare their cases, mistaken decisions because of rushed deadlines, and due

process violations. *See* Human Rights First, Fact Sheet: Asylum Process Rule Includes Welcome Improvements, But Critical Flaws Remain to Be Resolved (May 6, 2022), https://humanrightsfirst.org/library/asylum-process-rule-includes-welcome-improvements-but-critical-flaws-remain-to-be-resolved/

Several groups filed litigation challenging aspect of the Interim Final Rules and that litigation continues. "The Circumvention of Lawful Pathway Regulations" published May 12, 2023 are the subject of extensive litigation and may be enjoined based on reports from argument heard July 19, 2019. *See* Maria Sachetti, *Judge May Decide Fate of Biden's Asylum Rules within One Week*, THE WASHINGTON POST, (July 19, 2023).https://www.washingtonpost.com/nation/2023/07/19/border-asylum-biden-court-hearing/

Summary of New Procedures and Rules as of July 2023

In truth, reducing the complex regulatory and internal procedures for a textbook is daunting. Moreover, as soon as new regulations were promulgated in both the Trump and Biden administrations, litigation stayed some but not all provisions. On July 25, 2023 as this supplement was being finalize, Judge Tigar of the Federal District Court, Northern District of California, vacated the new Circumvention of Lawful Pathway Regulations. We provided an excerpt from that opinion in the supplement to Chapter 2 *supra.* The government immediately appealed the ruling. We have left this discussion to allow you to consider how asylum procedures might soon be different and to allow for class discussion of managing large numbers of applications.

So with caution and warnings that this is an oversimplification, Professor Lenni Benson prepared the one-page chart that appears following these thought **questions**:

1. How would you explain the process to a client contacting you from Mexico who is preparing to approach the border? Review the facts of Problem 2-3-2 for the mother and child waiting in a shelter in Tijuana.
2. How would you research how to prepare a client for a Credible fear interview? What do you think is required under the higher standards in the new Circumvention of Lawful Pathways rules that the individual show a substantial probability of harm as opposed to a credible fear? You will read about these standards in the main chapter when you read *Cardozo Fonseca.* See text page **823.**
3. While the regulations state that individuals in the Asylum Office credible fear interviews are entitled to counsel. Many problems have been reported. See Report Obstructed Legal Access: NIJC's Findings From 3 Weeks Of Telephonic Legal Consultations in CBP Custody (May 25, 2023) available at: https://immigrantjustice.org/staff/blog/obstructed-legal-access-june-2023-update
4. Here are some of the problems they reported in based on their attempt to represent clients:

- Sporadic access to paper or writing utensils: CBP is not regularly permitting people to have paper or writing utensils with them at legal consultations or during CFIs or immigration judge reviews. Imagine arriving at the border after a harrowing journey and then being forced to absorb an hour's worth of complex legal information by memory, then sufficiently retain that information and access it without notes during a high-stakes interview with a government official. Impossible for most. Furthermore, without writing utensils, people are unable to even record an attorney's phone number, making it nearly impossible for clients to contact legal counsel. ***
- Failure to provide important legal documents: The Form M-444 ("Information about Credible Fear Interview") provides critical information about the credible fear process. Every person undergoing the process should receive this form in a language they understand. However, one person told an NIJC attorney during their consultation they had not received the form. In another case, a CBP officer told an NIJC attorney that the person they were consulting with had been served the M-444, but the person told the attorney he hadn't received anything. Another person had arrived into CBP custody on May 11, and had not received any paperwork when he spoke with NIJC on May 16. ***
- Unworkable and unsustainable scheduling: The Biden rapid border deportation program rushes people through the CFI and immigration judge review process within days, all while in CBP custody. People have 24 hours to obtain a legal consultation, regardless of when that 24 hours falls. *** At the same time, CBP struggles to facilitate calls to attorneys when attorneys are available. NIJC attorneys typically wait about 45 minutes between calls from asylum seekers in CBP custody during business hours. This means NIJC reaches fewer people than we have capacity to serve, reducing access to counsel.

  After reading these issues? What would you recommend that the DHS do to improve the accuracy and fairness of the procedures?

It is impossible to fully diagram in one page all of the procedures being used to process the asylum and other protection claims under 2023 regulations and policies. The chart should help you make a comparison about the adequacy of the procedures and the availability of judicial review.

Many of the programs outlined in the chart are subject to litigation with some plaintiffs challenging the regulations as unduly protective and some State governments arguing the policies are overly generous and encouraging irregular migration.

Chart Next Page Below, San Ysidro inspection station at U.S./Mexico border in Southern California. Image from CBP.gov newsroom pages.

At Border	CBP One App	At arrest in interior (after May 12, 2023)	Affirmative w/ lawful admission	Defensive, entry prior to May 12, 2023
Expedited Removal or Parole for Regular Removal (DHS controls)	Exp removal or § 240 removal	Expedited Removal unless meets Higher standard or fits *exception* to Circumvention of Legal Pathways rules	If no NTA issued, apply at the Asylum Office of USCIS, "on -line process for forms.	For people not in expedited removal, after NTA issuance file application with EOIR –if NTA has not been lodged with court, try to perfect filing with USCIS
Expedited Removal → Credible Fear (CFI) before Asylum Officer	Same if expedited removal selected by DHS	"Substantial Probability" of persecution or torture. Detained?	Await interview at Asylum Office	EOIR determines whether person has well-founded fear of persecution and whether subject to bars, e.g., untimely filing
Option 1: Convert to Asylum Merits Interview where AO can grant. If not granted, refer for special Asylum Merits Review before EOIR— special docket a limited for § 240	Same if expedited removal selected by DHS	Option 1: confirm standard met and put into regular removal	Grant = asylee status	Grant, ICE may appeal to the BIA
Option 2: Only hear as CFI, refused allows limited IJ review--	Same as column one	Option 2: refuse and allow limited IJ review of substantial probability standard	Refer → to EOIR for de novo § 240 removal hearing and asylum application	Denial, individual may appeal within 30 days to BIA
NO BIA review	Same	Possibility of BIA review	BIA review	BIA review
No judicial review either under § 242 or habeas	Same	Unclear as to judicial review under INA § 242	Petition for Review to Fed. Cir. Court of Appeals and cert. to Supreme Court possible	Petition for review for individual to Fed Cir. Ct. of Appeals, possible cert to U.S. Supreme Court.

Comparison Chart of Asylum Process after May 12, 2023:

Read vertically to follow the process depending on physical entry or posture of the asylum applicant. Note this is greatly simplified and does not include possible exceptions. Each column explains the major steps in an asylum adjudication. Read the chart vertically.

Page 821 (§ 8.02): in chart in the text, correct BIS to "BIA"

Page 852 (§ 8.02[D][2]): Add the following before **[3]**:

Attorney General Garland Restores Protections for Victims of Domestic Violence and Family as a Particular Social Group

In January 2021, the Acting Attorney general issued a second *Matter of A-B-* decision to "provide additional guidance" on three issues arising in asylum cases involving persecution by nonstate actors. *Matter of A-B-*, 28 I. & N. Dec. 199 (Att'y Gen. 2021). First, the Attorney General provided that *Matter of A-B-* did not alter the longstanding "unable or unwilling" standard or implement a new test for when persecution by third parties may be attributed to the government. Second, in cases where an asylum applicant is a victim of violence or threats by non-government actors, if the government has actively engaged in protecting its citizens, failures of the government to prevent such violence or threats do not establish a breach of the government's duty to protect its citizens. Third, the Attorney General reiterated that the two-prong nexus test established in *Matter of L-E-A-*, 27 I. & N. Dec. 40, 43-44 (BIA 2017) is still the proper approach for determining whether an asylum applicant has satisfied the nexus requirement in mixed-motive cases.

In June 2021, Attorney General Garland withdrew both prior decisions in *Matter of A-B-*, holding that immigration judges and the Board should no longer follow *A-B- I* or *A-B- II* when adjudicating pending or future cases. Instead, pending forthcoming rulemaking, immigration judges and the Board should follow pre-*A-B- I* precedent, including *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014). *Matter of A-B-*, 28 I. & N. Dec. 307 (Att'y Gen. 2021). The same day, the Attorney General vacated *Matter of L-E-A-*, 27 I. & N. Dec. 581 (Att'y Gen. 2019), returning the immigration system to the preexisting state of affairs pending issuance of a final rule addressing the definition of "particular social group" *Matter of L-E-A-*, 28 I. & N. Dec. 304 (Att'y Gen. 2021). Since this recission, the circuits have continued to recognize family ties and relationships within claims for asylum based particular social group. *See e.g., Vasquez v. Garland*, 4 F.4th 213 (4th Cir. 2021) (holding that the petitioner sufficiently established her nuclear family as the particular social group that the persecution occurred on account of). For more information, *see* https://www.aila.org/infonet/asylum-cases-on-social-group.

The 2021 Attorney General's decisions have allowed many more asylum claims to advance based on particular social group involving familiar violence. This is a complex topic and an evolving area of law. Attorneys and students can register at the Center for Gender and Refugee Studies to receive practice advisories: https://cgrs.uchastings.edu/article/cgrs-releases-new-practice-advisory-gender-based-fear-return-claims-women-and-girls/

Page 856 (§ 8.02[D]): Add the following as new Note 3:

3. Regulating Social Group. On February 2, 2021, President Biden issued Executive Order 14010, titled "Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border." Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 2, 2021) https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration.

The executive order directed the Attorney General and DHS to, within 270 days, "promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a "particular social group," as that term is used in 8 U.S.C. 1101(a)(42)(A), as derived from the 1951 Convention relating to the Status of Refugees and its 1967 Protocol." *Id.* at 8271.

Page 883 (§ 8.03): Before § 8.04, add a new § 8.03[F] titled "Asylum Restrictions by Executive Action" and add the following:

Historical Attempts to Control the Border

1. *Migrant Protection Protocols (MPP), or "Remain in Mexico".* On December 28, 2018, the Trump Administration announced the "Migrant Protection Protocols," under which individuals who arrived at the southern border and asked for asylum were given notices to appear in immigration court and then sent back to Mexico, prompting a large number of those subject to the MPP to be unable to make their immigration court dates and subsequently being ordered removed or deported. The MPP was challenged in federal court, and briefly enjoined by the Ninth Circuit, but the Supreme Court stayed the injunction, resulting in the MPP remaining in effect. *See* U.S. Dep't of Homeland Security, Archived Content: Migrant Protection Protocols (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols

2. On January 20, 2021, the Department of Homeland Security issued a statement suspending new enrollments in the MPP. U.S. Dep't of Homeland Security, *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program*, (Jan. 20, 2021), https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program. On June 1, 2021, DHS terminated the MPP. Memorandum from Alejandro Mayorkas, Sec'y of the Dep't of Homeland Sec., Termination of the Migrant Protection Protocols Program (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.
   Later the same month, on June 23, 2021, DHS announced that it was expanding the pool of individuals enrolled in MPP who would be eligible to be processed into the United States. The **expansion included MPP-enrolled individuals who had their cases terminated or were ordered** removed in absentia, as well as MPP-enrolled individuals

with pending cases. Press Release, Dep't Homeland Sec., DHS announces Expanded Criteria or MPP-Enrolled Individuals Who Are Eligible for Processing into the United States (June 23, 2021), https://www.dhs.gov/news/2021/06/23/dhs-announces-expanded-criteria-mpp-enrolled-individuals-who-are-eligible-processing.

After the termination of MPP by DHS, the state of Texas filed suit to stop the termination of the MPP. For a litigation timeline of MPP, see https://refugees.org/wp-content/uploads/2022/03/MPP-TimelineFinal.pdf.

The district court in West Texas held that the termination of MPP failed to comply with administrative law and ordered DHS to reimplement the program. The Fifth Circuit refused to set aside this decision. The U.S. Supreme Court heard oral argument on April 26, 2022, in *Biden v. Texas*, to determine whether the termination of MPP has legal effect. On June 30, 2022, the Supreme Court reversed the Fifth Circuit and held that the Biden administration had the legal authority to end the program. For more on the Supreme Court's decision, see the supplement to **Chapter 2**.

3. *Title 42 Expulsions and Restrictions Based on COVID-19.* On March 20, 2020, the Centers for Disease Control and Prevention (CDC) issued an order titled Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists. This order was issued pursuant to the CDC's public health authority under Title 42 and allowed DHS to expel anyone, even those fleeing persecution and seeking asylum, if there was a "serious danger of the introduction of [a communicable] disease into the United States." On May 19, 2020, the order was extended indefinitely. Public health experts have called for an end to the order based on the "fundamental problem [that Title 42] expulsions are targeted primarily at a small number of people seeking asylum at a time when restrictions placed at ports of entry still allow large numbers of people to cross the border daily." *See* American Immigration Council, Fact Sheet, A Guide to Title 42 Expulsions at the Border (Mar. 29, 2021), https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border. In January 2021, President Biden announced he would not lift the Title 42 Order and has continued to expel foreign nationals based on the order. For more information, see https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border. On August 2, 2021, the CDC released an order after a reassessment, continuing Title 42 and exempting unaccompanied children arriving at the border. 86 Fed. Reg. 42828 (Aug. 5, 2021).

4. Title 42 continues to be controversial. On the litigation front, the D.C. Circuit held in March 2022 that under Title 42 the Executive may not expel noncitizens to places where they may face persecution or torture. Instead, the Executive has the authority under Title 42 to expel noncitizens to places where they would not face persecution or torture and

has the authority to detain noncitizens until they can be removed to those countries. *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022).

5. On April 1, 2022, the Biden administration announced that it would end Title 42 expulsion beginning on May 23, 2022. Media Statement, Centers for Disease Control and Prevention, CDC Public Health Determination and Termination of Title 42 Order (Apr. 1, 2022), https://www.cdc.gov/media/releases/2022/s0401-title-42.html. In response, DHS Secretary Mayorkas announced that beginning on May 23, 2022, DHS would no longer process individuals pursuant to Title 42. Dep't of Homeland Sec., FACT SHEET: DHS Preparations for a Potential Increase in Migration (Mar. 30, 2022), https://www.dhs.gov/news/2022/03/30/fact-sheet-dhs-preparations-potential-increase-migration.

6. Two lawsuits followed the Biden Administration's rescission of Title 42. The first lawsuit, *Arizona v. CDC*, was filed in a federal district court in Louisiana and named 24 plaintiff states, arguing that the rescission of Title 42 did not go through proper procedures. The district court issued a nationwide preliminary injunction against the April 2022 rescission of Title 42. As of February 13, 2023, an appeal is pending in the Fifth Circuit. The second lawsuit challenged the lawfulness of Title 42 itself. *Huisha-Huisha v. Mayorkas* was filed in the D.C. federal district court, arguing that Title 42 was arbitrary and capricious. The district court issued a permanent injunction against Title 42. For more information on the two lawsuits, *see* https://www.lexisnexis.com/LegalNewsRoom/immigration/b/outsidenews/posts/title-42-comes-to-the-court-steve-vladeck.

7. Following this extensive litigation in the courts regarding the Biden Administration's plans to end Title 42 expulsion, the U.S. Supreme Court, in a 5-4 holding on December 27, 2022, allowed for the continuance of Title 42. This holding allows the plaintiff states to keep Title 42 in place and continue blocking the Biden Administration's attempts to end the policy. *Arizona v. Mayorkas*, 214 L.Ed.2d 312 (U.S. 2022) https://www.supremecourt.gov/opinions/22pdf/22a544_n758.pdf

   For more information on the racialized impacts of Title 42, see the American Constitution Society's podcast on the current refugee crisis and challenges posed by the U.S. immigration system, https://www.acslaw.org/podcast/episode-43-just-how-broken-is-our-immigration-system/.

Page 883 (§ 8.03): Add a new example hypothetical after above additions, before **§ 8.04** titled "**Problem 8-3: Exploring the Bars to Asylum and Withholding of Removal**"

Asal was born in Afghanistan in 1996. She is now 26 years old. For a time, her entire family lived in exile in Pakistan due to harassment by the Taliban. Asal was 6 years old when they arrived there. They had temporary residence in Pakistan that had no specific end date. Asal has a copy of her Pakistan visa in her passport.

As the U.S. and other military forces helped to stabilize the region, her family returned and settled near Kabul. Asal was 22 when her family returned. Asal admired the peacekeepers and with the permission of her family she trained to be a police officer. As part of her training, she was trained in the use of guns and some military equipment.

At age 23, she was part of a group of officers who were specially trained to interrogate and investigate acts of sabotage that might have been perpetrated by female members of any insurgent or terrorist groups. One of the young women in her unit's custody was diabetic but did not tell anyone upon her arrest. During the long hours of interrogation, she asked for water, but water was only allowed every six hours. The young woman fell into a diabetic coma and died in custody. Her family blamed the police and the military. Several websites named female officers as people responsible for the detained woman's death. Asal was not named in these posts but many people in her family, her neighborhood, and of course, her colleagues knew she was part of the interrogation team.

Asal also was very proud of her work as a police officer where she organized and lead community meetings with women and girls to encourage female education. On several occasions, she traveled to meetings with her supervisor to convince regional leaders to expand opportunities for females to attend school. At these meetings, members of the Taliban would also attend if they were leaders in that regional area. The Afghan government was trying to build a dialogue between Taliban clerics and the civil society. Asal, would provide travel stipends and reimbursement from Police Department funds for all people who submitted travel expenses. Some of the Taliban leaders requested and received funds under Asal's authority.

Asal was evacuated from Afghanistan in August of 2021 by the U.S. military and granted humanitarian parole admission to the United States. She would like to apply for asylum. Her current grant of work authorization and parole will expire in 18 months.

Questions:

1. Is Asal subject to any statutory bars found in INA § 208(b)(2)(D); 8 U.S.C. § 1158(b)(2)(D)?
2. Is Asal subject to a statutory bar found in INA § 212(a)(3)(B)(i); 8 U.S.C. § 1182(a)(3)(B)(i)?
3. Do these facts raise any other concerns?

Page 886 (§ 8.04): Add new section before § 8.05
Temporary Protected Status compared to asylum:

A new discussion of Temporary Protection status INA § 244 is found in the supplement to **Chapter 4**.

Another protection that may be available for people who fear returning to their home country is Temporary Protected Status (TPS). TPS is available to individuals from countries that have been designated by the Secretary of Homeland Security and who are physically and continuously present in the U.S. since the date of designation. Individuals who are granted TPS may also be granted work and travel authorization and may not be removed from the U.S. during the designation period. Individuals applying for asylum may not be granted work authorization until asylum is granted. Further, asylees may be granted travel authorization, but risk their status being revoked if they travel to their home country. Unlike asylum, TPS is a temporary form of protection that does not directly lead to lawful permanent resident status. Jill H. Wilson, Cong. Rsch. Serv., RS20844, Temporary Protected Status: Overview and Current Issues (Oct. 10, 2018), https://crsreports.congress.gov/product/pdf/RS/RS20844/48.

Page 889 (§ 8.05[D]): Insert after text on **page 889**:

The standard set by the Attorney General in *Matter of L-A-B-R-,* 27 I & N Dec. 405 (A.G. 2018) *that continuances should only be granted for good cause,* has been followed by the Sixth Circuit, Fifth Circuit, Eleventh Circuit, and Fourth Circuit, and distinguished by the First Circuit. In the First Circuit, the court distinguish a request for a continuance where the respondent was a U status beneficiary but subject to the quota delays. *See Benitez v. Wilkinson*, 987 F.3d 46 (1st Cir. 2021).

The issue of qualifying for a continuance has become most urgent in many removal hearings. The agency has more than 1.3 pending cases as of May of 2023. The EOIR and individual judges may be pressured to meet performance measures and denying a continuance. Continuances can also impact eligibility for work authorization. As noted in Chapter 6, there is rarely ever counsel appointed at government expense in removal proceedings, seeking a continuance to find counsel is quite critical.

The future of asylum adjudication and the years it takes to complete the process is the main focus of a report by the American Immigration Council, Beyond a Border Solution How to Build a Humanitarian Protection System That Won't Break (May 2023) available at: https://www.americanimmigrationcouncil.org/research/beyond-border-solutions

[Editor Note: This report has several recommendations that are summarized in the Chapter 2 supplement where **Problem 2-4** asked the reader to consider recommendations to improve efficiency and fairness of the existing expedited removal process.]

Examine the table below, generated by the researchers at TRAC. What is the impact of such a large number of people being placed into removal proceedings in five locations?

Are there enough judges?
Are there enough ICE attorneys?
How will the immigrants find counsel?
For those seeking asylum or other protection, how long will their cases last?

Top Five Destinations for Immigrants in Immigration Court Filings – March 2021 to May 2023

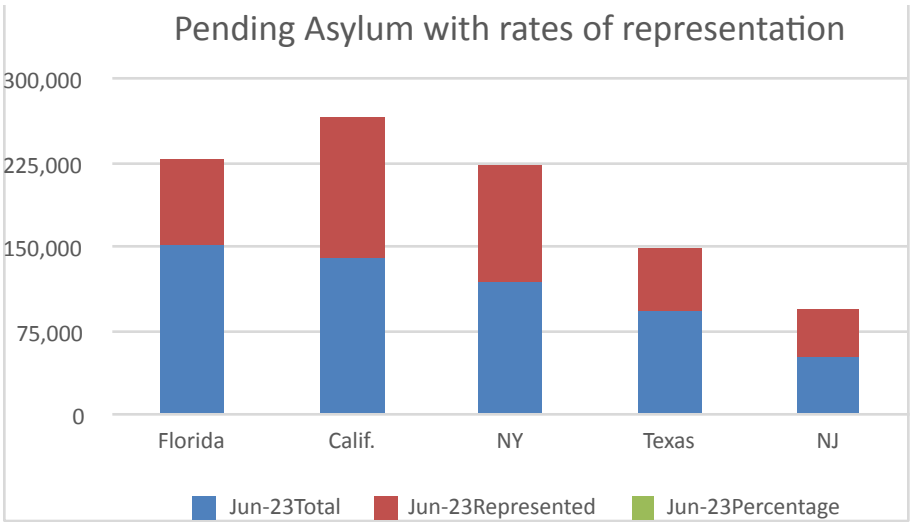
	Top 5 Destinations	
	Rank	Number
New York City, NY	1	134,848
Miami-Dade County, FL	2	114,408
Los Angeles County, CA	3	74,854
Harris County, TX (Houston)	4	67,550
Cook County, IL (Chicago)	5	36,355

Source: *https://trac.syr.edu/reports/720/*
Trac also offers several tools to look at past adjudication times, outcome of cases, nationality of asylum seekers, etc.

Visit: https://trac.syr.edu/immigration/#m_tools

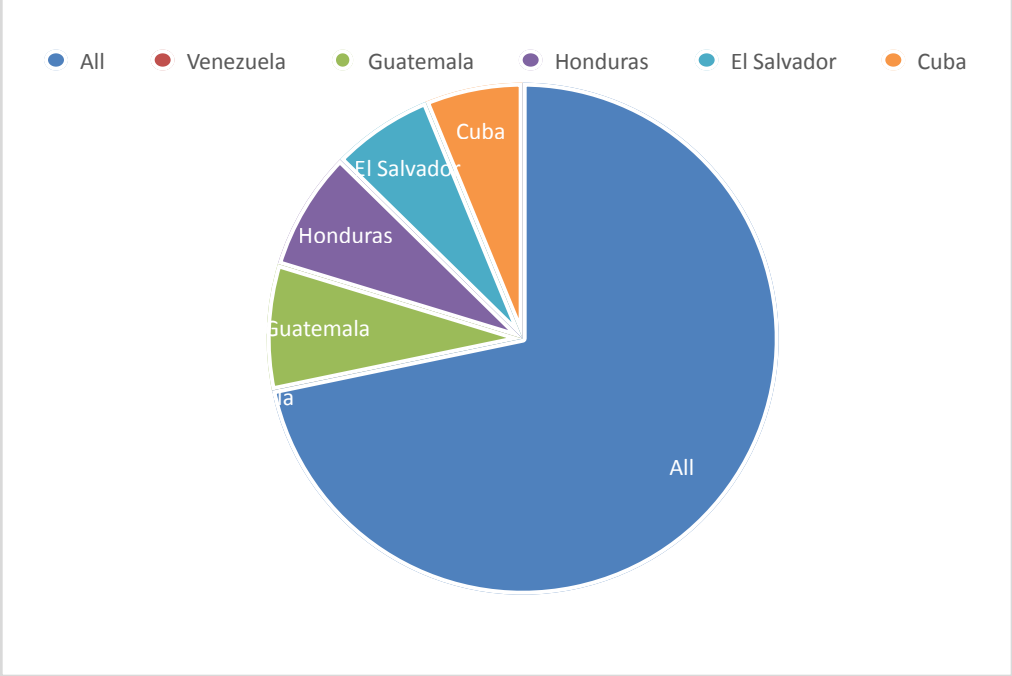
As of July 2023, Trac reports that the EOIR now has 2.4 million pending cases.

States with the largest number of pending asylum applications as reported by EOIR data June of 2023:



Source: Trac Pending Asylum Applications in Immigration Court; chart assembled from data by Lenni Benson

The pie chart illustrates the total number of pending asylum applications in the immigration courts and the top five nationalities as of June 2023.



Nationality	Number
All	919,433
Venezuela	104.653
Guatemala	102,035
Honduras	97,848
El Salvador	82,705
Cuba	79,444

These numbers do not include the asylum applications pending before USCIS Asylum Offices. For several years, USCIS has not been publishing data about the number of cases pending before the Asylum Office. The lack of transparency about workloads and processing priorities can make practicing immigration law very difficult and for the people seeking asylum, "How much longer must I wait to have my asylum interview?" has become a guessing game.

In 2022, TRAC used notes from an AILA liaison meeting with USCIS to estimate the number of applications for asylum pending before the USCIS. Their report states that as of December of 2022, an estimated 778,084 asylum seeking individuals had applications pending before the

USCIS—these are nicknamed the "affirmative applications." For the full report go to: https://trac.syr.edu/reports/705/

The chart on the next page illustrates how many of these affirmative filings are now referred to the Immigration Courts.

Affirmative and Defenses Filings for Asylum in the Immigration Courts

Fiscal Year End*	Number of Pending Cases		
	All	Affirmative	Defensive
2012	105,919	73,676	32,243
2013	108,398	69,999	38,399
2014	114,603	64,001	50,602
2015	136,145	66,263	69,882
2016	163,451	60,553	102,898
2017	259,871	69,024	190,847
2018	364,990	105,818	259,172
2019	489,003	152,396	336,607
2020	614,751	182,778	431,973
2021	667,229	196,994	470,235
2022	756,690	185,057	571,633
*2023	787,882	181,144	606,738

* The fiscal year ends on September 30; latest data for FY 2023 is at the end of Nov 2022.

In June of 2023, the Migration Policy Institute wrote a report that states:

Asylum Backlogs

More than 1.3 million asylum applications were awaiting processing as of May. Of these, approximately 750,000 were pending in immigration courts—comprising about 40 percent of all cases in the immigration court system—and 600,000 were with U.S. Citizenship and Immigration Services (USCIS). The average asylum case in immigration court takes more than 4.2 years to be completed.

Source: https://www.migrationpolicy.org/article/refugees-and-asylees-united-states#asylum-backlogs. No pin cite is provided for this estimate.

Chapter 9: U.S. Citizenship and Naturalization

What's New in This Chapter:

Updates on USCIS efforts to increase Naturalizations for the 9 million qualified Lawful Permanent Residents, over 1 million naturalizations in FY 2022.

New efforts to limit "birthright Citizenship."

How does USCIS view admission of the use of marijuana and the naturalization requirement of "good moral character."

Updates begin on the next page.

Page 894 (§ 9.01):

Add the following after **[7] Voting in Elections:**

On May 25, 2022, multiple applicants for U.S. citizenship sued the U.S. Citizenship and Immigration Services (USCIS) for unreasonable delays in the immigration agency's processing of their naturalization applications. USCIS stores paper-based immigration files at the Federal Records Center (FRC) in Kansas City, Missouri. Plaintiffs claim that they are prejudiced by the USCIS's delay in accessing those records. The plaintiffs claim that they will be unable to vote in the 2022 elections because of the unreasonable delay. The case was settled in the fall of 2022. *Carter v. USCIS*, 1:22-cv-10803-MLW (D. Mass filed July 1, 2022)(amended complaint).

The American Immigration Council provided this description of what happened in the litigation:

> After the lawsuit was filed, NARA completed A-file retrieval, and USCIS scheduled most of the original plaintiffs for citizenship interviews. But USCIS did not commit to prioritizing the naturalization application process—interview, adjudication, and oath ceremony upon application approval—for plaintiffs or other citizenship applicants who are in a similar situation. On July 1, 2022, an amended complaint was filed, which included claims on behalf of a proposed class who filed a citizenship application, whose A-files USCIS had stored in NARA Federal Records Centers, and who have not yet been interviewed on their application.
>
> On August 26, 2022, the government filed a motion to dismiss, claiming that since the named plaintiffs had been scheduled for interviews, they did not have any other claims against USCIS or Director Jaddou and there was no other relief the court could order. On September 9, plaintiffs opposed the motion, arguing that USCIS could not get rid of the case by voluntarily ceasing the delay as to them, and the court could still decide whether USCIS unreasonably delayed when it failed to plan for the A-file retrieval and prioritize the processing of 2020 naturalization applications post-retrieval.

> By September 1, 2022, all of the Plaintiffs had been interviewed, and by September 13, they had each become U.S. citizens, with one exception, whose application USCIS denied. The government filed a reply on September 21, but the court did not decide the motion. On November 16, 2022, the parties filed a stipulation dismissing the lawsuit.
>
> Plaintiffs and other naturalization applicants who had not completed the application process because their immigration files were stuck in a Federal Records Center, faced a loss that other applicants for immigration benefits did not —the right to vote in the November 2022 elections. Plaintiffs, and others, had their applications adjudicated, and if approved, became U.S. citizens in time to vote.
>
> The lawsuit was filed in the federal district court for the District of Massachusetts by the American Immigration Council and the law firm Gibbs Houston Pauw.
>
> https://www.americanimmigrationcouncil.org/litigation/challenging-uscis-naturalization-application-delays

More information on the status of the FRC can be found at the National Archives website. Federal Records Center, FRC Reopening Frequently Asked Questions (Mar. 25, 2022), https://www.archives.gov/frc/reopening-faq.

Page 896 (§ 9.02): Add the following to the end of **Note 1 after Problem 9-2**:

Former President Donald J. Trump vowed to end birthright citizenship for U.S.-born children of noncitizens and undocumented immigrants. The Trump administration issued a rule allowing customs officials to deny entry to travelers whom they suspected came to the United States only to give birth to their child so that their child could become a U.S. citizen. John Bowden, "Trump Administration Releases Rule to Restrict 'Birth Tourism'," *The Hill* (Jan. 23, 2020, 10:36AM), https://thehill.com/homenews/administration/479540-trump-administration-releases-rule-to-restrict-birth-tourism.

The Fourteenth Amendment guarantees citizenship to children born in the territory of the United States but some candidates for the Presidency continue to argue that the Executive branch can redefine the scope of who may benefit by executive order. See Martha S. Jones, "Why Republicans Keep Calling for the End of Birthright Citizenship—It's about more than immigration", *The Atlantic*, (July 2, 2023). Martha Jones is a historian who authored the book BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICAN (2018).

For a detailed discussion of the issue as debated before Congress see Congressional Research Service, Margaret Mikyung Lee, "Birthright Citizenship to Persons Born in the Territory of the United States to Alien Parents" Report RL 33079 (2015) available at https://www.everycrsreport.com/files/20150820_RL33079_e4e572f8f787b0c573e531089e90dcf9e465470b.pdf

Page 895, before § 9.02 Applying for U.S. Citizenship

Who Naturalizes?

The USCIS has created a large number of infographics and charts that provide information about who is naturalizing. https://www.uscis.gov/citizenship-resource-center/naturalization-statistics

Reproduced here is one of the interesting charts from those USCIS pages cite above:

The U.S. naturalized close to one million people in FY 2022, a 22% increase from the prior year.

"Among the top five countries of birth for people naturalizing in FY 2022, Mexico was the lead country, with 13.3% of all naturalizations, followed by India (6.8%), the Philippines (5.5%), Cuba (4.8%), and the Dominican Republic (3.6%). The top five countries of birth comprised 34% of the naturalized citizens in FY 2022."

Additional data analyzes demographics characteristics such as state of residence, age, gender, original path to lawful permanent resident status, etc. The top four states were: California, Texas, Florida and New York each with more than 100,000 new citizens in FY 2022.

One of the interesting data points is to look at the eligible population who could seek naturalization. As of July of 2023, there are over 9.2 million lawful permanent residents who could apply.

Using USCIS data, here is a chart that depicts lawful residents by country of origin and the number of people for each nation – only countries with more than 70,000 qualified U.S. residents are listed:

Nationalities of Lawful Permanent Residents Eligible for Naturalization

Ghana	**72,907**
Russia	**74,157**
Egypt	**78,343**

Ukraine	**79,012**
Honduras	**86,201**
Nepal	**91,276**
Venezuela	**91,797**
Ecuador	**94,775**
Peru	**105,299**
Ethiopia	**106,046**
Guatemala	**106,118**
Canada	**106,983**
United Kingdom	**107,096**
Iran	**115,519**
Burma	**119,380**
Nigeria	**119,411**
Brazil	**122,303**
Bangladesh	**125,745**
Iraq	**142,847**
Pakistan	**142,945**
Haiti	**175,833**
Korea, South	**179,871**
Jamaica	**181,752**
Colombia	**182,794**
El Salvador	**187,688**
Vietnam	**283,851**
Dominican Republic	**411,636**
Cuba	**462,043**
Philippines	**464,908**
India	**580,515**
China, People's Republic	**650,276**
Mexico	**1,371,324**

Questions:

1. Identify some of the obstacles to naturalization. These may be economic, cultural, family resentment, lack of time, English skills, distance to the closest USCIS office. Can you identify others.
2. Many attorneys warn applicants for naturalization, that the USCIS reviews their entire immigration history. Problems in prior applications may surface at the time of naturalization resulting in the initiation of removal proceedings or at a minimum, a denial of the application. Should all applicants for naturalization have a complete copy of their past immigration history before filing?
3. Consider how increased rates of naturalization might impact on subsequent family based petitions being filed with the USCIS. Remember, only U.S. citizens can sponsor their parents for immigration. Should the U.S. consider an age cutoff for sponsoring elderly parents?
4. Naturalization may impact whether the individual can retain their existing citizenship. Despite what internet searches might suggest, learning if naturalization will mean an individual loses their existing citizenship is quite complex. Statutes and policies in many nations frequently change. In recent years, some nations have allowed people who naturalized in the United States to regain their birth citizenship. There are no simple rules. This topic always requires legal research.
   Reliable resources:

   C. GORDON, S. MAILMAN, S. YALE-LOEHR & R. WADA, IMMIGRATION LAW AND PROCEDURE, VOL. 10 Introduction (2023). The treatise gathers citizenship information by country but has an introductory note reminding readers that laws in foreign nations may change frequently.

   The CIA World Fact Book https://www.cia.gov/the-world-factbook/field/citizenship/

   Unfortunately, this book does not provide references to the legal sources for the summary analysis.

Page 895 Problem 9-2 Note on facts

Earlier in the book you are told that Celia Gutierrez-Nimba was adopted by her grandparents after her birth in Colombia and the subsequent death of her parents. Assume for this problem that she was born in Tucson, Arizona.

Page 902 Problem 9-5 Update Note 1—The Good Moral Character Requirement

In this problem, Maria has a conviction for driving under the influence. In a recent Ninth Circuit Court of Appeals case, the court upheld a denial of naturalization for an individual who worked in a legal cannabis production company. *See Reimers v USCIS*, 2023 WL 3773644 (9th Cir. 2023) (not for publication affirming denial of naturalization by district court and the agency).

In the USCIS Policy Manual, the agency explains why use or possession of marijuana is a statutory bar to establishing "good moral character" even if the conduct was not criminal in a particular state or foreign country:

> 2. Conditional GMC Bar Applies Regardless of State Law Decriminalizing Marijuana
>
> A number of states and the District of Columbia (D.C.) have enacted laws permitting "medical"[19] or "recreational"[20] use of marijuana.[21] Marijuana, however, remains classified as a "Schedule I" controlled substance under the federal CSA.[22] Schedule I substances have no accepted medical use pursuant to the CSA.[23] Classification of marijuana as a Schedule I controlled substance under federal law means that certain conduct involving marijuana, which is in violation of the CSA, continues to constitute a conditional bar to GMC for naturalization eligibility, even where such activity is not a criminal offense under state law.[24]
>
> Such an offense under federal law may include, but is not limited to, possession, manufacture or production, or distribution or dispensing of marijuana.[25] For example, possession of marijuana for recreational or medical purposes or employment in the marijuana industry may constitute conduct that violates federal controlled substance laws. Depending on the specific facts of the case, these activities, whether established by a conviction or an admission by the applicant, may preclude a finding of GMC for the applicant during the statutory period. An admission must meet the long held requirements for a valid "admission" of an offense.[26] Note that even if an applicant does not have a conviction or make a valid admission to a marijuana-related offense, he or she may be unable to meet the burden of proof to show that he or she has not committed such an offense

See https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5

In 2019 the Canadian singer and song writer Neil Young was told that his admission of marijuana use would delay his naturalization. In 2020, he was naturalized by USCIS in California. *See* "Neil Young Celebrates U.S. Citizenship: 'Vote Your Conscience'", *Variety* (Jan. 25, 2020).

Questions:

1. Should marijuana use or possession that is legal in a state be a bar to naturalization? Should the bar only apply to people with controlled substance convictions?
2. In the fall of 2022, President Biden announced a process for people to secure a Presidential pardon for federal convictions of possession of marijuana. His order expressly excludes some non-citizens, "This pardon does not apply to individuals who were non-citizens not lawfully present in the United States at the time of their offense." How might this pardon be used in Naturalization applications? Read more at https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/06/granting-pardon-for-the-offense-of-simple-possession-of-marijuana/. More materials are found at https://www.justice.gov/pardon/presidential-proclamation-marijuana-possession#:~:text=On%20October%206%2C%202022%2C%20President%20Biden%20announced%20a%20full%2C,people%20with%20those%20prior%20convictions.

Page 903 (§ 9.02): Add the following to the end of **Note 3 after Problem 9-5**:

Naturalization applications have significant backlogs. The average wait time for naturalization applicants has changed from 5.6 months in 2016 to 10.3 months in 2018, 9.9 months in 2019, and 8.8 months in 2020. Some organizations have called the backlogs a "novel form of voter suppression" that prevented many applicants from voting in the 2020 elections. ILRC & Boundless, *Denying the Right to Vote: Politicization of the Naturalization Process as a Novel Form of Voter Suppression* (Oct. 15, 2020), https://www.ilrc.org/denying-right-vote-politicization-naturalization-process-novel-form-voter-suppression.

In 2023, the Immigration Forum, a nonprofit organization, examined the causes of naturalizations delays from shortages of personnel to agency internal priorities. For a very detailed examination that includes data on the number of pending petitions see "Eliminating the Naturalization Backlog available at: https://immigrationforum.org/article/eliminating-the-naturalization-backlog/

In July of 2023 the USCIS reports average waiting times of 10.5 months is FY 2022 and 6 months in the first three quarters of FY 2023. https://egov.uscis.gov/processing-times/historic-pt

This link shows historical mean waiting times for many different immigration petitions and applications.

Page 903 (§ 9.02): Add the following after the first paragraph in **Note 4 after Problem 9-5**:

Before December 2020, the civics test had 100 potential questions, and applicants had to answer six questions correctly out of ten. In December 2020, USCIS made the civics test more difficult by adding 128 potential questions and requiring applicants to answer twelve questions correctly out of twenty. Maeve Higgins, *128 Tricky Questions That Could Stand Between You and U.S. Citizenship*, N.Y. TIMES (Nov. 30, 2020), https://www.nytimes.com/2020/11/30/opinion/us-citizenship-test.html. Many commentators said the test created barriers to English language learners and pushed certain political beliefs. For example, the new questions asked for the biographical details of Alexander Hamilton and the purpose of the Tenth Amendment. Another question asked why the United States entered the Vietnam War, for which the only correct answer was "to stop the spread of Communism." Simon Romero & Miriam Jordan, *New U.S. Citizenship Test is Longer and More Difficult*, N.Y. TIMES (Dec. 3, 2020), https://www.nytimes.com/2020/12/03/us/citizenship-test.html. In February 2021, USCIS announced that it would revert to the old test. Specifically, USCIS will administer the 2008 civics test to applicants who filed for naturalization before December 1, 2020, or who will file on or after March 1, 2021. For applicants who filed between December 2020 and March 2021, USCIS will give applicants the option to take either the 2008 civics test or the 2020 civics test. USCIS Policy Alert, PA-2021-02, Revising Guidance on Naturalization Civics Educational Requirement (Feb. 2, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210222-CivicsTest.pdf.

In July of 2023, the USCIS announced a revision to the techniques its examiners will use to test English comprehension. The new test will show a picture to the applicant and ask the person to describe it in English. These changes were formally announced in the Federal Register. See 87 Fed. Reg. 76634 (Dec. 15, 2022) https://www.federalregister.gov/documents/2022/12/15/2022-27178/trial-testing-of-redesigned-naturalization-test-for-naturalization-applications

Naturalization Oath, Image from USCIS media. https://www.uscis.gov/newsroom/video-and-photo-gallery

The USCIS does provide free resources to help individuals prepare for the examinations: https://www.uscis. gov/citizenship/find-study-materials-and-resources

Page 904 (§ 9.02): Add a new Note 7 after **Problem 9-5**:

7. U.S. Citizenship Act of 2021. Rep. Linda Sanchez (CA) introduced a bill supported by President Joe Biden the U.S. Citizenship Act of 2021 to Congress in January 2021. If enacted, the bill would have waived the English-language requirements for naturalization for immigrants with disabilities and those who are older than sixty-five and have had legal permanent resident status for five years. The bill would have also waived the English and civics test requirements for immigrants who have attended high school in the United States. U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. (2021). The bill was not adopted.

Rep. Sanchez, introduced a similar bill introduced in the next Congress, H.R. 3194. The statute covers many areas of immigration law in addition to naturalization standards. As of July 2023 the bill has been referred to a House committee.

https://www.congress.gov/bill/118th-congress/house-bill/3194/text?s=1&r=3&q=%7B%22search%22%3A%5B%22citizenship%22%5D%7D

Page 905 (§ 9.02[A]): Add the following to the end of **Note 4 after Problem 9-6**:

What if you were born in the United States, but do not have a birth certificate to prove it? In 2020, the Trump administration expelled several U.S.-born newborns and their mothers to Mexico before they could obtain a U.S. birth certificate. They were expelled under a Centers for Disease Control and Prevention order issued during the COVID-19 pandemic. The order allowed CBP to expel all migrants who entered the United States without authorization before they applied for asylum. Without birth certificates, the children are unable to establish their citizenship. Tanvi Misra, *Revealed: US Citizen Newborns Sent to Mexico Under Trump-Era Border Ban*, THE GUARDIAN (Feb. 5, 2021), https://www.theguardian.com/us-news/2021/feb/05/us-citizen-newborns-mexico-migrant-women-border-ban.

Page 923 (§9.05 Losing Citizenship Status [A] Expatriation

Note 2. Death and Taxes add this sentence. U.S. Citizens must also prove they have met all existing tax liabilities and in some cases may have to pay an Exit tax. https://www.irs.gov/

individuals/international-taxpayers/expatriation-tax. Lawful Permanent Residents who decide to relinquish residence may also be subject to this tax.

The State Department also charges a fee to process the formal renunciation. In 2023 the fee is $2,350. The steps to renunciation are explained at this State Department site: https://common.usembassy.gov/en/renounce-citizenship/

Page 924 (§9.05 Losing Citizenship Status [A] Expatriation):

Update Note 1. The names of the individuals renouncing are published quarterly. In the most recent quarterly report 526 people renounced. 88 Fed. Reg. 274270 (April 19, 2023).

Page 931 (§ 9.05[A][2]): Add the following to the end of **Note 2** after *Kungys v. United States*:

ICE also began Operation Second Look to identify people who had naturalized despite deportation orders or past fraud or criminal charges. Seth F. Wessler, "Is Denaturalization the Next Front in the Trump Administration's War on Immigration?," *N.Y. Times* (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/magazine/naturalized-citizenship-immigration-trump.html.

Visit this page to read a press release from 2020 summarizes some of the denaturalization work of the new special division of the Office of Immigration Litigation (OIL) in the DOJ.

https://www.justice.gov/opa/pr/department-justice-creates-section-dedicated-denaturalization-cases

The denaturalization responsibilities are described in a 2022 update at the OIL DOJ website

https://www.justice.gov/jm/jm-4-7000-immigration-litigation

Page 931 (§ 9.05[A][2]): Add a new **Note 3** after *Kungys v. United States*:

5. **Denaturalization under the Trump administration and forward.** Denaturalizations sharply increased under the Trump administration. Of 228 denaturalization cases the DOJ filed since 2008, about forty percent of them were filed since 2017. Denaturalization case referrals also increased 600 percent from 2017 to 2020. See a description in Katie Benner, *Justice Dept. Establishes Office to Denaturalize Immigrants*, N.Y. TIMES (June 17, 2020), https://www.nytimes.com/2020/02/26/us/politics/denaturalization-immigrants-justice-department.html. Individuals who had been citizens for years were suddenly investigated for non-violent crimes they were alleged to have committed decades earlier. For example, in 2018, the DOJ sued to denaturalize Norma Borgono, a sixty-three-year-

old grandmother from Peru. The DOJ wanted to denaturalize Borgono for failing to disclose her role in a fraud scheme, even though Borgono was not charged with a crime when she applied for citizenship, did not financially benefit from the scheme, and had cooperated with the FBI to put her boss in jail. This story was reported by Adiel Kaplan, *Miami Grandma Targeted as U.S. Takes Aim at Naturalized Immigrants with Prior Offenses*, MIAMI HERALD (July 9, 2018), https://www.miamiherald.com/news/local/immigration/article214173489.html.

Denaturalizations continue in the Biden administration. The agency lists its priorities on its website. Here is a partial quote:

The Civil Division has adopted the following priorities:

Cases against individuals who pose a potential danger to national security, including those with a nexus to terrorism, espionage, or the unlawful export from the United States of sensitive goods, technology, or information raising national security concerns.

Cases against individuals who engaged in war crimes or human rights violations.

Cases against individuals who committed very serious felonies that were not disclosed during the naturalization process. In determining whether there was a very serious felony, the following factors should be assessed: Whether the conduct shows the individual presents a significant ongoing risk to public safety or to vulnerable persons. Relevant to such a determination is whether the individual committed human trafficking, sex offenses, or violent crimes, or held a public-trust position. Whether the conduct resulted in conviction and involved substantial culpability or responsibility for an extensive and sustained criminal enterprise, or caused extraordinary harm to individuals or entities in the United States, including significant financial loss to individuals, entities, or the United States.

Source: https://www.justice.gov/jm/jm-4-7000-immigration-litigation

In *United States v. Martinez*, a lawful permanent resident applied and received naturalization in 2011. He answered "No" to the question have you ever committed a crime for which you have not been convicted. Two years later he was convicted for medicare fraud for activities taken during the five year period prior to his naturalization. He sought a dismissal of the U.S. governments suit to denaturalize, and the District Court denied his motion. See 507 F.Supp.3d

793 (S.D. Texas 2020). The risk of denaturalization has also prompted criminal defense counsel to try to set aside guilty pleas because the Federal Rules of Criminal Procedure do not require a warning about denaturalization but only a warning to noncitizens of possible removal based on the conviction. *See, e.g., United States v. Hamed,* 976 F.3d 825 (8th Cir. 2020).

Index of Selected Key Topics in Supplement: reference is to chapter where topic is discussed