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Immigration and Nationality Law

PROBLEMS AND STRATEGIES

SECOND EDITION

2024 SUPPLEMENT

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

[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.]

What's New in this Chapter:

Each insert or update to the text refers to the Page and Section of the Book being supplemented.

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 available data.

The chapter also addresses the tools Congress has identified to manage irregular migration: criminal penalties, civil penalties, and employer sanctions. In the past fifteen years, State and local governments have increasingly passed legislation or adopted policies that interact with the federal laws.

The Form 1-9 and E-Verify programs are also updated, and links to new USCIS requirements are provided below.

In June of 2023, the Supreme Court addressed a First Amendment facial challenge to the Constitutionality of the criminal "harboring" statute. We have added the text of that statute to our brief section on the use of criminal penalties and provided an excerpt from the opinion. *United States v. Hansen*, 599 U.S.762 (2023).

This trend of considering both federal and criminal sanctions to deter or control immigration are explored throughout the chapter. New updates on State attempts to enter immigration controls are provided.

This text does not gather all constitutional challenges into a single chapter but discussion is spread throughout the chapters related to the focus of the chapter, e.g., family and marriage in chapter 4, due process in removal in Chapter 6, etc.

Updates begin next page

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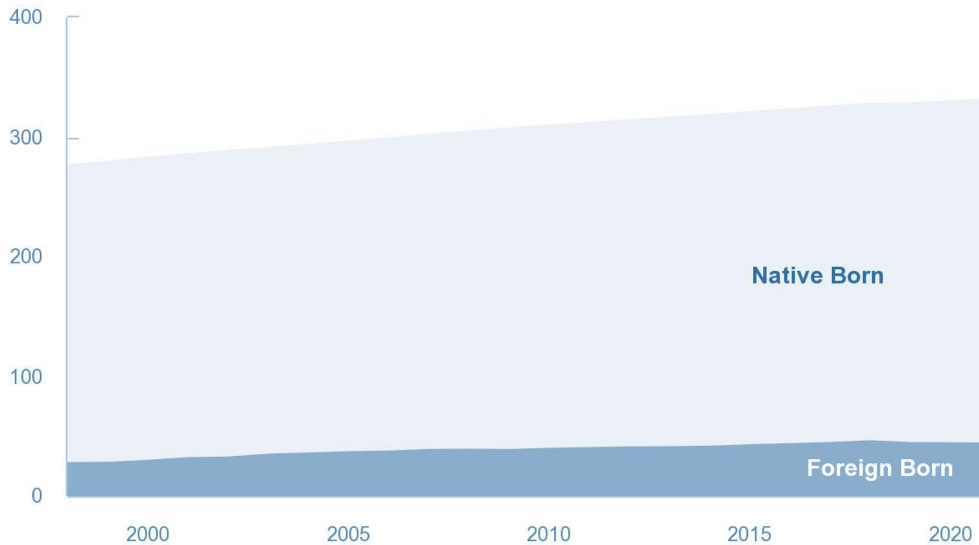
Page 3, ¶ 2 (§ 1.01 Welcome to Immigration Law [A] What is Immigration Law)

- The current population estimate (July 2024) is that there are 46.2 million foreign-born people in the United States, representing 7.2% 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.

In July of 2024, the Pew Research Center published new estimates of the unauthorized population and information about which regions or countries are seeking an increase in unauthorized migration and which have declined.
The full report has many tables that can be accessed and will help people better explore the data. Here are a few highlights.

Unauthorized population grew between 2020 and 2022 but is still below the highest estimate in 2007.
[numbers in millions]
2020 estimate = 10.5 2022 estimate = 11.0 2007 high = 12.2

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Many Unauthorized Migrants have a formal permission to remain in the United States.
The Pew Research Center estimates that approximately 3 million of the 11 million unauthorized residents have some type of permission to remain in the United States.
https://www.pewresearch.org/short-reads/2024/07/22/what-we-know-about-unauthorized-immigrants-living-in-the-us/

Some people hold Temporary Protected Status discussed in Chapter 3 and 7. Some people have long-form of humanitarian parole. See Chapter 3. Some people have deferred departure grants that allow residence and work but that status does not contain a path to permanent residency. For many people these liminal statuses distinguish them from the undocumented population. Pew characterizes them as not yet lawful permanent residents. We prepared this table using data Pew provided for FY **2022**

Category	**Number in FY 2022**	**Comment**
DACA	595,000	
TPS	650,000	Greatly increased in 2023
U Status applicant	300,000	Quota limits to 10,000 per year
Asylum Affirmative applicant	500,000	
Asylum Defensive applicant	915,000	Greatly increased in 2023
Other deferred departure		Not specified
Total:	**2,960,000**	

Temporary Protection Status Population
The American Immigration Council reported in March of 2024 that the estimated number of people with TPS was approximately 863,880 people. They also reported that an additional 486,418 initial or renewal applications were then pending with USCIS. To read the primer on TPS visit: https://www.americanimmigrationcouncil.org/research/temporary-protected-status-overview?utm_campaign=everyaction&utm_medium=email&utm_source=&emci=e96f5dfb-7856-ef11-991a-6045bddbfc4b&emdi=e73effdd-e957-ef11-991a-6045bddbfc4b&ceid=4547489

The largest number of unauthorized people are Mexican nationals, but the numbers have sharply declined.
2000 estimate of unauthorized Mexican nationals = 6.9 million   2022 estimate = 4 million

Every region of the world saw increases in an unauthorized population and the fastest growing include the region of the Caribbean, Europe, and Canada.

The lawful foreign-born population of lawful permanent residents is also 11.5 million.
Pew estimates 2 million temporary lawful residents, 11.5 million lawful residents and 23.4 million naturalized U.S. citizens. In Chapter 9 we will discuss naturalization. This number is at a historic level and the number of people naturalizing increased in the past three years due to greater outreach by USCIS.

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USCIS data on Naturalizations indicates that in the past ten years, 24% of all naturalizations occurred in Fiscal Year 2022 and 2023.

The Top Five Countries for People Seeking Naturalization is represented in the table below.

Country of Origin	Percentage of all naturalized	Number of people naturalized
Mexico	12.7%	111,500
India	6.7%	59,100
Philippines	5.1%	44,800
Dominican Republic	4.0%	35,200
Cuba	3.8%	33,200
Total		878,500

Source: USCIS FY 2023 data available at: https://www.uscis.gov/citizenship-resource-center/naturalization-statistics

DHS Estimates of Unauthorized Populations.
In April of 2024, DHS published its own estimate of the unauthorized and foreign born populations. The methodologies and sources of data are described in the full report available at: https://ohss.dhs.gov/sites/default/files/2024-06/2024_0418_ohss_estimates-of-the-unauthorized-immigrant-population-residing-in-the-united-states-january-2018%25E2%2580%2593january-2022.pdf. Both Pew and the DHS have an estimated unauthorized population as 11 million. Below is a chart taken from the DHS report at page 5 on the countries of origin for the foreign born:

Table 2

Unauthorized Immigrant Population Estimates by Top 10 Countries of Birth: 2018–2020 and 2022

Country	2018*	2019	2020	2022
Total	11,570,000	11,110,000	10,510,000	10,990,000
Mexico	5,540,000	5,350,000	4,970,000	4,810,000
Guatemala	620,000	670,000	780,000	750,000
El Salvador	730,000	750,000	750,000	710,000
Honduras	450,000	450,000	550,000	560,000
Philippines	370,000	360,000	340,000	350,000
Venezuela	190,000	220,000	260,000	320,000
Colombia	210,000	190,000	190,000	240,000
Brazil	190,000	180,000	190,000	230,000
India	480,000	390,000	340,000	220,000
China, People's Republic	390,000	330,000	270,000	210,000
All other countries	2,400,000	2,220,000	1,870,000	2,600,000

* The estimate for 2018 has been updated compared to the previous edition of this report.
Notes: Detail may not sum to totals because of rounding. Estimates for 2021 are not available. The estimates for China include Hong Kong and Macau.
Source: Office of Homeland Security Statistics.

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Race and Immigration – Not Always Measured:

The Migration Policy Institute offers some estimates of the racial composition of both authorized and unauthorized migrants. In 2019, MPI estimated that 6% of all unauthorized migrants are Black. In 2024 the estimate is that Black people represent 9% of all immigrants. *See* *https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2024*.

The Pew Research Center notes that there are 47.9 million Black people residing in the United States. They estimate that 11% of this population are foreign born.

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

Why do you think that DHS does not generally report on the racial characteristics of immigrants?

The Unauthorized Population has been here for many years.

Several sources estimate that nearly 59% of the unauthorized population has resided in the United States for more than ten years. Source: www.cmsny.org
Here is a table based on 2019 data and presented by the Center for Migration Studies of New York.

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

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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

DHS data estimates are similar. Published in 2024, the DHS estimate that 79% of all unauthorized migrants entered before 2010; however, the percentage may be less given the increase in new authorized populations arrived. Below is Table 1 estimating date of entry for the unauthorized population.

Table Next page

Table 1

Unauthorized Immigrant Population Estimates by Period of Entry: 2018–2020 and 2022

Period of Entry	2018*	2019	2020	2022
Total	11,570,000	11,110,000	10,510,000	10,990,000
1980–1990	1,560,000	1,520,000	1,480,000	1,460,000
1990–1999	3,820,000	3,540,000	3,420,000	3,360,000
2000–2009	4,230,000	4,180,000	3,930,000	3,860,000
2010 or later	1,960,000	1,870,000	1,680,000	2,310,000

* The estimate for 2018 has been updated compared to the previous edition of this report.
Notes: Detail may not sum to totals because of rounding. Estimates for 2021 are not available.
Source: Office of Homeland Security Statistics.

Source: https://ohss.dhs.gov/sites/default/files/2024-06/2024_0418_ohss_estimates-of-the-unauthorized-immigrant-population-residing-in-the-united-states-january-2018%25E2%2580%2593january-2022.pdf at page 3.

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. 752, (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

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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	FY 24 as of June 2024
El Salvador	17,512	9,143	4,949	12,021	2,189	15,530	16,434	7,387	4,031
Guatemala	18,913	14,827	22,327	30,329	8,390	58,783	60,789	33,124	11,815
Honduras	10,468	7,784	10,913	20,398	4,454	39,906	37,375	21,446	9,169
Mexico	11,926	8,877	10,136	10,487	14,359	25,745	28,031	19,174	43,586
Total:	58,819	40,631	48,325	73,235	32,099	139,964	142,629	91,842	68,601

*FY 24 YTD June 2024

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. This chart was produced from that CBP apprehension data.

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

Unaccompanied Children Country of Nationality	Apprehensions in FY 2024(June) Number	
Guatemala	26,484	
Honduras	15,411	
Mexico	26,277	Mexican youth may be returned if not a victim of severe trafficking
El Salvador	6,132	
Ecuador	2,554	
Nicaragua	1,413	
Venezuela	2,727	
Cuba	1,134	
Colombia	1,333	
Peru	435	
Haiti	4,948	
Turkey	82	
Philippines	1	
Brazil	145	
Canada	51	
Russia	36	
China	148	
Romania	16	
Ukraine	11	
India	403	
TOTAL	90,529	
No country named	2,521	

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

FY 2023	FY 2022	FY 2021	FY 2020	FY 2019	FY 2018	FY 2017	FY 2016
118, 938	128,904	122,731	15,381	69,488	49,100	40,810	59,170

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In June of 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). In August of 2024 the agency reports that they have 6,011 children in their custodial care. https://www.acf.hhs.gov/orr/fact-sheet/programs/uc/fact-sheet The HHS reports that DHS referred over 110,000 children to their care in FY 2023.
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 148.8 billion in 2023. "Expenditures decreased $57.4 billion, or 28 percent, from $206.2 billion (revised) in 2022 and were below the annual average of $265.6 billion for 2014–2022. As in previous years, acquisitions of existing U.S. businesses accounted for most of the expenditures." Bureau of Economic Analysis, New Foreign Direct Investment in the United States (July 12, 2024), 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 2023: $148.8 billion
- "Expenditures decreased $57.4 billion, or 28 percent, from $206.2 billion (revised) in 2022 and were below the annual average of $265.6 billion for 2014–2022. As in previous years, acquisitions of existing U.S. businesses accounted for most of the expenditures."
- News Release, Bureau of Economic Analysis, New Foreign Direct Investment in the United States, 2023 (July 12, 2024), https://www.bea.gov/news/2024/new-foreign-direct-investment-united-states-2023
- 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

Page 10, ¶ 2 Update to Data about Refugee Admissions

U.S. Refugee Admissions –Refugee Admissions goals are set by the President. There is a longer discussion in Chapter 8.

Year	Refugees Admitted	Administration
2012	58,238	Obama
2013	69,926	
2014	69,987	
2015	69,933	
2016	84,994	
2017	53,716	Trump
2018	22,589	
2019	30,000	

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2020	11.814	
2021	11.411	Biden
2022	25,465	
2023	60,014	
2024	68,291*	

*As of June 2024.
https://www.migrationpolicy.org/programs/data-hub/charts/us-refugee-resettlement
In Chapter 3 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). A grant of asylum is not counted as a refugee admission.

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
- 2022-2023: Students from China (27%), India (25%), and South Korea (4.1%) account for about 56% of international students
- Increase in economic contributions to $40.1 billion in the 2022-2023 school year Increase to 368,333 jobs created or supported in the 2022-2023 school year

Page 11, ¶ 1 Continued update about foreign students

- ~1,057,188international students enrolled in the U.S. in the 2022/23 School Year
- ICE publishes a report called "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.
- The current report is here https://opendoorsdata.org/fast_facts/fast-facts-2023/

- The report indicates that 5.6% of all students studying post-secondary school are foreign students. This chart below 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

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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	2023
20,438	29,445	32,766	19,526	18,726	19,566	20,299

https://www.uscourts.gov/statistics/table/d-2/statistical-tables-federal-judiciary/2023/12/31

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

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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 Immigration 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:

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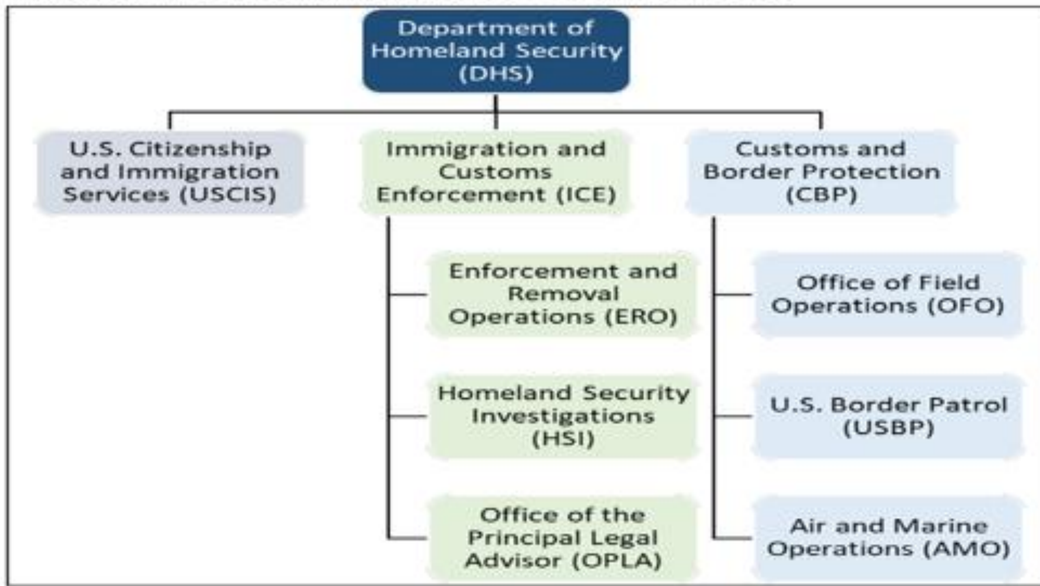

Page 16, Table 1

Immigration Cases in the Federal Docket by Year

	2016	2017	2018	2019	2020	2021	2022	2023
Total Appeals	60,357	50,506	49,276	48,486	48,190	44,546	41,839	39,987
BIA Appeals	5,215	5,210	5,158	5,112	6,067	5,510	4,399	3,606
% of Total	8.6%	10.3%	10.5%	10.5%	12.6%	12.4%	10.5%	9%

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

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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 22 percent to 4,450, mostly due to a reduction in appeals of decisions by the Board of Immigration Appeals (BIA).BIA appeals accounted for 79 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-2023

We created the chart 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 2023 and 2022.

CIRCUITS FY 2023	TOTAL CASE WORKLOAD OF CIRCUIT	BIA APPEALS In CIRCUIT	PERCENTAGE OF TOTAL WORKLOAD	Increase or Decrease from prior year
ALL CIRCUITS	39,987	3,505	9%	-1.4
Ninth Circuit	7,784	1,922	24.7%	-.4
Second Circuit	3,573	547	15.3%	-.7
Third Circuit	2,513	136	5.4%	-1.2
First Circuit	1,083	73	6.7%	+.5
Fifth Circuit	5,568	245	4.4%	-1.6
Tenth Circuit	1,742	76	4.4%	-1.4
Fourth Circuit	3,671	203	5.5%	+.4
Sixth Circuit	3,366	148	4.3%	-.5
Eleventh Circuit	4,239	131	3.1%	-.6
Eighth Circuit	2,843	78	2.7%	-.1
Seventh Circuit	2,555	47	1.8%	-.2

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).

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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. 762 (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 in *Hansen* authored by Justice Barrett:

***United States v. Hansen*,**
599 U.S. 762 (2023)

> 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

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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 (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.

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***

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]

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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. 595 at 615 (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 615. 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.

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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

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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.

***

(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:

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(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.

See below for discussion of new attempts by states to criminalize aiding noncitizens or to enter or remain within a state territory. This discussion follows the discussion of preemption in Chapter 1. Pages 71-100 and the text discussion of *Arizona v. United States*, 567 U.S. 387 (2012).

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. 191 (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”

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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

On August 2, 2024, the USCIS announced that employers could use older form until 2027. https://www.uscis.gov/i-9-central/form-i-9-related-news/uscis-extends-form-i-9-expiration-date

Editors' Note: DHS does not publish I-9 enforcement statistics along with its other reports generally. In its 2024 on line accomplishments to the Appropriations Committee the agency wrote about labor investigations and I-9 enforcement.

Labor Exploitation Investigations: The employment of noncitizens violates both the Immigration and Nationality Act (INA) and criminal law and facilitates a host of other crimes including human trafficking, human smuggling, document fraud, identity theft, money laundering, and labor violations. The Document, Benefit, and Labor Exploitation Unit (DBLEU) oversees strategies to prevent the exploitation of undocumented individuals through unauthorized employment. HSI works to protect the public from crimes of victimization and exploitation, strategically targeting and investigating individuals, businesses, and networks that engage in labor exploitation, including forced labor, a form of human trafficking.
Prioritization is placed on the identification and prosecution of employers who earn their profits on the backs of individuals they believe have no voice and no opportunity to secure lawful employment. This unit creates a culture of business compliance through criminal arrests of employers, the administrative arrest of employees, suspension and debarment of companies exploiting employees, where applicable, compliance of the I-9 Employment Eligibility Verification Form, and the ICE Mutual Agreement between Government and Employers (IMAGE) program. Cases involving National security or public safety concerns, and allegations of egregious worker exploitation, receive high priority. By focusing on these priorities,

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DBLEU targets suspect employers and provides field units with the necessary investigative tools to combat these types of crimes. In FY 2022, DBLEU entered into a partnership with the CCHT to combat forced labor and labor exploitation more effectively. DBLEU and CCHT unified existing expertise and streamlined related programs and efforts with the goal of increasing the field's access to support and resources to best position HSI to combat forced labor and labor exploitation. In FY 2023, HSI has affected more than 60 criminal arrests, approximately 20 indictments, and 15 convictions of business management and owners, initiated more than 500 worksite cases, and **initiated more than 300 Form I-9 inspections.** During this timeframe, HSI has debarred over 100 businesses and 50 individuals. HSI referred 40 cases with a nexus to forced labor, human trafficking, and document servitude for debarment. Three of these cases involved forced child labor. Lastly, HSI served more than 200 final orders issued totaling more than $12.0M, of which approximately $7.4M has been collected and more than $10.7M has been seized through forfeitures, fines, and restitution. [emphasis added]
See DHS Immigration and Customs Enforcement Budget Overview Fiscal Year 2025. Available at https://www.dhs.gov/sites/default/files/2024-03/2024_0308_us_immigration_and_customs_enforcement.pdf at page 124.

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*.

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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.

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.

State Regulation in the Field is Dynamic…a lot is happening.
The Immigration Law Resource Center (ILRC) has a dynamic map that tracks both legislation and ranks the state jurisprudence as positive or negative for noncitizens, especially those without documentation. https://www.ilrc.org/state-map-immigration-enforcement

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The ILRC ranks Washington and Illinois as the most protective states both as to their refusal to fully cooperate with DHS and as to substantive access to driver's licenses and resources for support. The states listed as most hostile include: Texas, Iowa, and Florida are listed as most hostile.

In recent years the Florida legislature has been defending some of its restrictions on noncitizen land ownership, laws that are frankly very reminiscent of anti-Asian land restriction laws of the past century. One statute precludes nationals of the People's Republic of China from buying property anywhere in the state unless they are lawful permanent residents of the United States or have become citizens. And the statute lists nationals of several other countries "of concern" from owning property in proximity to research facilities, military bases, or airports. These countries include Russia, Iran, North Korea, Cuba, Venezuela and Syria. Florida Statutes §§ 692.201-692.204.

Several Chinese citizens with nonimmigrant status challenged the Florida statute on equal protection and fair housing grounds alleging that the statute was racially discriminatory. The lower court rejected the challenge finding that the law applied to all people domiciled in the People's Republic of China, not only those of the Chinese race. Further, the court rejected other civil rights statutes and found that the statute would likely survive a rational basis analysis. See *Yifan Shen v. Simpson*, 637 F. Supp. 3d 1219 (N.D. Fl. 2023). The Eleventh Circuit accepted an appeal and issued a limited injunction for the plaintiffs in the suit but not of general applicability. *See Yifan Shan v. Comm'r*, 2024 U.S. App. LEXIS 2346 (11th Cir. 2024). As of August of 2024, the appeal remains pending.

Other states have adopted or considered restrictions on land ownership for Chinese foreign nationals. *See, e.g.*, Louisiana S.B. 91 limiting owning or renting property within ten miles of sensitive locations. A civic organization of U.S. citizens of Chinese dissent is monitoring legislation that restrict land ownership. https://www.committee100.org/our-work/federal-and-state-bills-prohibiting-property-ownership-by-foreign-individuals-and-entities/ They report that as of July of 2024 151 bills have been considered in 2023 and 2024; "12 passed and were signed into law in Georgia, Idaho, Indiana, Iowa (2 bills), Nebraska (2 bills), Oklahoma, South Dakota, Tennessee (2 bills), and Utah, respectively." Of these seven expressly limit some forms of land ownership for Chinese nationals.

State Criminalization of Unlawful Presence, Entry, and More.
Several states passed legislation aimed at criminalizing aiding noncitizens or transporting them into the states. One such Florida, S.B. was enjoined on May of 2024 and the opinion summarizes Eleventh Circuit law that has broadly found many immigration related statutes preempted. *See The Farmworker Association of Florida, Inc., et al. v. Moody (A.G. of Florida)*, 2024 U.S. Dist. Lexis 91671 (May 22, 2024) citing prior cases finding preemption of state laws aimed at criminalizing entry or concealing or encouraging entry of people without immigration status, *see, e.g., Georgia Latina Alliance for Human Rights*, 691 F.3d 1250 (11th Cir. 2012) and *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012).

Perhaps one of the strongest state statutes is the 2023 Texas Legislation that is nicknamed S.B. 4. Note this is the second immigration Texas statute called S.B. 4. In the textbook, the discussion is

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about an anti-sanctuary statute. The 2023 S.B. 4. was to go into effect in March of 2024. A lower court initially enjoined the state statute as preempted. The State of Texas sought to stay the injunction and almost succeeded obtaining an order from the U.S. Supreme Court but only hours later was superseded by a panel of the Fifth Circuit Court of Appeals. The procedural issues are complex but as of August 2024 S.B. 4 is enjoined while the panel considers a full appeal.

S.B. 4 seeks to criminalize unlawful entry into the State of Texas and to allow for a state prosecution and then the removal of the convicted person. The United States government has argued that the statute is preempted and the lower court and 5th Cir. have preliminarily agreed. But Texas is also raising a distinct argument that builds upon the Scalia dissent in Arizona v. United States found in the text at pages 96 – 100 that asserts States reserve a right of self-defense. Specifically, Texas is asserting that the state has a right to act under a clause in the U.S. Constitution, Article I, § 10 cl. 3 referred to as the "State War Clause.".

Here is a brief excerpt from the 5th Circuit opinion describing S.B. 4 and rejecting the state right of defense against an "invasion."

Texas v. United States
97 F.4th 268 (5th Cir. 2024)

I

> In November 2023, the Texas legislature passed Senate Bill 4 (S. B. 4).[4] Its preamble reflects that its purpose is to prohibit the illegal entry into or illegal presence in the state of a noncitizen, to "authoriz[e] or requir[e] under certain circumstances the removal of persons who violate those prohibitions," and to create criminal offenses. S. B. 4 amended the Texas Penal Code to include new sections entitled: "Illegal Entry from Foreign Nation" and "Illegal Reentry by Certain Aliens."[6] Those and other implementing laws are the primary focus of our analysis.
>
> The crime of "Illegal Entry from Foreign Nation" is codified at Texas Penal Code § 51.02, and provides: "A person who is an alien commits an offense if the person enters or attempts to enter this state directly from a foreign nation at any location other than a lawful port of entry." That section also enumerates affirmative defenses, including: (1) the federal government has granted the defendant "lawful presence in the United States"; (2) the federal government has granted the defendant asylum under 8 U.S.C. § 1158; (3) the defendant's conduct does not constitute a violation of 8 U.S.C. § 1325(a), which prohibits illegal entry into the United States; and (4) the defendant was approved for benefits under the federal Deferred Action for Childhood Arrival program (DACA) between certain dates.
>
> The crime of "Illegal Reentry by Certain Aliens" is codified at Texas Penal Code § 51.03, and provides:

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[4] Senate Bill 4, 88th Leg., 4th Called Sess. (Tex. 2023).

[6] *Id.* § 2 (codified at TEX. PENAL CODE §§ 51.02-03).

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> A person who is an alien commits an offense if the person enters, attempts to enter, or is at any time found in this state after the person:
> (1) has been denied admission to or excluded, deported, or removed from the United States; or
> (2) has departed from the United States while an order of exclusion, deportation, or removal is outstanding.

S. B. 4 also empowers Texas state judges and magistrates to order noncitizens to return to the country from which they entered or attempted to enter.[10] A state judge or magistrate "may" enter such an order if "the person agrees to the order," among other requirements. A judge "shall" issue the order "[o]n a person's conviction of" a Chapter 51 crime (described above).

Another S. B. 4 provision relevant to this appeal is codified at Texas Code of Criminal Procedure 5B.003. It directs: "A court may not abate the prosecution of an offense under Chapter 51 . . . on the basis that a federal determination regarding the immigration status of the defendant is pending or will be initiated."

*** [In parts III. A and B the court rejects the arguments against preemption.]

III.
C.

In a facial challenge to a legislative act, "the challenger must establish that no set of circumstances exists under which the Act would be valid."[footnotes omitted] Texas posits that the district court erred by granting a preliminary injunction in this facial challenge because some applications of S. B. 4 are valid. Texas's argument for why S. B. 4 would be valid relates to Texas's contention that it has been invaded and has the right to defend itself. Texas asserts that Article I, § 10 of the Constitution (the State War Clause) permits some applications of S. B. 4. The State War Clause provides:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Specifically, Texas contends that, at a minimum, S. B. 4's application to transnational cartel members is a constitutionally authorized response to an "invasion."

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[10] Senate Bill 4, 88th Leg., 4th Called Sess., § 1 (Tex. 2023) (codified at TEX. CODE CRIM. PROC. art. 5B.002).

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> But Texas does not demonstrate why it would be entitled to vacatur of the preliminary injunction. Constitutional text, structure, and history provide strong evidence that federal statutes addressing matters such as noncitizen entry and removal are still supreme even when the State War Clause has been triggered. Such statutes do not pertain to laying any duty of tonnage; keeping troops or ships of war in time of peace; or entering into any agreement or compact with another state or a foreign power.
>
> Texas has not identified any authority to support its proposition that the State War Clause allows it to enact and enforce state legislation regulating immigration otherwise preempted by federal law. One would expect a contemporary commentator to have noticed such a proposition. Instead, in The Federalist No. 44, James Madison glossed over the portion of the State War Clause at issue here by writing: "The remaining particulars of this clause fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark."
>
> Thus, we cannot say Texas has persuaded us that the State War Clause demonstrates it is likely to succeed on the merits.
>
> In sum, Texas has not shown that it is likely to succeed on the merits of plaintiffs' preemption claims. There is considerable authority supporting that the core provisions of S. B. 4 are field, or alternatively, conflict preempted by federal law. Texas has not persuaded us that the State War Clause is likely to compel a contrary result. ***

97 F.4th 268, 294-95(5th Cir. 2024).

Other States:
The Department of Justice filed suits against Iowa and Oklahoma laws in 2023. See United States v. Iowa, (enjoined on preemption grounds, appeal pending in the 8th Cir. as of July 2024) United States v. Oklahoma, 2024 U.S. Dist. Lexis 128145 (June 28, 2024)(injunction granted, appeal filed July to the 10th Cir). Both cases followed the Fifth Circuit Court of Appeals in rejecting the "invasion" arguments.

More Background:
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).

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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 called for a prioritization of removing noncitizens with convictions.

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).

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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.

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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.

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.

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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/ 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. [1] The ABA recognized the effort and awarded the city and its partners the ABA Hodson award for their public service. Several colleges and area law schools contributed to the efforts. See https://www.nyc.gov/office-of-the-mayor/news/538-24/new-york-city-s-asylum-application-help-center-wins-american-bar-association-s-hodson-award-for

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

Cornell Law School and related faculty won a $1.5 million dollar grant to try to help many DACA recipients to obtain nonimmigrant or immigrant status through employment based options. Read more about Path2Papers at https://www.lawschool.cornell.edu/academics/experiential-learning/clinical-program/11-immigration-law-and-advocacy-clinic/. We discuss DACA in chapter 4 and the important options for nonimmigrant visas and waivers of unlawful presence in chapter 3.

End Update Chapter 1.

[11] [Editor's Note: Professor Lenni Benson serves as an informal advisor in the design and implementation of the help center. NYLS held 16 clinics and aided more than 1,000 people completing 400 pro se asylum applications and over 300 applications for Temporary Protected States. All work was reviewed by experienced asylum attorneys but only barebones applications could be assembled at these short clinics More than 500 volunteers assisted.]

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

What's new in this chapter?
This chapter focuses on the power of the federal government to control the admissions of noncitizens at the border or within the interior after irregular entry. Since 2019 when the book was published, this has been an area of rapid change.

The first major shift was created by the Trump Administration and entitled the "Migrant Protection Protocols." This is a misnomer. The thrust of the program was to force people to "remain in Mexico" and to wait for streamlined hearings. The program was formally repealed by the Biden administration and the chapter will only contain brief references to the program.
The second major change was created by the pandemic. The Center for Disease Control and DHS used their authority under Title 42 which concerns public health to exclude people from the United States *outside* of the INA provisions. The Biden administration lifted these controls for the SW border on May 12, 2023.

Then in May of 2023 and again in June of 2024, the Biden administration announced both regulatory changes and enforcement procedures that to many looked a new type of "asylum ban." This supplement will try to give a current picture, as of early August 2024, of the procedures being implemented at the SW border and beyond. Are we back to forcing people to wait in Mexico?
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* (2020).
- 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 and a discussion of the litigation that followed.
- New Problem 3-2-3 is to be analyzed under the May 2023 rules.
- 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.

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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. Immigration statutes use the word "alien" to describe human beings who are not U.S. Citizens, which is offensive. In July of 2021, EOIR Director Jean King announced all EOIR decisions and communications would no longer use the word "alien," and replace it with words like "migrant," "noncitizen," "respondent," "applicant." King noted the EOIR would still use the word "alien" when quoting statute and regulations. Exec. Off. Of Immigr. Rev., PM 21-27, Clarifying the agency's use of terminology regarding

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.

Asylum "Ban": Technically the 2023 and 2024 regulatory changes did not officially ban access to asylum, but the procedures have made the immediate and long term eligibility much more difficult.

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 considered an admission for many purposes and so the person's legal status 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 United States. The Biden administration has greatly expanded the use of parole for humanitarian purposes and to lessen congestion at the border with Mexico. (Chapter 3 Supplement). 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.

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Reasonable Probability Standard: Standard proposed for all irregular entrants after June 3, 2024 (subject to humanitarian exceptions). Defined as more than a reasonable possibility, but somewhat less than more likely than not.

Further Introductory Note

There are an exceptional number of updates to this chapter since the text was published in 2019. Many of these changes reflect the impulse of DHS and the Executive Branch to respond to the so-called "border/migrant crisis." The response to this "crisis" has overwhelmingly been to enact restrictionist migration policies. Other updates reflect the extraordinary amount of litigation in response to these policies, asserting 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.

This introduction offers a structure to understanding the power of the federal government to exclude people at the United States borders or ports of entry. The first key inquiry is to examine the status of the individual. Is the person a returning citizen or lawful permanent resident, are they an individual with a valid visa stamp seeking temporary admission, are they seeking protection guaranteed under domestic and international law or are they attempting to enter without detection. The second key inquiry is to assess whether the individual could be denied admission, or is "inadmissible," which is further explored in chapter 5. Finally, the third 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.

Below is a narrative illustration of how to apply the key inquiries. Each example follows a different procedural posture that starts with a person's entry (or attempted entry) into the United States. Many factors affect how the person is moved through immigration law, including the person's status, manner of entry, fear of returning to a home country, age, family status. Other factors that have significant effects on how a person is treated at the border includes their race, class, nationality, language ability, literacy, gender identity, disability, and religion. The law might on its face treat people of different classes or races the same, but in practice the outcome is significantly different for people of certain classes or races. The next few sections give context to the new regulations at the border, how the concerns they address fit into broader U.S. immigration law policy, and most importantly, the human impact of these regulations.

I. Policy Concerns Addressed in Recent Regulatory Changes

In May of 2023 the Department of Homeland Security announced the "**Circumvention of Lawful Pathways**" rule. The rule established a presumption of ineligibly for asylum for noncitizens who traveled through third countries before entering the United States through the southern U.S. border with Mexico, between May 11, 2023 and May 11, 2025 and do not fall into any humanitarian exceptions. The presumption of ineligibility will affect a final decision of asylum eligibility by an immigration judge. It will also allow a judge who reviews a negative credible fear determination to apply a higher standard to the applicant's case. The Department justified this rule by citing to the increased apprehension rate as documented by the Department.

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They argue this rule will encourage people to take advantage of lawful means to enter the United States. However, this rule was quickly challenged and caught in litigation. The East Bay Sanctuary Coalition (EBSC) argued the rule was inconsistent with the INA which states that any noncitizens who arrives in the US, whether at a designated port of arrival or between ports of entry, may apply for asylum. EBSC argued that both the lawful path to entry—the CBP One App—and the humanitarian exceptions to the rule were insufficient. EBSC also documented serious safety concerns for people who attempt to wait for a CBP One appointment in Northern Mexico, and the barriers they face to ever getting an appointment. After months of litigation, EBSC and the government announced a settlement, the details of which have not been announced. As of August 2024, the rule remains in effect.

In May of 2024, the Department of Homeland Security announced the "**Application of Certain Mandatory Bars in Fear Screenings**" rule. The new regulations authorize Asylum Officers to consider potential bars to asylum during a credible fear interview. A person who would otherwise pass a credible fear interview may now receive a negative determination because they are subject to certain bars. This includes bars for people who have engaged in persecution of others, been convicted of a particularly serious crime, committed a serious nonpolitical crime outside the United States, are a danger to national security, or have engaged in terrorist activities. The Department argued this rule was necessary to "shorten the overall time between encounter and … removal from the United States," to address what the Department believes are "non-meritorious protection claims." The Immigration Legal Resource Center published a comment on the final rule, describing concerns about the effect of the rule on due process, lack of uniformity, and potential for the bars to be applied in a discriminatory way. The IRLC also noted that this rule likely violates the United States's obligation of non-refoulment and the credible fear standard as written by Congress. This rule means more people will be deported to countries where their safety and lives are in danger. *See full report here:* *https://www.ilrc.org/sites/default/files/2024-06/ILRC%20Comment%20on%20NPRM%20Application%20of%20Certain%20Mandatory%20Bars%20in%20Fear%20Screenings.pdf*

In June of 2024, the Department of Homeland Security announced the "**Securing the Border**" rule. Under this rule any person who enters the United States without inspection or admission, on or after June 3, 2024 (or during a period of "Emergency Border Circumstances" is now subject to a higher standard during the credible fear interview. The person must show that there is a reasonable probability they are eligible for asylum to receive a positive credible fear determination. This is a substantial increase from the old standard, which states that a person who shows there is a significant possibility they could establish eligibility for asylum will receive a positive credible fear determination. The Department claimed the new rule was necessary to address the "surging" number of migrants entering the southern border. The Department explained "at the current levels of encounters and with current resources, the Department cannot predictably and swiftly deliver consequences to most noncitizens who cross the border without a lawful basis to remain." The Department explained that this is because they do not have the resources to detain each person apprehended at the southern border, so many people are released from custody and given a court date with the immigration court. DHS argues that many people will not appear for court hearings.
https://www.federalregister.gov/documents/2024/06/07/2024-12435/securing-the-border The

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solution proffered by this regulation is to make it harder to get into the country in the first place, by raising the standard for passing a credible fear interview. In practice, legal service providers and border organizations report due process and human rights violations are rampant in the wake of this new regulation. DHS is no longer required to ask people if they fear a return to their home country, and DHS reportedly has ignored people who do express a fear of return. Read the full report here: https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2024-07/Six-Week-Report-Biden-2024-Asylum-Ban_FINAL.pdf.

II. Policy Justifications in U.S. Immigration Law

These three regulatory changes are reflective of a pattern in U.S. immigration law, which is to enact policies that focus on preventing migration. Most of the adopted legislation in Congress since the early 1990s has focused on border security. The number of Border Patrol agents was 4,139 agents in 1992. *U.S. Border Patrol Fiscal Year Staffing Statistics*, U.S. CUSTOMS AND BORDER PATROL (May 6, 2021). By 2002, the total number of Border Patrol Agents was over 10,000. *Id.* Today, there are 19,357 agents employed by Border Patrol, with about 85% of them assigned to the southwest border. *Id.*

Since the 1990s, the U.S. government has invested substantial resources into increasing physical barriers to enter the United States. This is part of a larger policy strategy known as "Prevention Through Deterrence," which was first announced by Border Patrol in 1994. The strategy aimed to increase the numbers of agents along the border to raise the risk of apprehension. *See Border Patrol Strategic Plan 1994 And Beyond,* U.S. CUSTOMS AND BORDER PATROL *(*1994). The prediction was the increased risk of apprehension would either deter people from crossing illegally or force them to cross "over more hostile terrain," thus using the desert as a natural deterrent. The logic was that the natural hazards of the desert would act as a deterrent to keep people from crossing the border. Presence of Border Patrol agents and wall construction has pushed migrants to take more remote routes. The so-called "virtual border", or CBP's surveillance system, sends migrants further into the desert to avoid detection. *See* Sam Biddle and Ryan Deveraux, *Mapping Project Reveals Location of U.S. Border Surveillance Towers*, THE INTERCEPT (Mar. 20, 2023) https://theintercept.com/2023/03/20/border-surveillance-map/. In a report to Congress in 1997, the U.S. General Accounting Office identified that deaths of migrants attempting to cross the border would indicate the Attorney General's strategy of deterrence had been successful. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-98-21, *Illegal Immigration: Southwest Border Strategy Results Inconclusive; More Evaluation Needed* (1997). Since the enactment of this policy, at least 10,000 migrants have died attempting to cross the U.S./Mexico Border. *See* The True Cost of Border Deterrence: Hearing on Border Security and Enforcement Before the Subcomm. on Counterterrorism, L. Enf't., and Intel. of the H. Comm. On Homeland Sec. 118th Cong. (2023) (statement of Ari Sawyer, U.S. Border Researcher for Human Rights).

Instead of creating more physical barriers to enter the United States, these regulations create legal barriers to obtaining lawful status for people who do not cross legally. This follows a similar logic to prevention through deterrence—the existence a legal barrier to lawful status will prevent people from crossing the border unlawfully. And similar to prevention through deterrence, it is not likely to have the outcome of decreasing migration.

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III. Human Impact of Prevention Through Deterrence Immigration Policy

Another name for the strategy "Prevention through Deterrence" as coined by John Washington is "Prevention Through Death." From 1995 to 2005, the number of border-crossing deaths more than doubled. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-770, *ILLEGAL IMMIGRATION: Border-Crossing Deaths have Doubled Since 1995; Border Patrol's Efforts to Prevent Deaths Have Not Been Fully Evaluated* (2006). There was also a shift in what caused border-crossing deaths, from traffic accidents, drownings, and homicide to exposure to heat and cold. *Id.* Since the enactment of this strategy, thousands of migrants have died in the desert. However, the exact number of people who have perished in the desert is challenging to estimate. A number of organizations along the southwest border try to track the number of migrants who die in the desert each year. EL PASO SECTOR MIGRANT DEATH DATABASE, https://www.elpasomigrantdeathdatabase.org/ (last visited: May 26, 2024), *see also* ARIZONA OPENGIS INITIATIVE FOR DECEASED MIGRANTS, https://humaneborders.info/ (last visited: May 26, 2024). Professor Jason De León suspects that the numbers could be much higher, because of how quickly bodies are erased by environmental factors in the desert. JASON DE LEON AND MICHAEL WELLS, THE LAND OF OPEN GRAVES 36 (U. of California Press, 1st ed. 2015). There are thousands of missing persons reports filed by families of migrants every year, and the bodies are never recovered. Radiolab: Border Trilogy Part 2: Hold the Line, WNYC STUDIOS (Apr. 5, 2018) . Migrant crisis lines also receive calls from people looking for missing family members. In 2015, the Arizona-based group No More Deaths opened 1,200 cases for people who were unaccounted for after crossing the U.S.-Mexico border. *See* http://www.thedisappearedreport.org/uploads/8/3/5/1/83515082/disappeared--introduction.pdf. While the exact number of humans who perish in the desert each year is uncertain, the overarching cause of their deaths is clear. The policy of Prevention Through Deterrence has pushed migrants into harsh terrain where the likelihood of dying a violent and painful death is significantly greater than before this policy was enacted.

Left: shrine created by migrants for migrants who have died crossing the U.S./Mexico border

Photo Credits: Becs Chant

While these policies hope that people will be deterred by the consequences of crossing the border, people still cross the border. People who do not have a proper document to enter the United States have several options on how to enter the United States, and each option comes with its own risks. First, a person can download the CBP One App and try to make an appointment with CBP. As documented in the complaint filed by East Bay Sanctuary Covenant, there are significant issues with the CBP One App that preclude people from making

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appointments. Amended and Supplemental Complaint for Declaratory and Injunctive Relief at 27, *East Bay Sanctuary Covenant, et al., v. Biden*, 683 F.Supp.3d (9th Cir. 2023) (No. 147-2). Second, a person could present themselves at the border, by turning themselves in to an agent for processing. David J. Bier, *What Makes Crossing the Border Illegal? DHS Does,* CATO INSTITUTE (Dec. 16, 2022) https://www.cato.org/blog/what-makes-crossing-border-illegal-dhs-does. Finally, a person could make the difficult decision to cross the border without inspection, by crossing the Rio Grande or entering around, above, or under the border wall. Most people who resort to this option eventually turn themselves in to CBP, after trekking through the desert for 5 to 10 miles. Justin Fox, *Illegal U.S. Border Crossings Aren't Really Breaking Records,* BLOOMBERG (Mar. 20, 2024) https://www.bloomberg.com/opinion/articles/2024-03-20/illegal-us-border-crossings-aren-t-really-breaking-records. There is another option for families traveling with children. Parents realize their child has a chance of making it across the border, and so have their children present by themselves to a CBP Officer. Erica Bryant, *Children Are Still Being Separated from Their Families at the Border,* VERA INSTITUTE (June 23, 2022) https://www.vera.org/news/children-are-still-being-separated-from-their-families-at-the-border. CBP is required to allow the child to cross the border, and then refers the child to the Office of Refugee Resettlement (ORR).

People who are apprehended by CBP are first brought to CBP holding cells. CBP holding is known for its freezing cold temperatures, and is colloquially known as "la Hielera," which translates from Spanish as "the icebox." Migrants report huddling together for warmth and being unable to sleep because of the cold temperatures. *In the Freezer: Abusive Conditions for Women and Children in U.S. Immigration Holding Cells,* HUMAN RIGHTS WATCH (Feb. 28, 2018) https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells. There are also extensive reports of physical and sexual abuse of migrants while in CBP custody. *"They Treat You Like You Are Worthless" Internal DHS Reports of Abuses by US Border Officials*, HUMAN RIGHTS WATCH (Oct. 21, 2021) https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials.

The government spends incredible amounts of resources on keeping people out of the United States. As you read through the chapter updates, consider how effective these policies are at doing what they purport today, and what consequences they have on the lives on human beings.

Left: art installation titled "Paseo de la Humanidad" along the U.S./Mexico Border fence in Nogales, Mexico. Created by Alberto Morackis, Guadalupe Serrano and Alfred Quiróz

Read more about the art and artists here: http://www.nomadicborder.com/photo-essays/border-art-border-dynamics-and-paseo-de-la-humanidad

Photo Credits: Becs Chant

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Below are photos from reports written by CBP about their strategy as an organization. Do you notice any themes in the photos? What is the narrative that the Border Patrol emphasizes?

US Border Patrol Strategy 2024 – 2028 (https://www.cbp.gov/sites/default/files/2024-08/usbp-strategy_051424.pdf)

Holding the Line in the 21st Century (https://www.cbp.gov/sites/default/files/documents/Holding%20the%20Line_TRILOGY.pdf)

USBP agents operating with state law enforcement

USBP agents at a command and control center

Trainees at the Border Patrol Academy

6

Small Unmanned Aircraft System (sUAS) surveilling at the border

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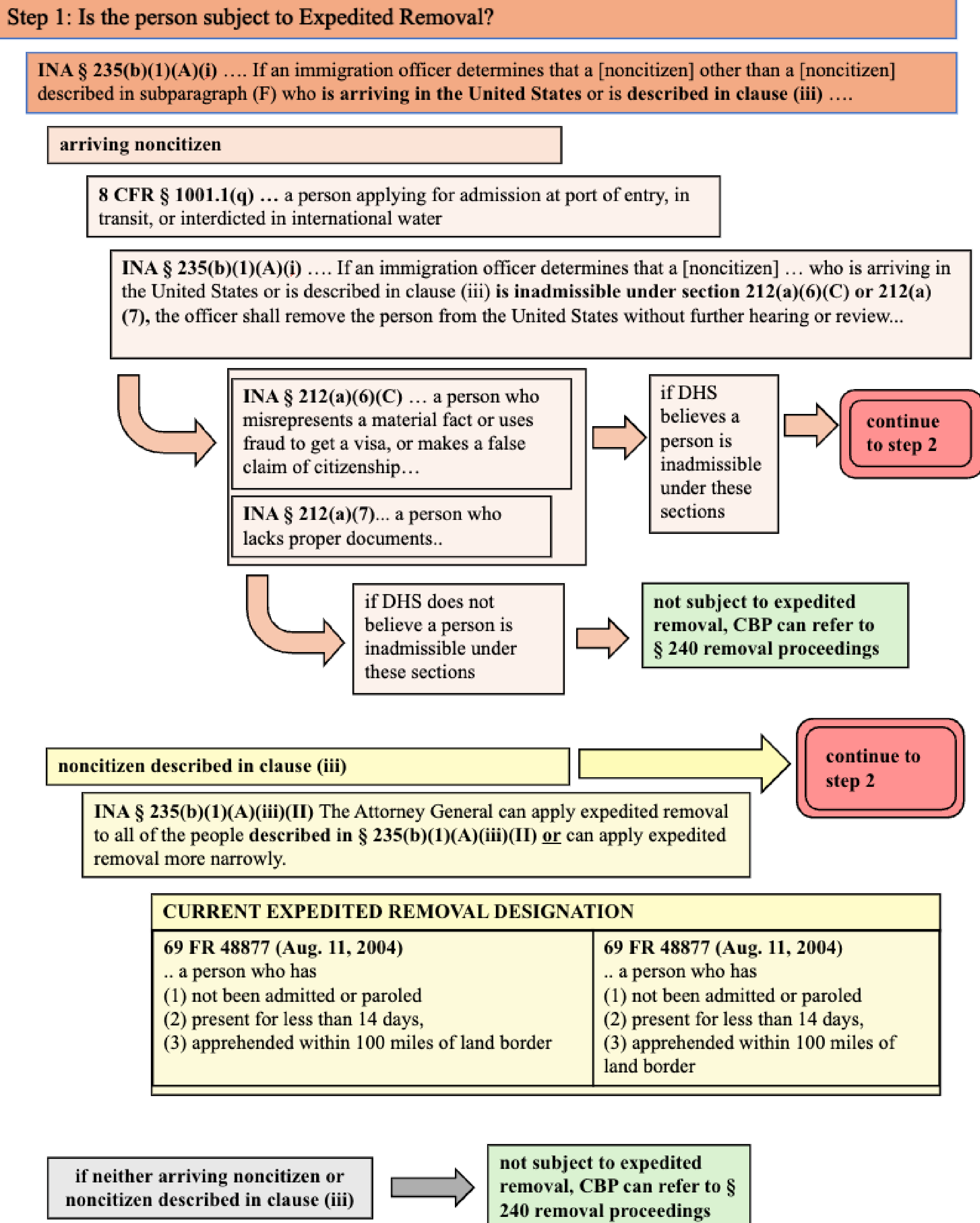
Here we provide a step-by-step guide to what should occur in expedited removal pursuant to statutes and regulations. In the text problems you will be asked to analyze these steps. Ultimately, it is difficult to know if the government is following the procedure for there is little transparency in the process and even less judicial oversight.

Flow Charts



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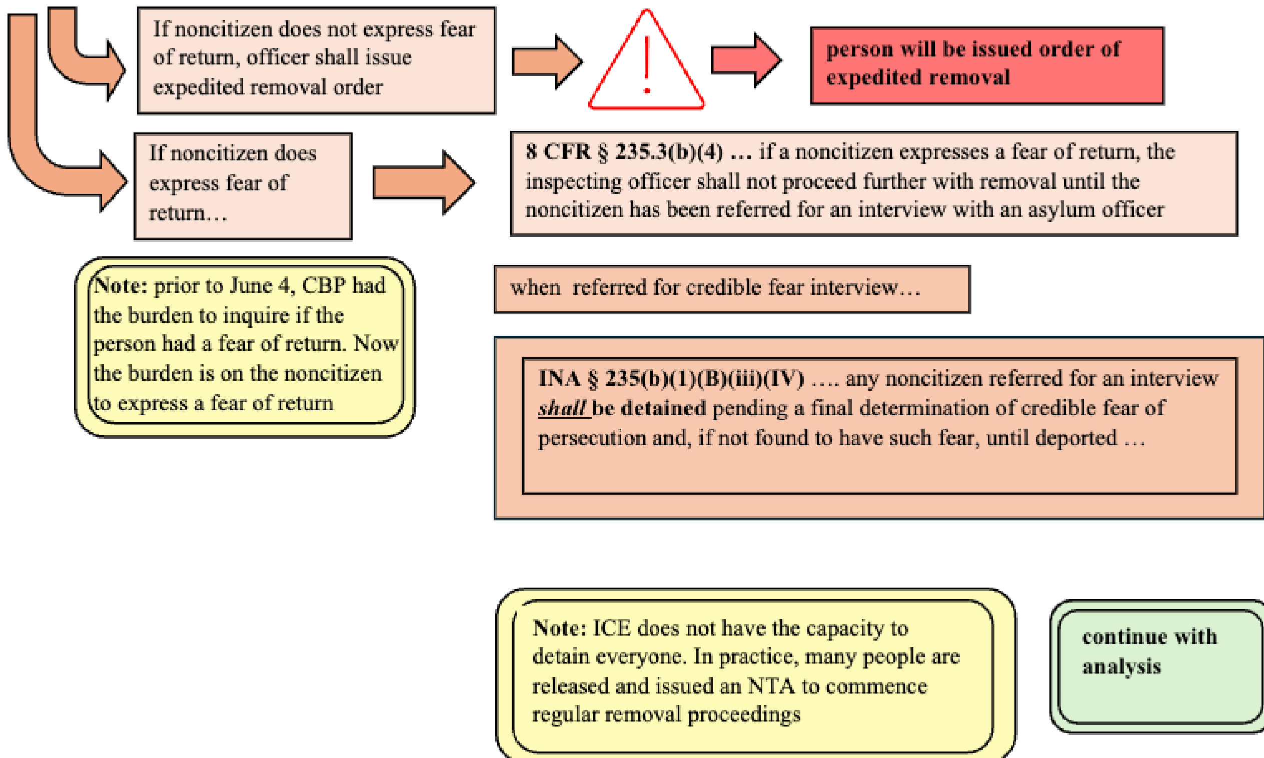

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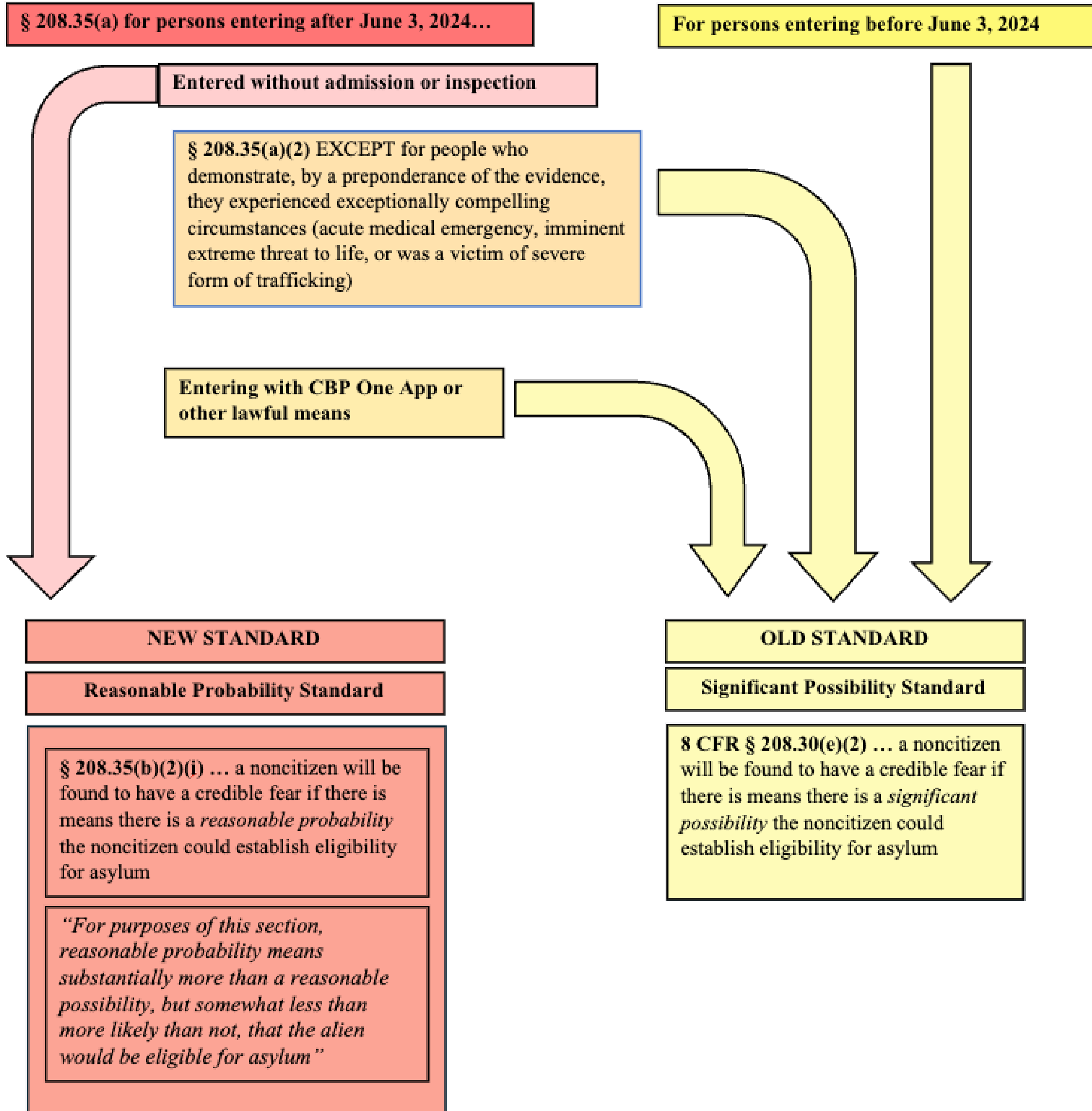

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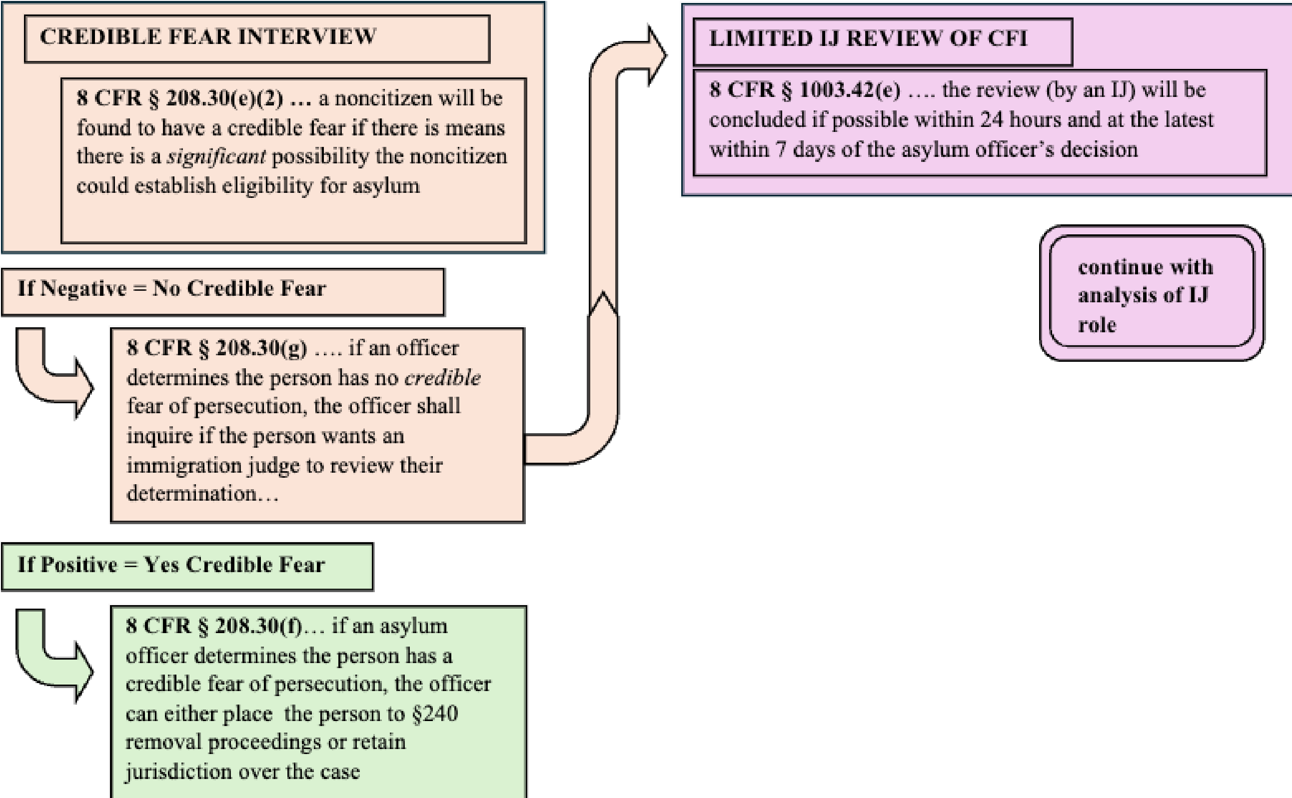

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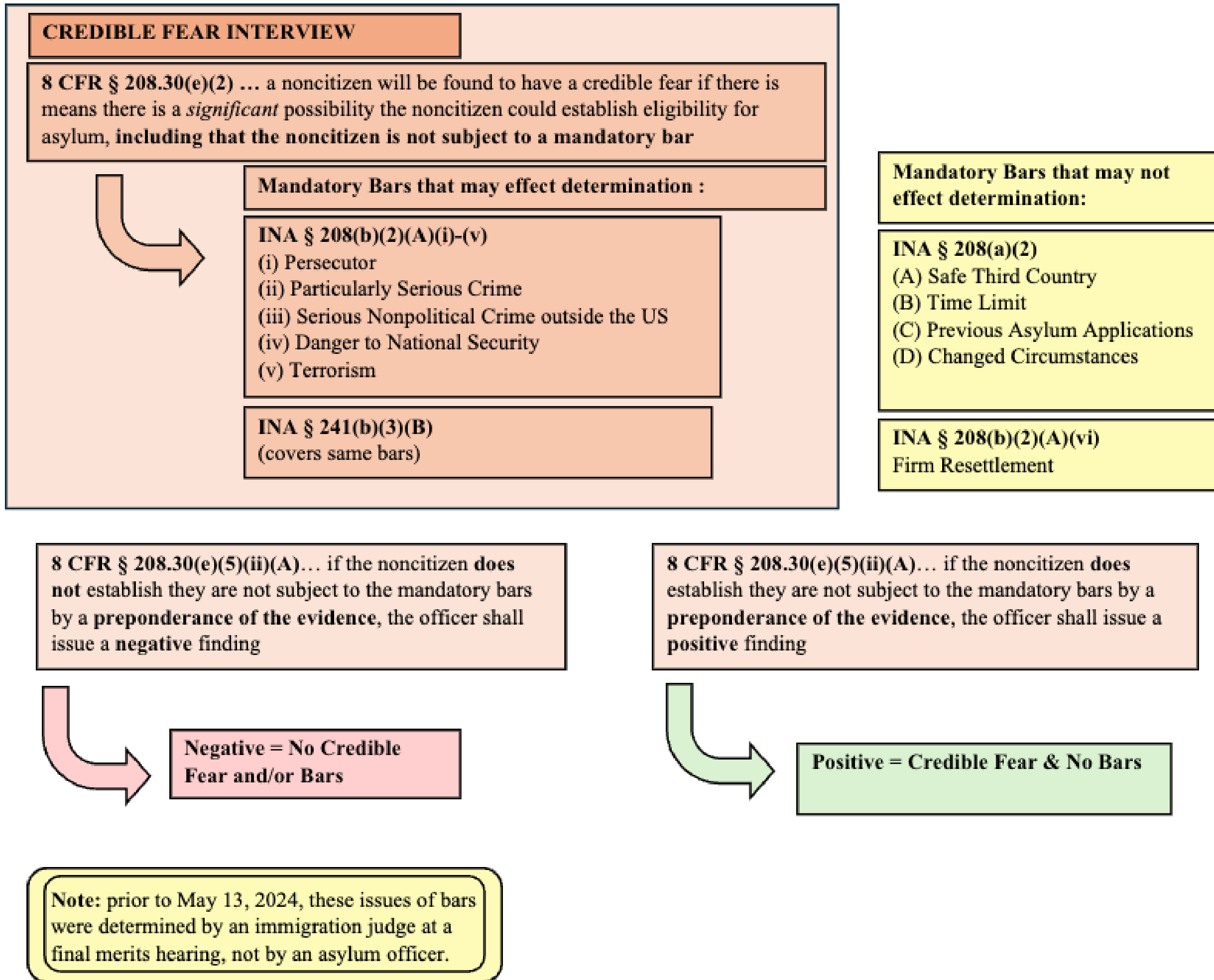

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Part 5: What is the Immigration Judge's standard of review for a fear determination?

See Circumvention of Lawful Pathways, 88 FR 31314 (May 16, 2023)

LIMITED IJ REVIEW OF CFI

8 CFR § 1003.42(e) …. the review will be concluded if possible within 24 hours and at the latest within 7 days of the asylum officer's decision

Determine which standard of review applies:

- If entered before May 11, 2023
- If entered after May 11, 2023, but entered with CBP One App
- If entered after May 11, 2023, did not enter lawfully, BUT are an unaccompanied child, parolee, or person who sought and were denied asylum in third country
- If entered after May 11, 2023, did not enter lawfully, BUT entered unlawfully because could not use CBP One App because of technical failure, language barrier, illiteracy, or another serious obstacle
- If entered after May 11, 2023, did not enter lawfully, BUT shows by a preponderance of the evidence they experienced experienced exceptionally compelling circumstances (acute medical emergency, imminent extreme threat to life, or was a victim of severe form of trafficking)

Significant Possibility Standard

8 CFR § 1003.42(d) …. The immigration judge shall make a de novo determination as to whether there is a *significant possibility* the person is eligible for asylum

If entered between May 11, 2023 and May 11, 2025, and traveled through a third country, and does not meet an exception above

Reasonable Possibility Standard

88 FR 31314 (May 16, 2023) … a noncitizen will be found to have a credible fear if there is means there is a *reasonable possibility* the noncitizen could establish eligibility for asylum

Potential outcomes after judicial review (under either standard)

If Positive = Yes Credible Fear

8 CFR § 1208.30(g)(2)(iv)(B) … judge can refer person back to DHS or place in §240 removal proceedings

If Negative = No Credible Fear

8 CFR § 1208.30(g)(2)(iv)(A) … judge shall return case to DHS for expedited removal

Note: for Negative Findings, per INA § 235(b)(1)(C) … an [expedited] removal order is not subject to administrative appeal

The textbook updates begin in regular format on the following page.

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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 2019-2023:

	FY2019	FY2020	FY2021	FY2022	FY2023
PROCESSED PASSENGERS TOTAL	**1,124,075**	**650,178**	**491,688**	**868,867**	**1,081,030**
Int'l Air Passengers & Crew	371,912	169,842	121,516	263,000	350,597
Passengers & Crew by Sea	70,414	35,795	8,094	58,549	85,974
Passengers & Pedestrians by Land	681,750	444,541	362,078	547,318	644,459
Private Vehicles	273,338	187,049	159,598	226,589	236,572
Truck, Rail, and Sea Containers	78,703	77,895	89,458	91,605	100,350
$ Amount of Imported Goods	$7.3 billion	$6.64 billion	$7.6 billion	$9.2 billion	$9.2 billion
$ Amount of Duties, Takes and Other Fees	$224 million	$216 million	$256 million	$306 million	$253 million
Apprehensions at Ports of Entry	2,354	1,107	1,703	6,068	5,654
Arrests of Wanted Criminals	23	39	25	41	44
Refusals of Inadmissible Persons	790	634	723	1,152	3,116
Intercepted Fraudulent Documents	18	269	7	8	5
Discovered Pests	314	250	264	240	231
Discovered Materials for Quarantine (plant, meat, animal product, soil)	4,695	3,091	2,548	2,677	3,287
Pounds of Narcotics Seized/Disrupted	3,707 pounds	3,677 pounds	4,732 pounds	2,895 pounds	2,339 pounds
$ Amount of Undeclared or Illicit Currency Seized	$207,356	$386,195	~$342,000	~$217,700	~$182,998
$ Amount of Products Seized with I.P. Violations	$4.3 million	$3.6 million	$9 million	$8 million	$6.6 million

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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 (all)	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	2,766,582**	3.76%	Not calculated	3.76%
2023	132,400,00*	Not available	3,201,144**	Not reported		

*This figure comes from all admissions of nonimmigrants. ** data from CBP enforcement page found at https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics

Page 131 (§ 2.01[B][1]): Notes and Questions: 1. Where Are the Borders?
The U.S. government spends billions of dollars a year enforcing immigration laws along the northern and southern land borders. As you know, immigration laws do not only exist along the land borders. Immigration laws touch all aspects of a noncitizen's life. Does the border only exist where the U.S. government says it does? Where else could the border exist?

> "The U.S-Mexican border es una herida abierta where the Third World grates against the first and bleeds. And before a scab forms it hemorrhages again, the lifeblood of two worlds merging to form a third country — a border culture.
>
> Borders are set up to define the places that are safe and unsafe, to distinguish us from them. A border is a dividing line, a narrow strip along a steep edge. A borderland is a vague and undetermined place created by the emotional residue of an unnatural boundary. It is in a constant state of transition. The prohibited and forbidden are its inhabitants."

-- GLORIA ANZALDÚA, BORDERLANDS/LA FRONTERA: THE NEW MESTIZA (2012)
Gloria Anzaldúa (1942-2004) was a scholar who wrote extensively about borders and borderlands, not just physical ones defined by nation states. How does your understanding of what a border is change when you apply her theory that a border is a "dividing line"?
The U.S. government does not just spend dollars domestically on border enforcement. The Department of State has consulates in 173 countries where people looking to visit or immigrate to the United States apply for visas. In the last 30 years, the U.S. government has developed partnerships with "transit countries" such as Mexico providing funding, training and equipment. The considerable efforts the U.S. has taken to strengthen Mexico and other transit country's border patrol has been called out by scholars as "pushing the border south."

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[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

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See Nancy Hiemstra, *Pushing the US-Mexico border south: United States' immigration policing throughout the Americas,* International Journal of Migration and order Studies, (2019) https://doi.org/10.1504/IJMBS.2019.099681

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 website 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).

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See also a settlement statement from the Sierra Club. Available at: https://www.sierraclub.org/press-releases/2023/07/sierra-club-southern-border-communities-coalition-and-aclu-reach-settlement

Presidents before Donald Trump contributed significantly to the construction of the border wall The Bush administration set a goal of building 670 miles of border fence on the U.S./Mexico Border, as part of the War on Terror. Fact Sheet: The Seventh Anniversary of 9/11, THE WHITE HOUSE PRESIDENT GEORGE W. BUSH (Sept. 10, 2008), https://georgewbush-whitehouse.archives.gov/news/releases/2008/09/20080910-5.html. Most of President Bush's border fence was built during President Obama's administration, who oversaw the construction of 385 miles of border fence from 2008 to 2014. *See Our Comprehensive Response at the Border, By the Numbers,* THE WHITE HOUSE PRESIDENT BARACK OBAMA (Sept. 15, 2014) https://obamawhitehouse.archives.gov/blog/2014/09/15/our-comprehensive-response-border-numbers . The Trump administration actually only constructed 87 miles of new border barriers and 371 miles of replacement border barriers. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105443, SOUTHWEST BORDER: ADDITIONAL ACTIONS NEEDED TO ADDRESS CULTURAL AND NATURAL RESOURCE IMPACTS FROM BARRIER CONSTRUCTION 19 (Sept. 2023)

Physical barriers are not the only tool the federal government uses to deter migrants from crossing the border. In 2005, CBP deployed the Secure Border Initiative Network, a surveillance tower project which covered about 53 miles of the southern border in Arizona. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-22, ARIZONA BORDER SURVEILLANCE TECHNOLOGY: MORE INFORMATION ON PLANS AND COSTS IS NEEDED BEFORE PROCEEDING (2011). Today, the Electronic Frontier Foundation has tracked 469 surveillance towers along the U.S./Mexico border alone. U.S.-Mexico Border Surveillance Data*,* ELECTRONIC FRONTIER FOUNDATION (May 10, 2024). In the last ten years, CBP has added several new surveillance technologies, including Unattended Ground Sensors (UBS), which are placed in remote areas and notify CBP when they detect persons or vehicles. U.S. DEP'T OF HOMELAND SECURITY, DHS/CBP/PIA-022(A), PRIVACY IMPACT ASSESSMENT UPDATE FOR THE BORDER SURVEILLANCE SYSTEMS. CBP also continues to build surveillance towers in remote areas, which use cameras to scan a three mile radius around the tower, and use artificial intelligence to track activity and alert CBP officers. John Davis, *A Watchful Eye,* U.S. CUSTOMS AND BORDER PATROL: FRONTLINE (Jan. 04, 2022)

Image from https://www.cbp.gov/border-security/along-us-borders/border-wall-system
See Electronic Frontier Foundation's map of Border Patrol Towers here: https://www.google.com/maps/d/u/1/viewer?mid=1bxUGeOT6vVXu0jFQhDLxgktLFLVOKsI&ll=32.372048257529386%2C-108.78984324794767&z=5
See the full dataset here: https://www.eff.org/document/us-mexico-border-surveillance-data

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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.

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.,

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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 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*]

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

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

Regulatory changes to expedited removal and asylum at the border are frequent. This update has several sections. First, this update explains expedited removal as it currently stands. Second, it discusses the May 2023 "Circumvention of Lawful Pathways" rule and subsequent litigation. Third, it discusses the May 2024 "Application of Certain Mandatory Bars in Fear Screenings" rule.

Expedited Removal

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).

In the Illegal Immigration Reform and Immigrant In an expedited removal proceeding, noncitizens have fewer rights than a person in regular removal proceeding. For example, see 8 U.S.C. §1225(c) (allows immigration officer to remove a noncitizen in expedited removal without a hearing, unlike in regular removal proceedings where an immigration judge must order a person deported), 8 U.S.C. §1225(b)(1)(B) (requires noncitizens in expedited removal to first receive a credible fear interview before being able to file for asylum), 8 U.S.C. §1225(b)(1)(B)(iii)(IV) (imposes a mandatory detention requirement on noncitizens in expedited removal). *See also* Eleanor Acer & Olga Bryne, *How the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Has Undermined US Refugee Protection Obligations and Wasted Government Resources*, 5 JOURNAL ON MIGRATION AND HUMAN SECURITY 356, (2017). Noncitizens in expedited removal are subject to mandatory detention, have fewer opportunities for agency review, are generally unable to seek legal advice, and may not appeal a decision of expedited removal to a federal judge. 8 U.S.C. §§ 1225(b)(1)(A)-(C).

DHS can only initiate expedited removal proceedings against certain noncitizens. The first category of noncitizens subject to expedited removal are noncitizens who are arriving at a port of entry and are found to be inadmissible for lacking proper documents or for misrepresenting a material fact or using fraudulent documents. 8 U.S.C. § 1182 (a)(6)(C), (a)(7). This includes persons who arrives at a port of entry, do not have a valid document to enter the United States (such as a visa, green card, or U.S. passport), is using someone else's documents or is using a fake document.

A second category of noncitizens subject to expedited removal is designated by DHS. The INA authorizes DHS to designate for expedited removal any noncitizens who were inadmissible under §§ 212(a)(6)(C) or 212(a)(7), entered the United States without being admitted or paroled, and have not been physically present in the United States for two continuous years prior to the determination of inadmissibility. 8 USC § 1225(b)(1)(A)(iii)(II). This includes people who have crossed the border between ports of entry, lack a visa or immigrant status, and have resided in the United States for less than two years. However, the current designation of expedited removal is narrower. For a noncitizen who is physically present in the United States to be subject to expedited removal, they must have been inadmissible under §§ 212(a)(6)(C) or 212(a)(7), entered without being admitted or paroled, present in the United States for less than 14 days, and

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apprehended within 100 miles of a U.S. international land border. 8 C.F.R. § 235.3(b), § 287.1(a)(2) (defining a "reasonable distance" as 100 air miles from any external boundaries of the United States.

CBP is required to place an arriving noncitizen inadmissible under §§ 212(a)(6)(C) or (a)(7) in expedited removal proceedings unless that person express an intent to apply for asylum. 8 U.S.C. § 1225(b)(1)(A)(i). The CBP officer may also allow this person to withdraw their application for admission and depart immediately. 8 U.S.C. § 1225(a)(4). Noncitizens do not have a right to withdraw their application, rather, it is at the discretion of the CBP officer to grant permission for a noncitizen to withdraw their application for admission and depart without being ordered removed. 8 C.F.R. § 235.4. CBP is supposed to only grant permission to withdraw an application for admission if that person can immediately leave the United States. 8 C.F.R. § 235.4. The benefit of withdrawing an application is that the noncitizen will not have an order of removal on their record, which in the case of expedited removal can never be reopened or appealed. 8 U.S.C. § 1225(b)(1)(C).

When CBP apprehends a person who has entered without inspection less than 14 days prior and is within 100 miles of the border, CBP has the discretion to place that person in expedited removal proceedings. However, other scenarios are also possible. CBP reports that a number of people who are about to be apprehended head back into Mexico, referred to in CBP data sets as "turn backs." Other times, CBP may interact with the person and tell them to return to Mexico, without placing them in proper expedited removal proceedings. This is known as a "kick back."

In 2023, CBP stopped 894,501 people who were determined to be "inadmissible" to the United States. 177,295 people were permitted to withdraw their applications for admission. 301,069 people were paroled into the United States, which included 82,000 Ukrainians, 60,513 Haitians and 54,980 Venezuelans. CBP placed 22,018 in expedited removal proceedings, and around 4,505 people placed in expedited removal expressed an intention to apply for asylum. Meanwhile, 279,260 people who were found to be inadmissible at a port of entry were placed in regular removal proceedings. *Stopping "Inadmissibles" at U.S. Ports of Entry,* TRAC SYRACUSE UNIVERSITY (July 2023) .https://trac.syr.edu/phptools/immigration/cbpinadmiss/ (TRAC compiles data published by DHS).

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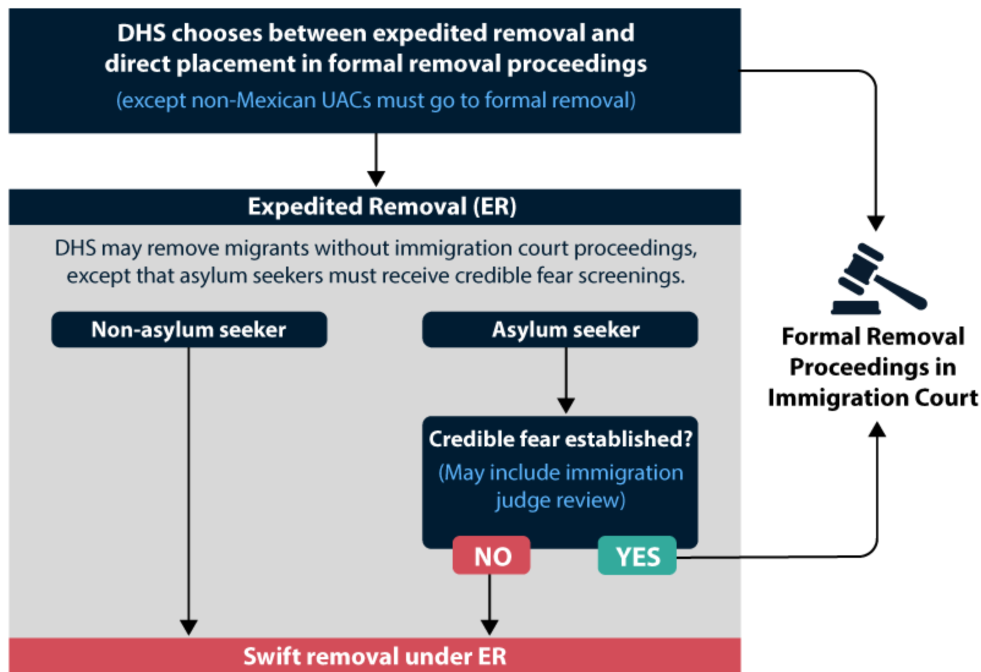

Circumvention of Lawful Pathways Rule

In May of 2023, the Biden administration ended public health expulsions under Title 42. The administration subsequently announced a new rule, "Circumvention of Lawful Pathways" these regulations give CBP the power 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.

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

The same day the rule was announced, the advocacy group East Bay Sanctuary Covenant (EBSC) challenged the legality of the rule. The District Court of Northern California granted summary judgement for the plaintiffs on July 25, 2023.
The court held that the rule was inconsistent with INA §108(a)(1), which says any noncitizen who arrives in the United States, whether at a designated port of arrival or between ports of entry, and irrespective of their status, may apply for asylum. *East Bay Sanctuary Covenant. Biden*, 683 F.Supp.3d 1025, 1043 (9th Cir. 2023). The court also found that the rule violated INA § 108(b)(2)(C), which says the attorney general may by regulation establish additional limitations and conditions, so long as the limitations are "consistent with this section." *Id.*
The government argued that the rule was consistent with INA §108(a)(1) because the rule permitted noncitizens who did not present at ports of entries to apply for asylum, so long as they fell under an exception or a category to rebut the presumption of ineligibility. *Id.* The plaintiffs

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argued that the exception for granted parolees was meaningless, because while the rule only applies to the southern border, granted parolees are required to enter the United States through a U.S. airport. Amended and Supplemental Complaint for Declaratory and Injunctive Relief at 23, *East Bay Sanctuary Covenant, et al., v. Biden*, 683 F.Supp.3d (9th Cir. 2023). No person attempting to enter over the southern border would be a participant in one of these parole programs. Second, the plaintiffs argued the exception for persons who had claimed asylum in a third country was insufficient, because of how challenging it is to apply for asylum in any country. *Id.* at 29. Third, the plaintiffs documented widespread problems with the CBP One App. The app is only available in three languages, English, Spanish, and Haitian Creole. *Id.* at 27. The error messages on the app are only in English. *Id.* at 44. The App frequently glitches because it is overloaded by the number of requests. There is also spotty service and limited access to WiFi in northern Mexico. *Id.* at 27. The plaintiffs also explained that while waiting in northern Mexico is dangerous for migrants, many of the dangers do not rise to the exception of "extreme and imminent threat to life or safety. *Id.* at 25.

The court found that the existence of exceptions did not make the rule consistent with the INA, because the rule still restricted eligibility for asylum based on where a person entered the United States. *East Bay Sanctuary Covenant. v. Biden*, 683 F.Supp.3d 1025, 1043 (9th Cir. 2023). The court also found that the exception for noncitizens who applied for asylum in a third country was insufficient because it did not consider whether the third country is safe. Congress's intent here was that there should only be a limit to asylum when transit in a third country presents a safe option. *Id.*

The government appealed this decision to the 9th Circuit on July 25, 2023. At the 9th Circuit, the government argued that any interruption in the rule would be a significant burden to the government, citing the "historic surge in migration" which, without the rule, would result in an "expected increase in border encounters threatened to overwhelm the Department." *Id.* The 9th Circuit stayed the lower court's ruling allowing the new regulations to stay in effect while the court ruled on the merits of the case. *East Bay Sanctuary Covenant. v. Biden*, 93 F.4th 1130, 1134 (9th Cir. 2024) (referencing the government's position).

In February of 2024, the plaintiffs and government announced a settlement. The details of the settlement have yet to be released, but the parties informed the court they were discussing options where the rule would go away. The 9th Circuit placed the case in abeyance, allowing the District Court's ruling to stand. *East Bay Sanctuary Covenant. v. Biden*, 2023 WL 11882094 (9th Cir. 2023). Circuit Judge VanDyke wrote the sole dissent to this procedural pause. VanDyke alleged that the government either severely misrepresenting their concern for what would happen at the border in the absence of the rule, or else were engaged in election year politics and "snatching defeat from the jaws of victory" to announce another rule at a more politically popular time.

> "The administration's abrupt about-face makes no sense as a legal matter. Either it previously lied to this court by exaggerating the threat posed by vacating the rule, or it is now hiding the real reason it wants to hold this case in abeyance. Given its success thus far in defending a rule it has consistently characterized as critical to its control of the border, and the fact that it has to realize its odds of success in this case

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> can only improve as it works its way vertically through the federal court system, the government's sudden and severe change in position looks a lot like a purely politically motivated attempt to throw the game at the last minute. At the very least it looks like the administration and its frenemies on the other side of this case are colluding to avoid playing their politically fraught game during an election year."

East Bay Sanctuary Covenant. v. Biden, 93 F.4th 1130, 1131 (9th Cir. 2024) (Van Dyke, dissenting).

As of July 2024, the details of this settlement have not been released and the rule remains in effect. For a brief report analyzing the legality of the rule, 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 through 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#*

The rule changes the standard of review Immigration Judges use when reviewing a negative credible fear determination. How much does changing the standard change the outcome? See the chart below which compiles data released by the Asylum Office:

FY 2024 to June	Total	Positive	Negative	Admin. Closed or Dismissed
CREDIBLE FEAR	144,786	67,851	55,429	38,930
Percentage Outcomes		47%	38%	27%
REASONABLE FEAR	12,868	3,971	5,291	3,221
Percentage Outcomes		31%	42%	25%

Even if a person passes the initial screening, or if they are placed in regular removal proceedings under INA § 240, the Circumventing Irregular Pathways rules could curtail their ability to apply for asylum altogether and unless they can establish that they qualify for an exception, they may only seek withholding of removal or protection under the Convention Against Torture. See discussion in Chapter 8 supplement.

Application of Certain Mandatory Bars in Fear Screenings Rule

On May 13, 2024, the Biden administration announced a new proposed rule, Application of Certain Mandatory Bars in Fear Screenings. The rule makes significant changes to rules governing asylum seekers in expedited removal.

The rule permits asylum officers conducting fear screenings to also consider what are known as "bars" to asylum. Typically, these bars are not evaluated until much further along in the asylum

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process, when asylum seekers have had the opportunity to consult with immigration attorneys. Asylum officers previously had no authority to consider these bars. Now, they may consider if an asylum seeker is subject to a bar, including bars for engaging in persecution of others, conviction of a particularly serious crime, committing a serious crime outside the U.S, being threat to national security, or meeting a terrorism-related ground of inadmissibility. These bars often require extensive legal analysis and research.
See American Immigration Council's fact sheet on the Biden Administration's Proposed Regulation on Asylum Bars: An Analysis:
https://www.americanimmigrationcouncil.org/research/biden-administration-proposed-regulation-asylum-bars-analysis#:~:text=On%20May%209%2C%202024%2C%20the,a%20full%20hearing%20before%20an
See also Immigrant Legal Resource Center's Comment on NPRM Application of Certain Mandatory Bars in Fear Screenings: https://www.ilrc.org/resources/community/ilrc-comment-nprm-application-certain-mandatory-bars-fear-screenings

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. One of these suits that resulted in a historic settlement is mentioned in Chapter 5. *See Emami v Mayorkas* joined with *Pars Equality Center v Blinken*, 18-cv-01587JD (N.D. Cal. 2024)

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,

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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 now appears to be moribund due to lack of sufficient resources. We have left the brief description for the regulations creating the process have not been repealed. The new Asylum Merits Interview Process 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 for 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 2022, 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 new rules of May 2023.

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	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
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. Biden administration later rules have largely moved the focus to more expedited process at the borders and the implementation of more bans on eligibility. ** 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.

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

DHS Repatriations by Type: Fiscal Years 2019 to 2024 YTD (March 2024)

		Total Repatriations				DHS Removals[1]			
Fiscal Year	Month	Total Repatriations[3]	Total Title 8 Repatriations[4]	Title 8 Enforcement Repatriations[5]	Title 42 Expulsions[6]	Total Removals	Expedited Removals	Reinstatements of Removal Orders	Other Removals
2019	**Total**	**518,390**	**518,390**	**428,670**	**X**	**347,270**	**163,520**	**127,380**	**56,370**
2020	**Total**	**608,430**	**401,660**	**287,800**	**206,770**	**234,410**	**98,960**	**90,600**	**44,840**
2021	**Total**	**1,334,340**	**263,250**	**134,910**	**1,071,090**	**85,220**	**37,150**	**26,890**	**21,180**
2022	**Total**	**1,468,320**	**364,350**	**184,090**	**1,103,970**	**103,140**	**54,140**	**30,880**	**18,120**
2023	**Total**	**1,200,970**	**621,900**	**467,420**	**579,080**	**178,600**	**91,240**	**55,290**	**32,080**
2024 YTD	**Total**	**423,870**	**423,870**	**374,460**	**X**	**166,010**	**99,760**	**46,790**	**19,460**
	Oct	74,770	74,770	65,360	X	27,550	15,590	8,450	3,500
	Nov	69,770	69,770	61,280	X	26,530	16,200	7,180	3,150
	Dec	65,190	65,190	56,780	X	24,470	15,370	6,170	2,940
	Jan	69,640	69,640	60,920	X	28,860	17,640	7,900	3,320
	Feb	69,920	69,920	62,940	X	28,240	16,720	8,290	3,240
	Mar	74,580	74,580	67,190	X	30,360	18,250	8,790	3,320

[1] Removals are the compulsory and confirmed movement of an inadmissible or removable noncitizen out of the United States based on an order of removal. A noncitizen who is removed pursuant to a removal order has administrative or criminal consequences placed on subsequent reentry owing to the fact of the removal. DHS removals include removals completed by ICE/ERO and those completed by CBP.
[2] Returns are the compulsory and confirmed movement of an inadmissible or deportable noncitizen out of the United States not based on an order of removal. Administrative returns are returns completed by OFO resulting from administrative encounters (see CBP Encounters by Type and Region tab), including withdrawn applications for admission in cases in which expedited removal or other immigration removal proceedings were not considered and foreign crew members without entry visas who are required to remain aboard their ships.
[3] The sum of Title 8 removals, Title 8 returns, and Title 42 expulsions of noncitizens to their country of citizenship or a third country.
[4] The sum of Title 8 removals and Title 8 returns. This does not include noncitizens expelled pursuant to the Centers for Disease Control's (CDC) Title 42 order.
[5] Includes sum of removals and enforcement returns (i.e., excludes administrative returns).
[6] Expulsions pursuant to CDC's Title 42 public health order occurred between March 20, 2020 and May 11, 2023.
[7] Includes withdrawn applications for admission in lieu of immigration removal proceedings.
[8] Other enforcement returns include returns with unknown return type.
[9] Includes withdrawn applications for admission prior to 2024 in cases in which expedited removal or other immigration removal proceedings were not considered.

Data are current as of April 30, 2024; future reporting may include updates to previous reports' data. Source: Office of Homeland Security Statistics Persist Dataset. Accessed Aug.6, 2024 color added

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:
Of the total 145,578 removals by ERO, 57,913 were done under expedited removal, representing 39.7% of total removals in FY 2023. *See:* Immigration and Customs Enforcement Removals https://trac.syr.edu/phptools/immigration/remove/

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See also, DHS Ann. Performance Rep. 52 (2022), https://www.dhs.gov/publication/dhs-fiscal-year-2023-performance-accountability-reports
In FY 2023, ERO conducted 145,578 removals. Of the 145,578 removals, 101,806 were border removals and 43,772 were interior removals. Removals almost *doubled* from FY22's 73,432. The percentage of convicted criminal removals was 39%. ERO deported 56,881 noncitizens with criminal histories. https://www.dhs.gov/sites/default/files/2022-12/2022_1114_plcy_enforcement_actions_fy2021.pdf]

The TRAC 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).

CBP also conducted 28, 806 Title 42 (health) expulsions in 2023 before President Biden stopped the practice in May of 2023. https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics

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

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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
See also Securing the Border, 89 FR 48710 (June 7, 2024).
https://www.federalregister.gov/documents/2024/06/07/2024-12435/securing-the-border
Read the Policy Brief prepared by the American Immigration Lawyers Association (AILA), Analysis of Proclamation and Interim Final Rule on "Securing the Border"

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https://www.aila.org/library/policy-brief-analysis-of-proclamation-and-interim-final-rule-on-securing-the-border

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, Securing the Border 89 FR 48710 (June 7, 2024).

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. In August of 2024, the federal district court found the State of Texas lacked standing to bring this litigation. *Texas v. Mayorkas*, 2024 U.S. Dist. LEXIS 138549 (Aug 5, 2024).

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.

5. **CBP Appointment Availability.** In 2023, only 3,940 people from Guatemala got an appointment through CBP One, of the 278,430 appointments that year. The countries with the highest numbers of appointments were Mexico (58,770) and Venezuela (57,380) Compare the previous numbers with these numbers: in 2023, there were 213,890 people from Guatemala encountered by Border Patrol, 201,440 from Venezuela, and 584,430 from Mexico. What factors might have increased the numbers of appointments for people from Mexico or Venezuela as compared to people from Guatemala? What barriers does Martiza face to accessing a CBP One appointment?

6. **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.

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

7. **DATA.** DHS is making monthly enforcement reports available and this includes data on the number of CBP One appointments.
https://ohss.dhs.gov/topics/immigration/enforcement/legal-processes-monthly-tables

8. **Waiting for a CBP One appointment—the new wait in Mexico?**
When the Biden administration ended the Migrant Protection Protocols that had required people to wait in Mexico for removal hearings and asylum adjudication, several states sued the federal government to try to prevent the change. Below is a discussion of that 2022 litigation and an excerpt from the Supreme Court case that discusses Executive Power over policy at the border.

Biden v. Texas, 597 U.S. 785 (2022)

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. *Biden v. Texas*, 597 U.S. 785 (2022). 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

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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. 543, 551 (2022) 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.

> In *Biden v. Texas,* 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

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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.

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> 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.

Biden v. Texas, 597 U.S. 785, 805-807 (2022)

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 Notices remain current law.

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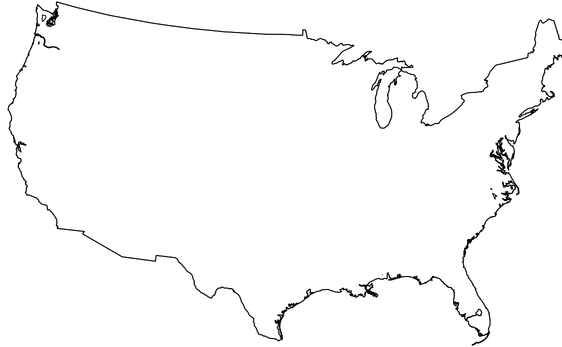
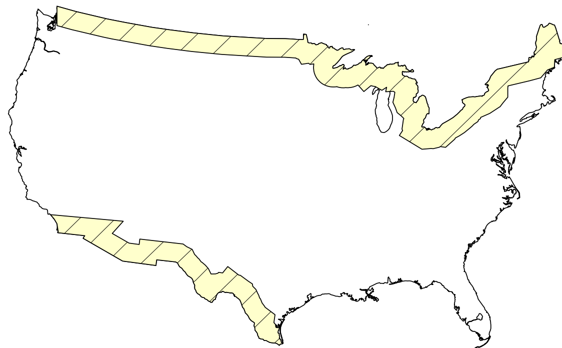
Here is a helpful graphic showing the changes to expedited removal over the years, including the 2002 expansion and the 2019 repealed expansion discussed below:

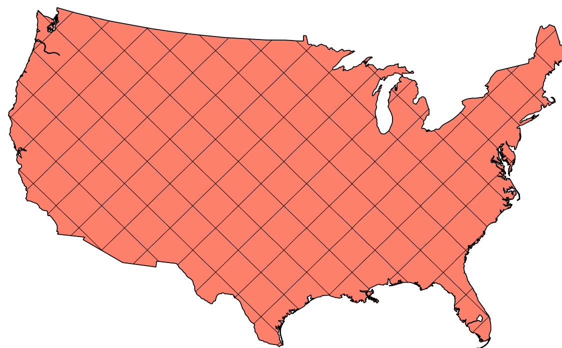
DHS USE OF EXPEDITED REMOVAL FOR USE OF PERSONS DEEEMED INADMISSIBLE UNDER INA § 212(a)(6)(C); 8 U.S.C. § 1182(a)(6)(C) and INA § 212(a)(7); 8 U.S.C. § 1182(a)(7)



2002:
DHS AUTHORIZED TO USE EXPEDITED REMOVAL FOR ANYONE WHO HAS ARRIVED BY SEA WITHIN 2 YEARS



2004:
EXPANSION: DHS AUTHORIZED TO USE EXPEDITED REMOVAL FOR ANYONE APREHENDED WITHIN 100 MILES OF INTERNATIONAL BORDER WITHIN 14 DAYS OF ENTRY



2019:
EXPANSION: DHS AUTHORIZED TO USE EXPEDITED REMOVAL FOR ANYONE IN THE ENTIRE U.S. WITHIN 2 YEARS OF ENTRY
REPEALED IN FEBRUARY 2021 BY EXECUTIVE ORDER
2002 AND 2004 RULES STILL IN EFFECT

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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/

4. **New Irregular Pathways Regulations—A new harsh reality?**
   As was summarized above, rather than expand expedited removal into the interior of the United States as Trump's administration had done, the Biden administration implemented regulatory restrictions on 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.

   Again, these new rules are dramatic. And in unprecedented ways they change both expedited removal procedures and 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.

   As was discussed above litigation immediately ensued but ultimately the May 2023 rules remain in place pending a negotiated settlement.

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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

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 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

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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.

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7. 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

Page 183: ADD Historical Note: TITLE 42 EXPULSIONS

8. 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—prepared by the Congressional Research Services-- helps illustrate how Title 42 expulsions became part of the removal process:

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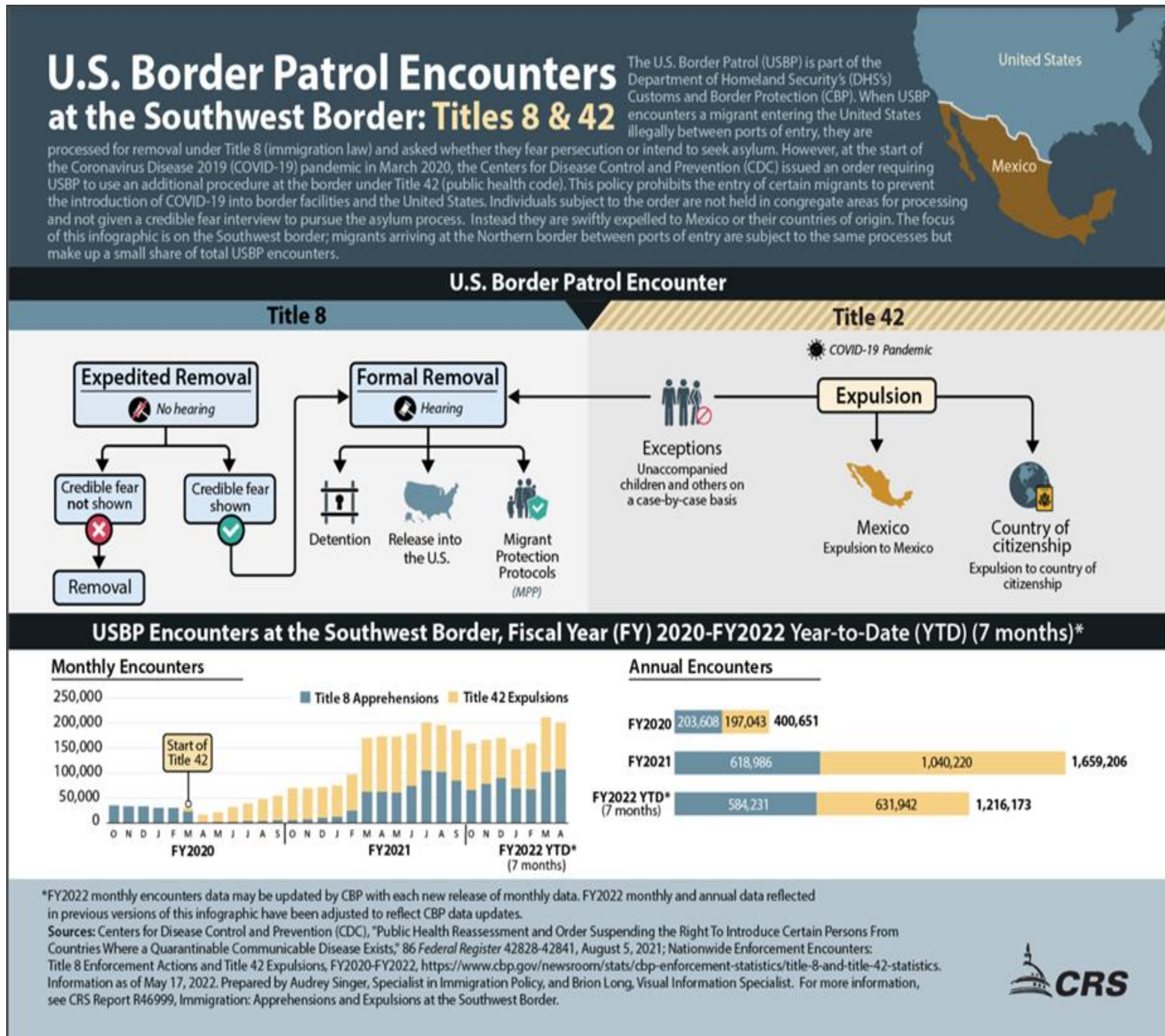

9. Extensive Litigation over Health Expulsions

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),

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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.

10. 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

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> 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. In late July of 2024, the program was summarily suspended for Haiti and other countries due to allegations of fraud.

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:

Nasrallah v. Barr, 590 U.S. 573 (2020)

In *Nasrallah v. Barr*, 590 U.S. 573 (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.

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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:

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Customs and Border Patrol reports data on their observations at the border. CBP regularly reports on the number of apprehensions of people who have crossed the border without inspection and the number of people found inadmissible and land port of entries. https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics. CBP also makes estimates of undetected crossings and "got aways," which are reported in yearly reports. Historically, the number of persons crossing the border has been challenging to estimate. Some types of entry are inherently challenging to calculate, although increased surveillance at the border allows CBP to collect more accurate data in present day. Entries as a category can also be misleading because of the tendency of people to cross multiple times. Labeling a category as "Entries" can also be misleading because of the tendency of people to cross multiple times.

CBP calculates the number of "enforcement encounters" along the land borders, which includes migrants that CBP apprehended after crossing without inspection or found inadmissible at a port of entry. CBP's definition of Inadmissible "refers to individuals encountered at ports of entry who are seeking lawful admission into the United States but are determined to be inadmissible, individuals presenting themselves to seek humanitarian protection under our laws, and

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individuals who withdrew an application for admission and return to their countries of origin within a short time frame. In both 2022 and 2023, CBP calculated it "encountered" around 2.5 million migrants along the southwest border. This number exceeded the previous record number of encounters of around 1.7 million encounters in 2021, which was during the period of Title 42 lockdown. CBP has also reported an increase in Border Patrol apprehensions—from around 1.6 million in 2021, to over 2 million in 2023. https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics.

While CBP data suggests there has been a dramatic increase in encounters, this data is misleading. First, the number of "encounters" is different from the number of people coming across the border. One person may also be apprehended multiple times. In 2021, an estimated 27% of CBP encounters were of people who had already crossed the border at least one before. https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics. In May of 2021, CBP reported that 38% of encounters were with migrants they had encountered at least once before. https://www.cbp.gov/newsroom/national-media-release/cbp-announces-may-2021-operational-update.

CBP calls these numbers "recidivism rates," to describe the percentage of persons apprehended more than once within a fiscal year. This "recidivism rate" only includes apprehensions of people who have a record with CBP from a prior expulsion or deportation under Title 8 or Title 42. (Consider: Recidivism has a criminal connotation, as it is commonly a term used to describe the rate at which formerly incarcerated people are arrested for criminal violations. Using the term here parallels crossing the border to a criminal violation, suggesting that crossing the border without authorization is a crime. While immigration violations are civil violations, the narrative around and consequences for violating immigration law are comparative to criminal law).
This means the apprehension number does not include people who "turned back" or were "kicked back". The number also only includes people apprehended within the prior year. Second, apprehensions only count the number of people who are *caught* entering without inspection. CBP does make estimates for those who enter without inspection and are not caught by CBP. These numbers are not included in number of encounters.
https://www.cbp.gov/sites/default/files/assets/documents/2023-Sep/nationwide-encounters-data-dictionary.pdf.

While these numbers are used to justify or criticize different policies at the border, the casual connection between immigration policy and border crossings is unclear. The use of Title 42 expulsions may have increased recidivism, because migrants from all around the world were expelled just across the U.S. border into Mexico. However, research at the Bipartisan Policy Center found that because border policies have been so inconsistent, there is not a clear way to understand the impact of an individual policy on recidivism and apprehension numbers It may be a political effective statement to credit a given policy with decreasing the recidivism rate, but it is not necessarily the accurate measure of human motivation or behavior.
See chart in more detail here: https://bipartisanpolicy.org/blog/changing-border-policies-and-apprehensions-whats-the-relationship/

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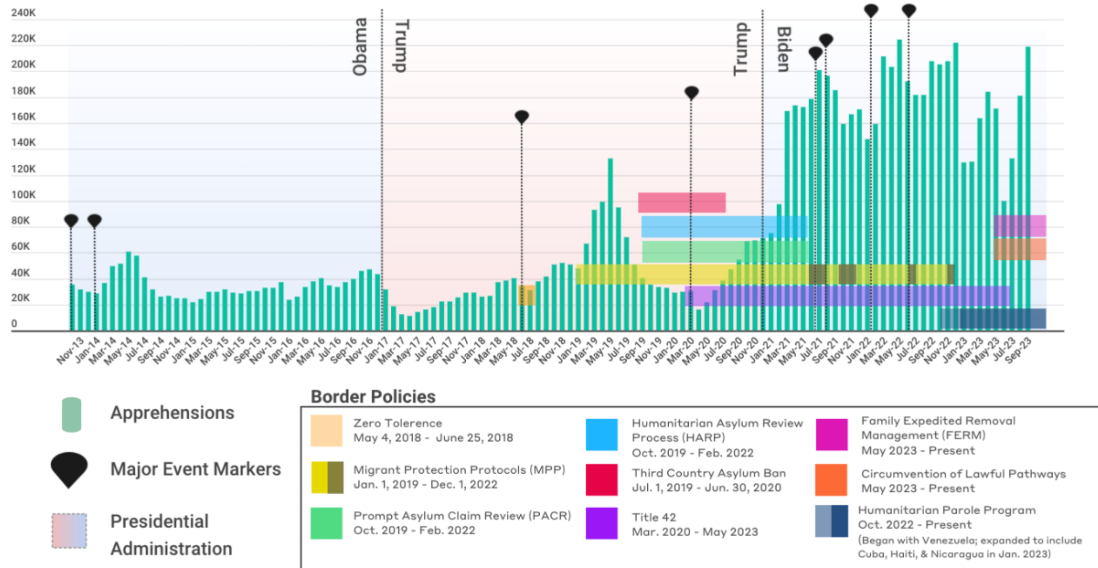

Increased apprehensions could also reflect increased Border Patrol agency presence in the borderlands, which has continuously increased each year since the 1990s. https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Fiscal%20Year%20Staffing%20Statistics%20%28FY%201992%20-%20FY%202020%29%20%28508%29.pdf. Or the increased apprehensions could reflect Border Patrol's investment in improved border surveillance technology. In the last ten years, CBP has added several new surveillance technologies, including Unattended Ground Sensors (UBS), which are placed in remote areas and notify CBP when they detect persons or vehicles.

See Privacy Impact Assessment Update For The Border Surveillance Systems, U.S. DEP'T OF HOMELAND SECURITY, DHS/CBP/PIA-022(A), (Aug. 21, 2018) https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp022-bss-september2018.pdf.

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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

591 U.S. 103 (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

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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.

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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*.

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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

[4] [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).

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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

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reason" to consider whether the Clause extends any further. We therefore proceed on that basis.[5] [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.[6][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.
***

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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[5] [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).

[6] [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.

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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.

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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.[7] [FN 28]

***

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.

[7] [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.

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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. 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. 87, 97, 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

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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. 221, 228, 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

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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.

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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.

***

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.[8] [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.

[8] [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.

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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 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 . 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

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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:

Transcript from the Immigration Review Hearing

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

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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.

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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.

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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

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> 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/

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?

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

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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) 2023, the U.S. government detained around 273,220 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. ICE has a detention budget of $3.4 billion for FY 2024. Since 2003, 267 people have died while in ICE custody. *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 August 11, 2024).

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- Immigration and Customs Enforcement held 37,004 in ICE detention according to data current as of July 14, 2024.
- 22,019 out of 37,004—or 59.5%—held in ICE detention have no criminal record, according to data current as of July 14, 2024. 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 July 8, 2024.
- ICE arrested 7,360 and CBP arrested 17,625 of the 24,985 people booked into detention by ICE during June 2024.

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- South Texas ICE Processing Center in Pearsall, Texas held the largest number of ICE detainees so far in FY 2024, averaging 1,707 per day (as of June 2024).
- ICE Alternatives to Detention (ATD) programs are currently monitoring 177,670 families and single individuals, according to data current as of July 13. 2024.
- Chicago's area office has [the] highest number in ICE's Alternatives to Detention (ATD) monitoring programs, according to data current as of July 13, 2024

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. 523, 141 S. Ct. 2271 (2021).

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

Johnson v. Guzman Chavez,
594 U.S. 523 (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.

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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

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> 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	FY2023	FY2024 YTD
October	2,539	3,026	3,959	2,969	3,275	3,493	3,689
November	2,446	2,962	3,805	2,909	2,991	3,250	3,614
December	2,509	3,365	3,966	2,760	3,894	3,343	3,588
January	3,090	3,765	4,450	3,014	3,642	3,441	3,714
February	2,512	3,096	3,702	2,829	4,148	3,165	3,680
March	2,921	3,526	2,514	3,445	4,976	3,401	3,859
April	2,701	3,218	451	3,139	4,136	3,270	3,834
May	2,764	3,138	616	3,323	4,156	3,758	4,317
June	2,606	3,480	1,149	3,150	3,746	3,434	3,439
July	2,798	3,458	2,047	3,244	3,524	3,333	
August	3,320	4,085	2,614	3,425	3,486	4,051	
September	3,090	3,794	2,765	3,243	3,525	3,628	
Total	33,296	40,913	32,038	37,450	45,499	41,567	33,734

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

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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).

Image generated by AI, people waiting in NY. Due to the alternatives to detention and the number of people released, hundreds of people were queuing each day for ICE Check-ins in NY. Many people waiting in line overnight. This image is based on a real photograph taken by Professor Benson.

End of Chapter 2

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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.

Parole in its many forms is discussed and how it may be used by people seeking protection but also for business entrepreneurs. Further, the limits of the parole status are mentioned. Parole in Place is covered in Chapter 4 relating to eligibility for adjustment of 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. In FY 2024, the USCIS altered the registration process.

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.

Updates begin next page

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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 encouraged 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 given employment authorization to children and spouses of H-1B visa holders. Furthermore, the bill would have expanded and raised 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

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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 277 (§ 3.01[A][6]: Consequence of Filing an Immigrant Petition

Editor's Note: Until 2020, the nonimmigrant classification of TN, for nationals of Canada and Mexico, was governed by the North American Free Trade Agreement (NAFTA). That agreement was dissolved and replaced by the United States-Mexico-Canada Agreement (USMCA), which now governs the TN classification. Where NAFTA is mentioned, please note that it is no longer governing law and that the USMC applies.

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 the DHS data

NONIMMIGRANT ADMISSIONS BY CLASS OF ADMISSION: FISCAL YEAR 2021, 2022 and 2023 complied by Professor Benson from published data.

Class of admission	2021	2022	2023
Total all admissions[1]	**35,300,000**	**96,700,000**	**132,400,000**
Total I-94 admissions	13,623,118	43,176,853	68,227,240
Temporary workers and families	1,843,944	3,049,583	4,980,290
Temporary workers and trainees	1,448,739	2,257,595	3,639,940
CNMI-only transitional workers (CW1)	374	935	2,060
Spouses and children of CW1 (CW2)	117	234	500
Temporary workers in specialty occupations (H1B)	148,603	410,195	755,020
Chile and Singapore Free Trade Agreement temporary workers (H1B1)	373	1,173	2,510
Registered nurses participating in the Nursing Relief for Disadvantaged Areas (H1C)	-	-	
Agricultural workers (H2A)	586,992	669,978	718,530
Nonagricultural workers (H2B)	123,046	149,391	175,230
Returning H2B workers (H2R) [2]	25	106	40
Trainees (H3)	400	930	1,350
Spouses and children of H1, H2, or H3 (H4)	69,549	166,939	86,120
Workers with extraordinary ability or achievement (O1)	26,395	77,256	108,180

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Workers accompanying and assisting in performance of O1 workers (O2)	8,512	37,515	57,120
Spouses and children of O1 and O2 (O3)	5,687	12,660	17,500
Internationally recognized athletes or entertainers (P1)	37,213	87,381	113,820
Artists or entertainers in reciprocal exchange programs (P2)	1,814	7,483	13,730
Artists or entertainers in culturally unique programs (P3)	1,000	8,370	15,660
Spouses and children of P1, P2, or P3 (P4)	2,283	3,848	5,490
Workers in international cultural exchange programs (Q1)	102	713	3,321
Workers in religious occupations (R1)	4,374	7,744	13,780
Spouses and children of R1 (R2)	1,472	2,851	5,520
North American Free Trade Agreement (NAFTA) professional workers (TN)	385,869	526,016	1,204,910
Spouses and children of TN (TD)	44,539	85,877	139,580
Intracompany transferees (all)	182,379	446,369	752,170
Intracompany transferees (L1)	116,120	294,142	503,490
Spouses and children of L1 (L2)	66,259	33,564	Spouses 148,290 Children 100,000
Treaty traders and investors (all)	200,672	321,082	555,710
Treaty traders and their spouses and children (E1)	27,332	43,494	77,810 Spouses 1,520
Treaty investors and their spouses and children (E2)	164,175	251,627	412,620 Spouses 10,240 Children 5,280
Treaty investors and their spouses and children (CNMI only) (E2C)	11	57	70
Australian Free Trade Agreement principals, spouses and children (E3)	9,154	25,397	37,170 E-3 s 6,350 E-3 child 3,780
Representatives of foreign information media (I)	12,154	24,537	32,470
Representatives of foreign information media and spouses and children (I1)	12,154	24,537	Included above
Students (all)	798,977	1,119,931	1,700,280
Academic students (F1)	758,458	1,059,414	1,625,740
Spouses and children of F1 (F2)	32,309	50,638	61,910
Vocational students (M1)	7,872	9,382	11,770
Spouses and children of M1 (M2)	338	497	860
Exchange visitors (all)	174,412	405,133	543,280
Exchange visitors (J1)	151,257	360,811	481,280
Spouses and children of J1 (J2)	23,155	44,322	62,000
Diplomats and other representatives (all)	161,041	318,318	437,330
Ambassadors, public ministers, career diplomatic or consular officers and their families (A1)	21,640	32,203	41,800
Other foreign government officials or employees and their families (A2)	65,441	130,362	175,880
Attendants, servants, or personal employees of A1 and A2 and their families (A3)	598	777	870

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Principals of recognized foreign governments (G1)	9,059	12,972	15,932
Other representatives of recognized foreign governments (G2)	2,797	12,450	20,900
Representatives of non-recognized or nonmember foreign governments (G3)	365	897	1,150
International organization officers or employees (G4)	38,400	80,531	121,370
Attendants, servants, or personal employees of representatives (G5)	139	346	390
North Atlantic Treaty Organization (NATO) officials, spouses, and children (N1 to N7)	22,602	47,780	59,050
Temporary visitors for pleasure (all)	9,055,378	33,679,378	52,956,620
Temporary visitors for pleasure (B2)	8,169,825	23,727,014	37,058,780
Visa Waiver Program – temporary visitors for pleasure (WT)	883,556	9,833,385	15,360,400
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	0
Temporary visitors for business	1,346,208	4,109,687	6,846,860
Temporary visitors for business (B1)	1,223,567	2,941,206	4,883, 380
Visa Waiver Program – temporary visitors for business (WB)	122,576	1,167,974	1,962,650
Guam - Commonwealth of Northern Mariana Islands (CNMI) Visa Waiver Program - temporary visitors for business to Guam or Northern Mariana Islands (GMB)	65	507	820
Transit individuals	211,283	429,970	706,560
Foreign nationals in continuous and immediate transit through the United States (C1)	207,307	423,132	696,660
Foreign nationals in transit to the United Nations (C2)	132	175	780
Foreign government officials, their spouses, children, and attendants in transit (C3)	3,844	6,663	9,130
Commuter students	514	965	730
Canadian or Mexican national academic commuter students (F3)	514	965	730
Noncitizen fiancé(e)s of U.S. citizens and children	18,974	24,819	21,710
Fiancé(e)s of U.S. citizens (K1)	16,643	21,534	18,660
Children of K1 (K2)	2,331	3,285	3,050
Other	32	9	20
Unknown	12,355	39,006	8,560
D Data withheld to limit disclosure. – indicates no data			

As you will see, there are some categories where admissions are quite small.

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What is significant about the updated data is a growth in overall visa issuance in the nonimmigrant categories from around 6.8 million visas in FY 22 to 10.4 in FY 23. The growth of these are largely due to a resumption of international travel and the ability of the Department of State to handle more nonimmigrant visa appointments.

Only 41 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 as of July 2024:
Andorra, Australia, Austria, Belgium, Brunei, Chile, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Israel, Ireland, Italy, Japan, Republic of 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.

Israel is the most recent country to receive the authorization to use Visa Waiver. Permission was granted by DHS and the Department of States on September of 2023 and operational by October 19, 2023. See https://www.state.gov/joint-statement-on-the-designation-of-israel-into-the-visa-waiver-program/

Learn more about the Visa Interview Experience

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.

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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 (E-1, E-2)**	**F**	**H (H1, H-2A, H-2B)**	**L**	**O (O-1 only)**
Africa 2022	1,320	264,603	127	30,781	15,686	3,851	1,009
2023	1,600	458,800	110	30,247	17,496	1,635	626
Asia/South Asia 2022	7,343	1,011,233	25,174	29,0075	312,480	70,732	6,090
2023	10,649	2,039,453	29,399	315,693	249,862	40526	4,782
Europe 2022	5,447	28,3784	17,249	63,519	20,914	40,541	19,136
2023	6,260	530,297	18,213	57,047	14,532	21,727	8,832
N&CAmerica 2022	14,418	37,0120	7,238	18,281	2,119	12,296	4,103
2023	6,116	626,816	10,431	16,152	419,966	4,759	1,138
Oceania	118	9,324	10425	2549	991	1,883	1,598
2023	137	18,467	609	2,830	930	1,135	940
S. America	3,296	1,288,282	1,735	31,730	12,139	22,089	4,980
2023	4,515	2,227,126	1,857	23,376	8,416	6,878	2,675
TOTALS 2022	21,943	3,228,199	61,949	437,018	769,299	151,406	369,922
2023	29,286	5,902,426	60,618	445,418	711,196	76,671	18,994

Source: Table XVI (Part 1) Nonimmigrant Visas Issued Fiscal Year 2023 Department of State. Available at: https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports/report-of-the-visa-office-2023.html. Prior year 2022 in similar table at Department of State.

Questions:

1. What factors might contribute to the comparative lack of nonimmigrant visas for some regions or nationalities? For example, in FY 23, people from Nigeria a country of over 206 million people received 8,892 F-1 student visas compared to 17,930 students from South Korea, a country of 51 million. Mexico, a top U.S. trading partner with a population of 129 million had 2,698 E visas issue as compared to 7,450 for Canada with a population of 38 million. See the below graphic to help visualize the ratio of visas to total population in these examples.

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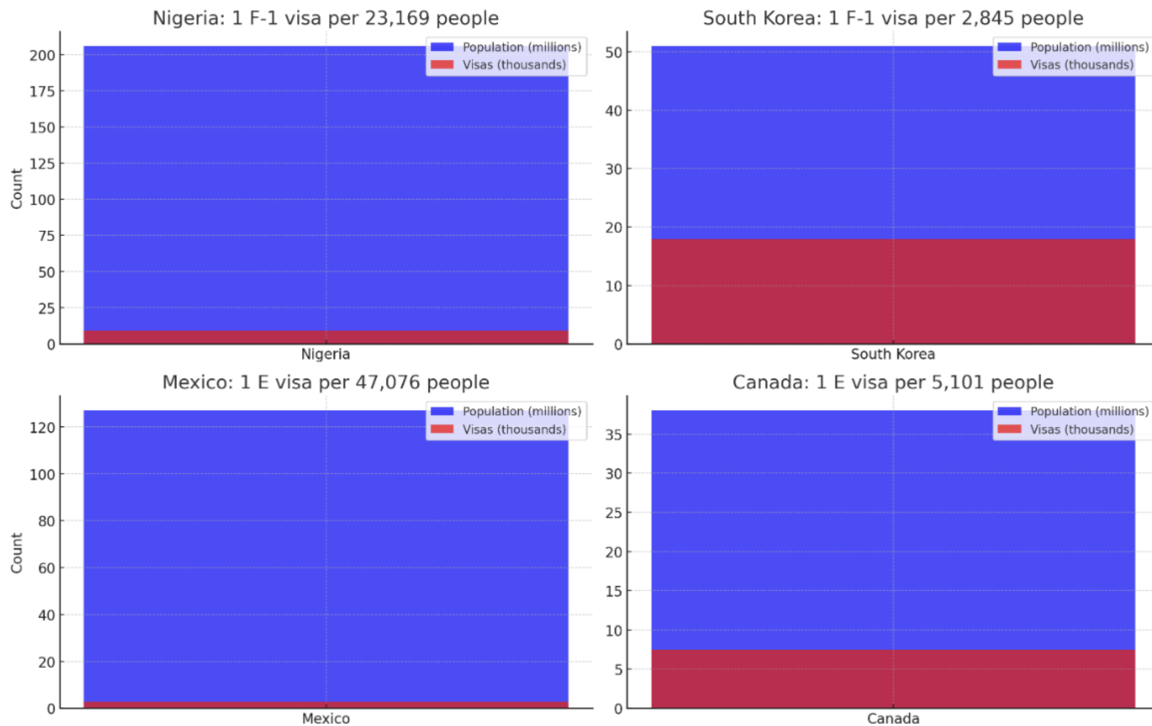

Chart prepared by Cassidy Lang and Lenni Benson using Chapt GPT and data.

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.

A recent FOIA request by a private attorney obtained more details about F-1 and J-1 visa applications and denials. The data has been shared with Law360 (Subscription required). Law360 posted as an interactive tool searchable by nationality and consular post. https://www.law360.com/articles/1841477/african-student-visa-denials-need-investigating-experts-say.

The Presidents' Alliance for Higher Education partnered with Shorelight LLC and produced a detailed study of African students and higher than average rates of visa refusals. See, Rajika Bhandari, Hilary O'Haire, Shelley Landry & Jill Welch, "The Interview of a Lifetime: An analysis of visa denials and international student flows to the U.S. (May 2024).

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"Of 3,000 students from Sub-Saharan Africa admitted for graduate studies to a top U.S. university in 2022, only about 60% were granted a student visa to the United States despite being admitted and having secured the required funding. This translates into a denial rate of 40% as compared with denial rates of 30% for India and 10% for students from China and Brazil." Report at 8.

The full report is available at:
https://assets.ctfassets.net/2htm8llflwdx/3Z8GEZRXvkyi6UKElSgGLc/02fb34ded9ab07b1fa153c8ec9ab79f1/Final_SL_24_WhitePaper_PresidentsAlliance_LR__2___1_.pdf

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 treaties, 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 re-entry 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). In July 2024, they updated this list to include Environmental/Natural Resource Economics. 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. The Biden administration also defended the Deferred Action for Childhood Arrivals (DACA) policy. DACA is discussed further in Chapters 4 and 7.

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.4th164 (D.C. Cir. 2022), *followed by Save Jobs USA v. U.S. Department of Homeland Security*, 664 F.Supp.3d 143 (D.D.C., 2023); Editor's Note: this is an area where the repeal of Chevron may make the USCIS very vulnerable to judicial reversal.

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). In 2024, the list was expanded again. See:
https://www.ice.gov/doclib/sevis/pdf/stemList2023.pdfhttps://www.ice.gov/doclib/sevis/pdf/stemList2022.pdf (posted last updated July 2212, 20243).

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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. Depts 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 into possible fraud were carried out and many stakeholders called 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 July 6, 2023).

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In 2022, the agency had received over 480,000 registrations. In most years the annual quota of 85,000 new H-1B workers is quickly exhausted. Following the investigations and high registration submissions in 2023, the total number of registrations decreased in 2024, with the eligible registrations decreasing 38.6%. https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process.

If not selected in the H-1B lottery, both foreign nationals and employers must explore alternative nonimmigrant petitions or post the worker outside the United States. A significant part of practicing business immigration law is developing strategies to avoid the problem of "losing" the H-1B lottery for registration.

In January of 2024, USCIS announced a final rule aimed at strengthening the integrity of the H-1B registration process and instances of potential fraud. The key provision in the rule centers the selection process around each individual beneficiary, rather than registration. Now, selections will occur based on the unique beneficiary, regardless of the number of registrations submitted on behalf of that beneficiary. See more at: https://www.uscis.gov/newsroom/news-releases/uscis-announces-strengthened-integrity-measures-for-h-1b-program

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

In 2024, the annual cap has returned to 33,000 for the first half of the year, and 33,000 for the second. https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants#:~:text=Currently%2C%20Congress%20has%20set%20the,30).

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

Page 293 (§ 3.02[D]): Intracompany Transferees (L-1)

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A company wishing open a new office in the United States to accompany their office abroad may also do so under L classification. Once the "new office" L is approved, the company may transfer employees into the United States. (9 FAM 402.12-9). For more information on new office L-1 petitions, see 8 CFR 214.2(l)(3)(v) and https://www.uscis.gov/working-in-the-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager.

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 293 (§ 3.02[E]): Individuals of Extraordinary Ability (O-1)
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. They released further guidance in July of 2022 clarifying that being named to a competitive STEM research government grant can be a positive factor in evidencing that a beneficiary is at the top of their respective field. https://www.uscis.gov/newsroom/alerts/uscis-updates-guidance-for-o-1-petitions-with-a-focus-on-stem-fields.

Page 296 (§ 3.02[G][1]): As noted in Editor's Note above, NAFTA was dissolved, and replaced by the USMCA, which took effect July 1, 2020 now governs this visa category.

Page 296 (§ 3.02[G][1]): Editor's Note: While it is not necessary to file an H-1B1 or E-3 petition with the USCIS because they can be presented at the consulate, they are able be filed with the USCIS in some circumstances.

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. Including 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 be converted to permanent resident status and a grant of U status may waive

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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 implemented since 2019:[9]

Evacuation Parole for Afghans summer of 2021 --

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

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

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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

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.

On August 2, 2024, the Department of Homeland Security temporarily suspended the four parole programs below, in light of concerns of possible fraud. For more information on this suspension, please see https://www.washingtonpost.com/immigration/2024/08/02/biden-migrants-travel-homeland-security/ **.**

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We note the four programs below for the purpose of the questions that follow and in the case that the suspension is lifted.

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

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?

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

Page 301 (§ 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

At times, the U.S. Embassy consular section has posted 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 sometimes be obtained in 7 days. Should processing times drive the strategy? Editor's Note: consular and processing times vary and are subject to change.

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 315 (§ 3.03[B][3]): Editor's note: as previously noted, NAFTA was dissolved in 2020.

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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:

To test the specialty occupation wage, a Labor Condition Application (LCA) must be filed and certified by the United States Department of Labor. This same application is noted earlier in the chapter, as it is also required for H-1B1 and E-3 status.

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,

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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). We have provided this update to indicate some of the ways that a change in administration can change the policies significantly.

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*

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(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 (summers of 2023 or 2024) preventing travel under a temporary visa due to the Coronavirus, the pandemic experience certainly demonstrated that some nonimmigrants could find their ability to live and work in the United States disrupted if they are 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 created a redesign of the H-1B registration process. Before an employer can sponsor a foreign national for the H-1B visa (if that person is not already in H-1B status), the employer must qualify in the lottery. The lottery is not based on substantive criteria but is random. Here is a link to where you can read more about the H-1B selection process: https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process

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Page 344 (§ 3.03[C]): Add to note after Problem 3-2, Notes and Questions 4. Labor Condition Applications and Public Access Files, Paragraph 6.

Editor's Note: The DOL now uses the Flag Portal System, instead of iCert. https://flag.dol.gov.

Page 349 (§ 3.03[C]): Moving to a New Job Site and the LCA Requirement

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.

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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 355 (§ 3.03[D][2]):

Editor's Note: The new link is https://www.uschamber.com/assets/archived/images/documents/files/uscc-uscis-h1b-petition-data-and-cap-dates-fy92-fy16_2.pdf (last visited June 2024).

Page 357 (§ 3.03[E][1]):

Editor's Note: The updated link is https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm30-external.pdf (last visited June 2024).

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.*

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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. *I Id.* at 26618. This temporary rule expired in October of 2023. In April of 2024, USCIS announced another temporary final rule that was essentially the same. This final rule also increased the automatic extension period to 540 days for certain EAD applicants. This temporary final rule applies to two categories: (1) applicants who timely and properly filed their Form I-765 applications on or after Oct. 27, 2023, if the application is still pending on April 8, 2024; and (2) applicants who timely and properly filed their Form I-765 application on or after April 8, 2024, and on or before Sept. 30, 2025. 89 Fed. Reg. 24,628 (April 8, 2024).

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]):

Editor's Note: The link in at the top of page 363 is now https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Faqs_Round_One_Final.pdf (last visited June 2024).

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.

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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.

In June 18, 2024, President Biden announced measures that would "ensure that U.S. citizens with noncitizen spouses and children can keep their families together." This would allow certain noncitizen spouses and children apply to apply for lawful permanent residence. Reviewed on a case-by-case basis, those approved would be given a three-year period to apply for permanent residency, during which spouses would be able to apply for work authorization for up to three years for eligible married couples. As mentioned, the Biden administration also announced changes and offered support for the DACA program, which will be discussed in further detail in chapters 4 and 7. For more information, see https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/18/fact-sheet-president-biden-announces-new-actions-to-keep-families-together/.

In August of 2024, the D.C. Circuit upheld the rule that allows certain H-4 spouses to apply for employment authorization. Eligible spouses will still be able to work in the United Status under this decision. For more information on the ruling and challenge, see https://news.bloomberglaw.com/daily-labor-report/h-1b-spouse-work-permit-program-survives-d-c-circuit-challenge and https://natlawreview.com/article/united-states-h-4-employment-authorization-rule-upheld-federal-court. The full opinion is available at https://aboutblaw.com/be6S.

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).

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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."

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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

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- 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 28, 2024 there are sixteen countries with active TPS designations:
Source: https://www.uscis.gov/humanitarian/temporary-protected-status

Country **Date of Physical Presence and Updates if any**
[note the specifics of the date of entry and designation date are not identical for all nationalities]

Country	Date of Physical Presence	Updates if any
Nicaragua	1/5/1999	
Nepal	6/24/2015	
El Salvador	3/9/2001	
Honduras	1/5/1999	
Yemen	01/03/2023	updated – 7/02/2024
Somalia	7/19/2021	updated – 7/12/2024
Venezuela	3/9/2021	updated – 7/21/2023
Syria	7/29/2022	updated – 11/24/2024
Burma (Myanmar)	9/26/2022	updated – 3/21/2024
Haiti	12/5/2022	updated – 06/03/2024
South Sudan	3/3/2022	updated – 09/04/2023
Afghanistan	3/16/2022	updated – 09/20/2023
Sudan	3/1/2022	updated – 08/16/2023
Ukraine	4/19/2022	updated – 8/16/2023
Cameroon	6/7/2022	updated – 10/05/2023
Ethiopia	12/12/2022	updated 4/11/2024

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

A recent Congressional Research Service (CRS) Report indicated that there are approximately 813,000 people with a grant of TPS. *See* Jill Weston, Temporary Protected Status and Deferred Enforced Departure (May 2024) available at: https://sgp.fas.org/crs/homesec/RS20844.pdf

This report also provides details by nationality of the TPS holders and some of the history of designation, revocation, and redesignation of this protective status. Here are some of the numbers:

Haiti	200,000
El Salvador	180,375
Honduras	54,290

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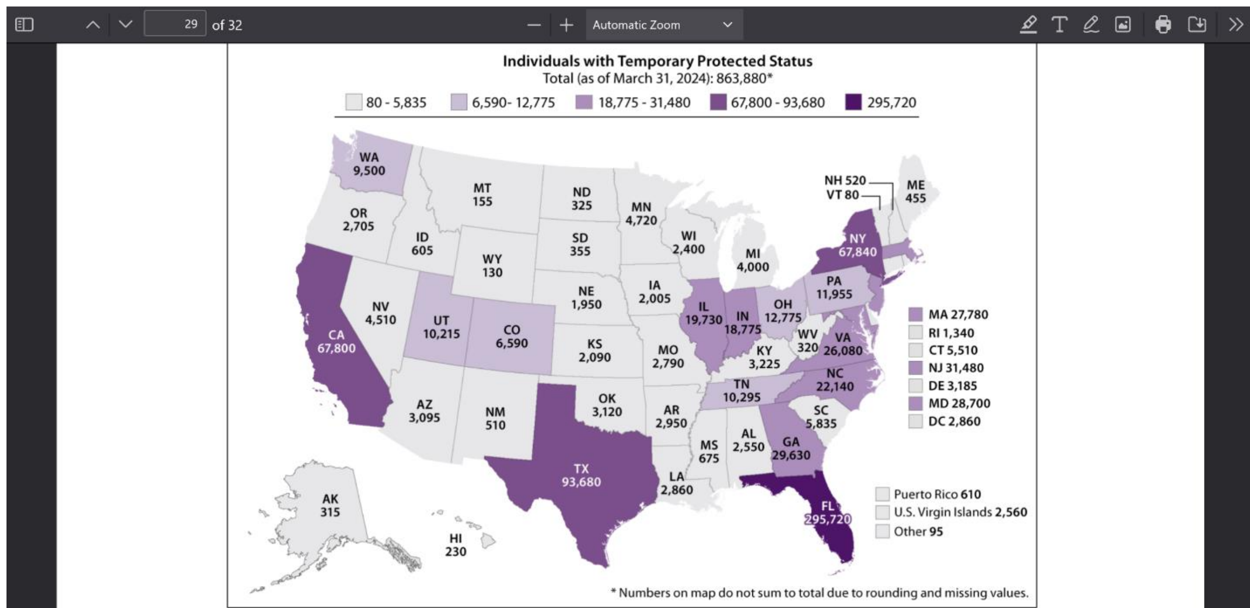
Ukraine	50,205
Afghanistan	8,245

A person may simultaneously seek TPS and pursue asylum and withholding of removal. Some people who have long grants of parole status may not see why they should seek TPS protections. One of the main distinctions is that a grant of parole is not a temporary status that allows a change of status to a different nonimmigrant category. But a grant of TPS is deemed to be nonimmigrant status. TPS does not change or convert into permanent status without a special act of Congress.

TPS can also be granted by an Immigration Judge if a person is in removal.

The map below, prepared by CRS, reflects the state residence of the grantees:



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. 593 U.S. at __, 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.*

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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**.

End of Chapter Comic. Trying to create an infographic on the material in this chapter, Professor Benson invited AI to make an image. The next two pages are meant as amusement only. The misspellings and confusion in the images may, however, reflect the feelings many people have about the complexity of immigration options.

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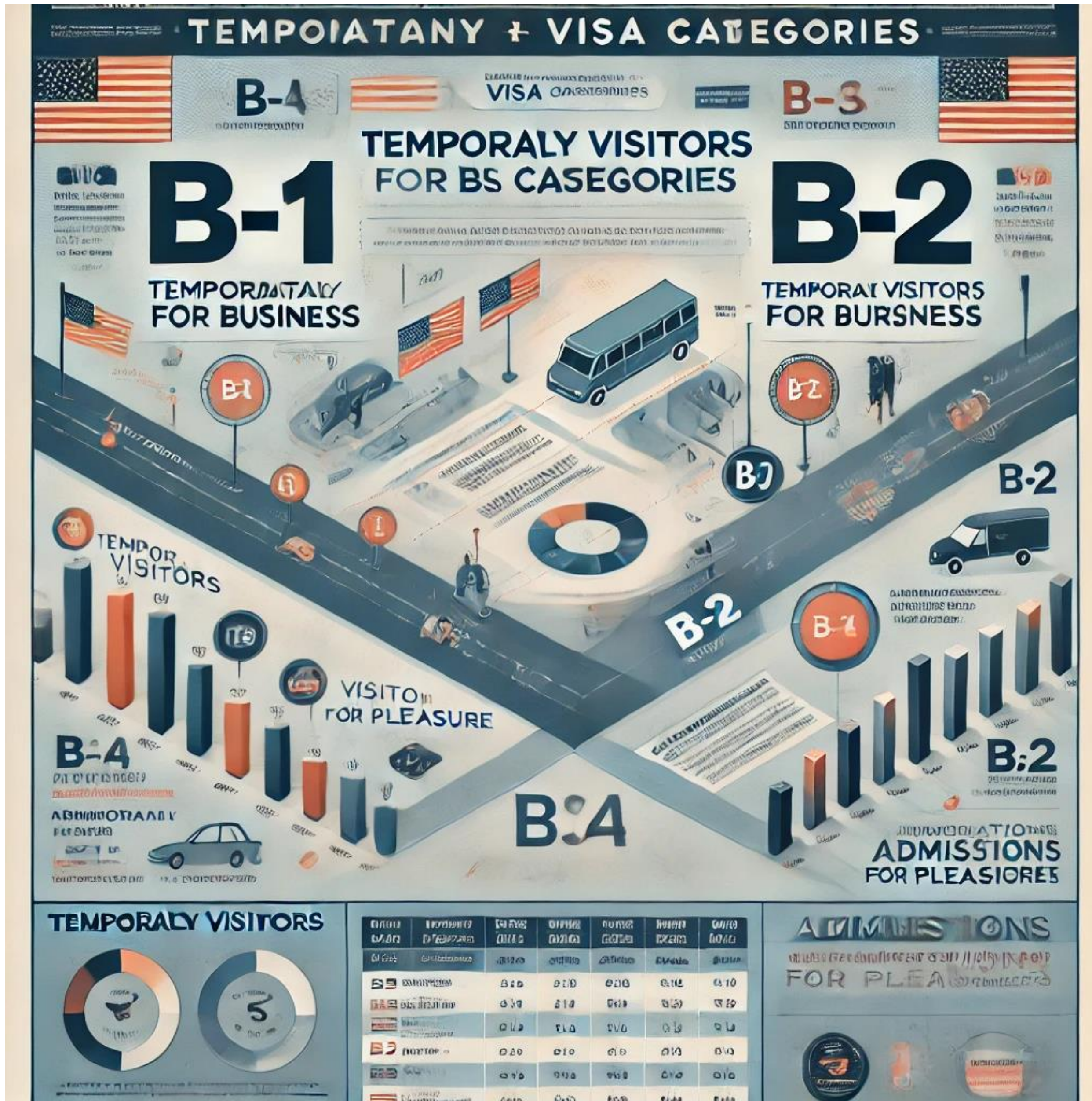

End Chapter 3

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Chapter 4: Immigrants and Paths to Permanent Resident Status

What's New in this Chapter?

New graphs and charts to help visualize the categories of people qualifying for immigrant admission.

Discussion of the Dept of State 2023 Yearbook of Immigration Statistics, Waitlists, and Special Immigrant Status for Afghan people who worked for the U.S. government.
Updated *Visa Bulletin* data with graphics based on FY 22 data and notes on FY 23.

Updated hypotheticals to demonstrate the problems with existing quotas and the waiting periods of immigrant visa numbers.

Discussion of Conditional Lawful Permanent Resident Spouses and data about how many marriages involve foreign nationals.

Discussion of the *Visa Bulletin* Backlogs.
Brief discussion of revocation of petitions and a pending Supreme Court case *Bouarfa v. Mayorkas*, cert granted 2024.

Expanded discussions of Prevailing Wage Certifications & PERM Labor Market Certifications, EB-5

How adjustment of status filing rules are relaxed for people granted asylum or those admitted as refugees speeding their path to full residence

Updated DACA discussions and special new Parole in Place rules that may add 500,000 U.S. citizen spouses and stepchildren to complete adjustment of status within the borders of the United States.

A brief discussion of humanitarian parole and TPS and how those categories impact eligibility for adjustment of status to lawful permanent resident. More details about parole admissions as reported by DHS to Congress.

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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 432 (§ 4.01) Introduction: Choosing a Strategy: Read the following expanded discussion of Lawful Permanent Resident Status before continuing to § 4.01[G].

Navigating the delays and obstacles to a lawful permanent resident (LPR) status is perhaps the greatest challenge to those who want to live in the United States. As you will see discussed in this chapter delays come both from quota limitations and from the long processing times before the various federal agencies involved in the process.

One immigration thinktank scholar, David Bier, at the CATO Institute examined the pending workload of all these agencies and calculated that of the nearly 35 million applications currently awaiting adjudication, only about 1.2 million will be approved in 2024. This does not mean all the rest will be refused; many will be stuck in long backlogs. Whether a pathway to status is more certain in part depends on the criteria for the category. David Bier compares the 8% approval rate for Employment-Based petitions with the 0.2% for lottery-based applications. *See* David J. Bier, *Green Card Approval Rate Reaches Record Lows* (Feb 15, 2024), https://www.cato.org/briefing-paper/green-card-approval-rate-reaches-record-lows.

David Bier has also created a "GREENCARD GAME" where individuals can use their own background or adopt the story of a game figure to learn more about all the steps in the immigrant journey. The game can be quite instructive; however, it does not build in how many people first enter the United States via nonimmigrant categories and maintain that status while they navigate the immigration mazes. For the game visit: https://www.cato.org/blog/try-catos-new-immigration-game-find-path-us-citizenship.

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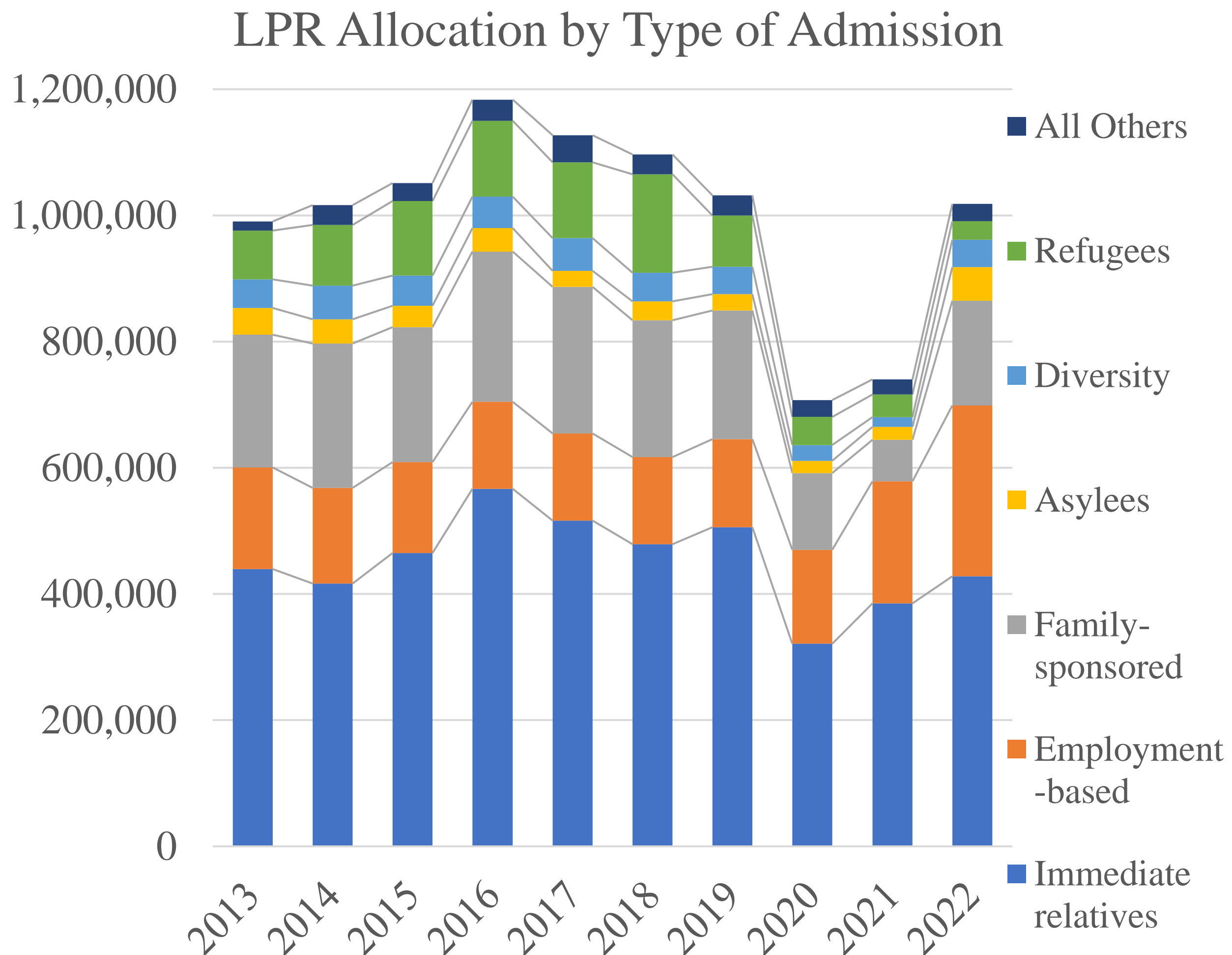
Who is getting their applications approved? Consider the following charts breaking down the persons obtaining lawful permanent resident status.



Source: U.S. Dep't of Homeland Security, Office of Homeland Security Statistics, *2022 Yearbook of Immigration Statistics*, 18 (2023) https://www.dhs.gov/ohss/topics/immigration/yearbook/2022.

In data posted by DHS for the last quarter of fiscal year 23 the percentage allocations are similar. Here are the reported totals:

Category FY 23	**Number**	**Percentage of total**	**comments**
Immediate Relatives	555,190	49.5%	[no derivatives in this category]
Employment Based	196,420	17.0%	Note that 60% of this category are derivative family members
Family Based	202,550	20.0%	
Asylees	40,330	3.6%	
Diversity	66,760	5.9%	
Refugees	59,020	5.0%	

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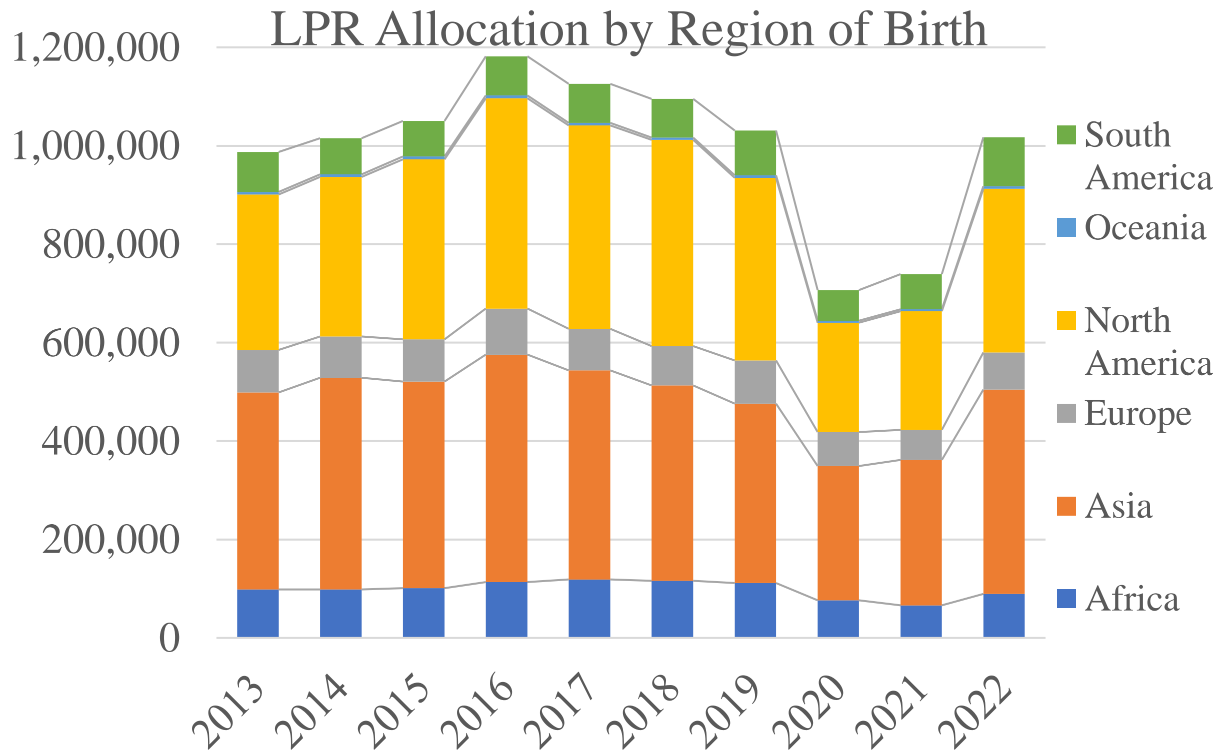
Total of these categories	1,120,270	100%+ due to rounding	

Omitted are some of the special categories such as VAWA and Cancellation of removal.
Data tables found at: https://ohss.dhs.gov/topics/immigration/adjustment-status-report



Source: *2022 Yearbook of Immigration Statistics*, 12. ("Unknown" region of birth omitted due to insignificant quantity).

Note the considerable impact of COVID-19 on the volume of LPRs granted. Is this surprising considering that the adjudication of a green card application often comes at the end of a multi-year process and travel restrictions might have less of an impact? Consider the below table breaking apart LPR approvals for those that filed an Adjustment of Status from within the United States, and those that arrived to the United States with an approval after their case was adjudicated abroad.

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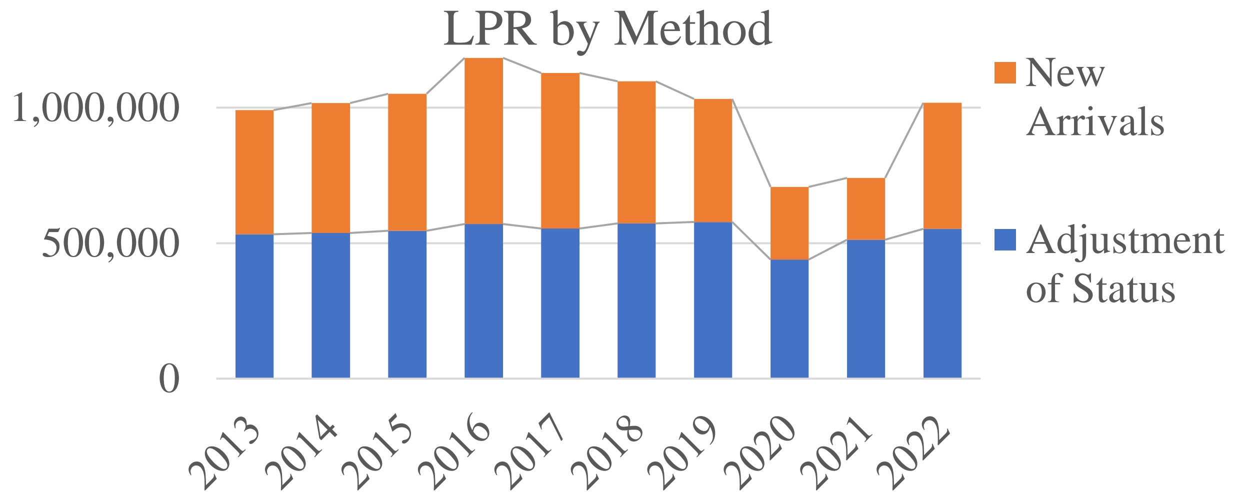

Source: *Id.*, Table 6.

What caused an increased in Employment Based migration?

On one hand, the increased volume of Employment-based (EB) LPR approvals during COVID-19 can be readily observed in the *LPR Allocation by Type of Admission* chart above. A significant portion of the reduced volume can also be attributed to bans on new arrivals across all categories in the *LPR by Method* chart above. *See* Danilo Zak, *President Trump's Proclamation Suspending Immigration*, National Immigration Forum (June 23, 2020), https://immigrationforum.org/article/president-trumps-proclamation-suspending-immigration/ (see the discussion corresponding to changes to **Page 508 (§ 4.04[B]) below**).

The increase in EB volume observable in 2021 and 2022 on page 3 was partly a result of the decrease in family-based (FB) volume. USCIS, *Employment-Based Adjustment of Status FAQs*, https://www.uscis.gov/green-card/green-card-processes-and-procedures/fiscal-year-2023-employment-based-adjustment-of-status-faqs.

Remember that the cap on the total number of available EB visas is in part dependent on unused family-based visas in the prior year. USCIS announced that the 2023 total employment-based limit fell from 270,284 in 2022 to 197,091 in 2023. *Id.*

If we take a closer look at just 2022 data, the situation becomes much more informative – albeit quite a bit more complicated. Chart follows next page.

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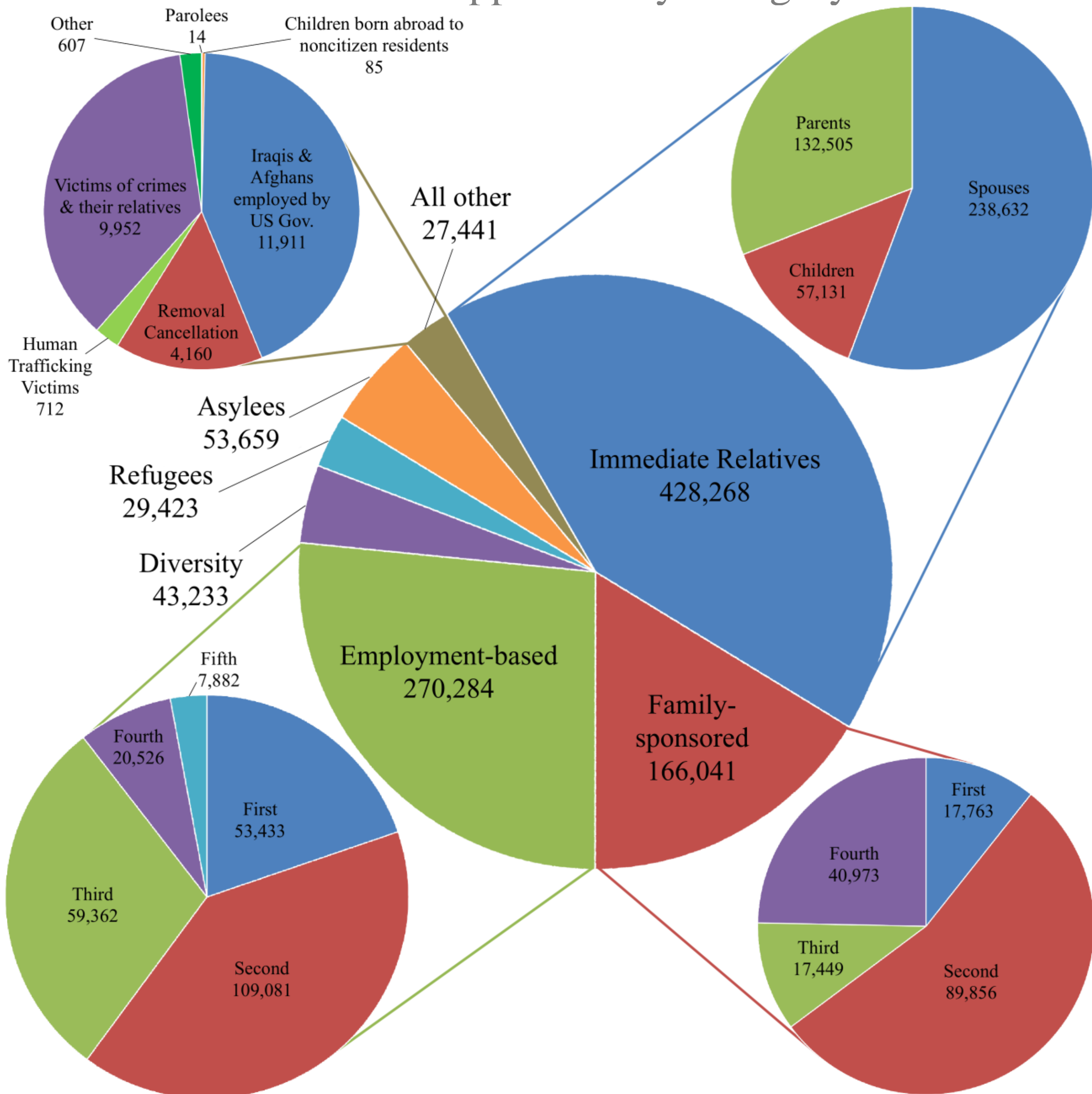

Source: *2022 Yearbook of Immigration Statistics* at 18.

Having seen the 2022 figures of those who made it ‘across the line,’ what are the figures for those who have not? The Department of State indicates that the current worldwide backlog for visa applicants is **4,034, 061**. U.S. Dep’t of State, *Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based preferences Registered at the National Visa Center as of November 1, 2023* (2023). https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2023_vF.pdf (retrieved July, 2024).

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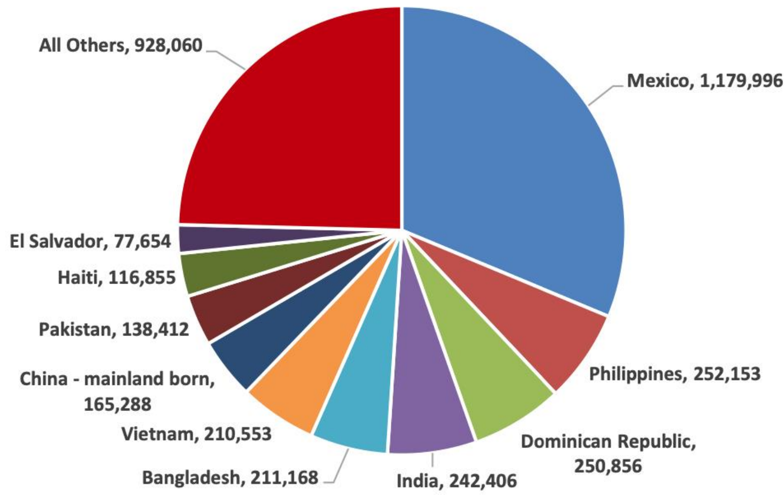
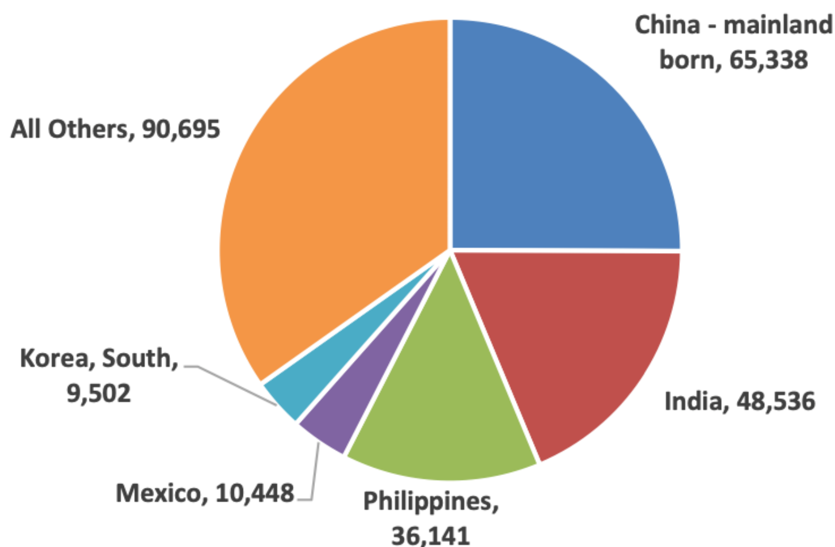
The most imposing constraint is referred to as the "per country cap," which limits any one country to no more than 7% of all visas in any one year. INA § 202(a)(2); U.S.C. §1152(a)(2). For high-emigration countries, this can mean a wait time of decades (see page 432 *What the Visa Bulletin Is and Learning How to Read It.)* Once a country hits the 7% limit, social and geographic factors are unlikely to subside, so the backlog simply grows. DOS shares the following information about the FB and EB backlogs:



Source: *The Waiting List*, 5.



Source: *Id.* at 11.

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In some ways, these figures present more questions than they answer.

For example, changing trends in the EB category might be more readily understood with a year-to-year review of EB-subcategories, keeping in mind that domestic labor supply and demand are confounding variables in any EB analysis (see additions to **§ 4.01[G][2]**, discussed below). Consider how the qualifications of a typical worker in an industry would determine which EB categories are most impacted by a dramatic event. How would the impact of an industry-wide layoff in the tech sector differ from the impact of the passage of a large federal infrastructure-construction funding bill? Different EB categories would be affected in different ways, and all EB categories would be affected by the amount of family sponsored rollover numbers available.

Another serious question is the status of the Afghan Special Immigrant Visa (SIV), which is a large portion of the "All Other" pie in the 2022 data (page 6). This is a special classification for Afghans who supported the American presence in Afghanistan and were endangered as a result. Do you think that the fall of the Afghanistan government in (very) late FY 2021 would be captured the FY 2022 data above?

In October of 2021 (in FY 2022), two months after the U.S. Embassy ceased operations in Afghanistan, the Department of State (DOS) reported that the average "U.S. Government" processing times for Afghan Special Immigrant Visa (SIV) applications was 435 calendar days.[10] This timeframe means that applications filed in the chaotic final days of American operations in Afghanistan would not be expected to be approved until sometime in early 2023. In a recent quarterly report (Q4, 2023), the DOS stated that the average "U.S. Government" processing time had decreased to 403 calendar days. U.S. Dep't of State, *Quarterly Reports on Status of Afghan Program*, https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov.html (January 2024, available at the base of the webpage). Through these quarterly reports, the DOS has indicated the following approval volume and timeframe for Afghan SIVs:

[10] This processing time does not include the time where the necessary action is with the applicant, such as obtaining and submitting documentation, scheduling an interview, or appearing for the interview at a U.S. Embassy or Consulate. Realistically, these steps would add a significant amount of overall time to the process.

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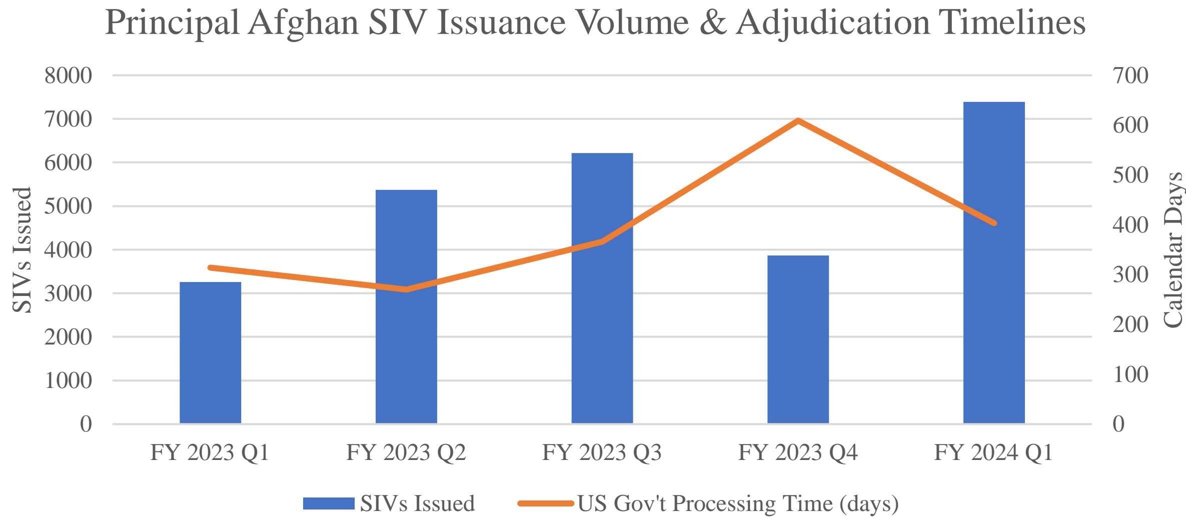

Source: *Quarterly Reports on Status of Afghan Program*, *supra* (data retrieved from the January 2023 – January 2024 reports available at the base of the webpage).

The variance in the processing time is alarming. It is difficult to estimate when someone who filed their SIV application in the days before the fall of the Afghan government (or at any time) should expect their application to be adjudicated. But if the processing time is *somewhere* around 400 days, does it still matter at the time you are reading this? If you assume that applicants from August of 2021 take very little time (say, 120 days in total) to prepare any necessary documentation and schedule and attend their interviews (see footnote above), most applications should have been processed by the end of 2023, right?

Stunningly, in 2022 the DOS's Office of the Inspector General (OIG) declared that it could not verify the Department's own Afghan SIV quarterly report timelines (cited above) because of unreliable data management systems and "deficiencies" in the Department's reporting methodology. U.S. Dep't of State, Off. of Inspector General, AUD-MERO-22-38, 2-3 (Sept. 2022). The OIG also conducted its own analysis and determined that the average processing time for *only a small, initial portion* of the overall application process was about 7 months in 2021. *Id,* at 29. In this same report, the OIG remarked that "initial" submissions received in August of 2021 (the month of the US withdrawal from Afghanistan) **had not even been opened until May of 2022.** *Id.* at 13.

Concerningly, the purported 403 days presented in the DOS' quarterly reports does not include this initial eight-month delay because it is characterized as "pre-processing." *Id.* at 13-14. The OIG consequently "could not reliably calculate an overall average processing time for Afghan SIV applications." *Id.* at 14. Since this report in late 2022, the OIG has not provided an updated independent analysis on the processing timeline or backlog of the Afghan SIV program, other than determining that the relevant agencies have made considerable progress on the "pre-processing" backlog, (U.S. Dep't of State, Off. of Inspector General, AUD-MERO-23-23, 9-10 (Aug. 2023)), and that one official stated that processing the applications in the first administrative step of the process would take the government "**3 to 5 years**." *Id.* at 12.

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While it may be no surprise that many LPR applicants make decisions about their immigration pathway with incomplete information about the process, it is also true that many attorneys must advise their clients with incomplete information about specific options, timelines, or chances of success. Learning how to navigate this uncertainty and advise clients to the greatest extent possible is a crucial skill for immigration attorneys. One of the immigration attorney's greatest assets in the struggle to have a clear understanding of the U.S. immigration system is the frequently mentioned Visa Bulletin, discussed on textbook page 432.

Source: Information About Your Immigration Document, USCIS (March 31, 2023), https://www.uscis.gov/tools/uscis-tools-and-resources/information-about-your-immigration-document.

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. Assume that Marlene filed for her sister on December 1, 2007. This date of filing is Beatrice's priority date. Examine the May 2024 Visa Bulletin, provided below. Is Beatrice eligible to file her adjustment of status on the basis of her backlogged F4 petition?

Chart next page.

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A. **FINAL ACTION DATES FOR FAMILY-SPONSORED PREFERENCE CASES**

On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are authorized for issuance to all qualified applicants; and "U" means unauthorized, i.e., numbers are not authorized for issuance. (NOTE: Numbers are authorized for issuance only for applicants whose priority date is **earlier** than the final action date listed below.)

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	08JUL15	08JUL15	08JUL15	15OCT01	01MAR12
F2A	01JUN21	01JUN21	01JUN21	08NOV20	01JUN21
F2B	01APR16	01APR16	01APR16	01MAR04	22OCT11
F3	01JAN10	01JAN10	01JAN10	22JUL99	01AUG02
F4	22JUL07	22JUL07	15JAN06	22JAN01	08SEP03

For May, F2A numbers EXEMPT from per-country limit are authorized for issuance to applicants from all countries with priority dates earlier than 08NOV20. F2A numbers SUBJECT to per-country limit are authorized for issuance to applicants chargeable to all countries EXCEPT MEXICO, with priority dates beginning 08NOV20 and earlier than 01JUN21. All F2A numbers provided for MEXICO are exempt from the per-country limit.

B. **DATES FOR FILING FAMILY-SPONSORED VISA APPLICATIONS**

The chart below reflects dates for filing visa applications within a timeframe justifying immediate action in the application process. Applicants for immigrant visas who have a priority date earlier than the application date in the chart below may assemble and submit required documents to the Department of State's National Visa Center, following receipt of notification from the National Visa Center containing detailed instructions. The application date for an oversubscribed category is the priority date of the first applicant who cannot submit documentation to the National Visa Center for an immigrant visa. If a category is designated "current," all applicants in the relevant category may file applications, regardless of priority date.

The "C" listing indicates that the category is current, and that applications may be filed regardless of the applicant's priority date. The listing of a date for any category indicates that only applicants with a priority date which is **earlier** than the listed date may file their application.

Visit www.uscis.gov/visabulletininfo for information on whether USCIS has determined that this chart can be used (in lieu of the chart in paragraph 4.A.) this month for filing applications for adjustment of status with USCIS.

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	01SEP17	01SEP17	01SEP17	01APR05	22APR15
F2A	01SEP23	01SEP23	01SEP23	01SEP23	01SEP23
F2B	01JAN17	01JAN17	01JAN17	01SEP04	01OCT13
F3	01JUN10	01JUN10	01JUN10	15JUN01	08NOV03
F4	01MAR08	01MAR08	15JUN06	22APR01	01JUN05

Source: Dep't of State, *Visa Bulletin For May 2024,* (Apr. 3, 2024) https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2024/visa-bulletin-for-may-2024.html.

In order to answer whether Beatrice's priority date of 12/01/2007 is current for Colombia, we need to first determine which chart is being used. USCIS has determined that for May 2024, the "Dates for Filing" chart should be used for family-based petitions. USCIS, *Adjustment of Status Filing Charts from the Visa Bulletin*, https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates/adjustment-of-status-filing-charts-from-the-visa-bulletin. Recognizing that Colombia is not listed explicitly in the chart above, Marlene's sister recently became current under the F4 "All Chargeability" column, after waiting for roughly 16 years.

If we look at the historical timelines when Marlene filed back in December of 2007, the then-current priority date then was for people who filed before June 22, 1997, or an estimated wait of around 10 years. Dep't of State, *Visa Bulletin for December 2007* (Nov. 13, 2007), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2008/visa-bulletin-for-

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december-2007.html. The increase in the backlog from 10 to 16 years may not have been predictable at the time of filing in 2007, but such increases are now the norm.

If Beatrice's children are now over the age of 21, they cannot now secure an immigrant visa as following to join Beatrice under INA § 203(d); 8 USC § 1153(d). INA § 203(h); 8 USC § 1153(h) and the Childhood Status Protection Act (CSPA) stipulate that applicants can subtract the time an application is pending (the time between the submission of the application and the approval of the application; typically several months). USCIS, *Child Status Protection Act (CSPA)* (2023), https://www.uscis.gov/green-card/green-card-processes-and-procedures/child-status-protection-act-cspa. If Beatrice's children get married at any time, they will also loose the child classification regardless of their age. *Id.*

Note at the end of this chapter a special program for Colombian nationals with approved family-based petitions that may allow some people to wait inside the United States.

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 a 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 behind. Her daughters, Rava and Emal, 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. In the fall of 2021, the Visa Bulletin was stuck at September 22, 2015. If you were advising them in the fall of 2023, would you say the wait for Asal and Esin is 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?

---

[11] Editor Note: I have changed the names but this hypothetical is based on real people and their experience. LB

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The priority date for adult unmarried children of lawful permanent residents finally moved in April of 2024 and the sisters were able to secure their immigrant visa stamps. Only at the end can we say how long the process will take. For this family the wait was from November of 2015 to July of 2024…. A waiting time for the quota and visa issuance of 104 months or **8.7 years**.

Take a look at the FB2 category for July of 2024. If you were filing for an unmarried daughter or son today the cut off states processing for people who filed before May 1, 2016. Is the wait going to be 8.2 years or will it be longer? No one knows, because it depends on how many people enter and remain in this category.

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 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

[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

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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 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.

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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	01Mar20	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. *See* 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.

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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

October 2023

Employment Based	All Charge-ability Areas	China — Mainland born	El Salvador, Honduras, Guatemala	India	Mexico	Philippines
4th	01Jan 19	01Jan19	01Jan 19	01Jan19	01Jan19	01Jan19

April 2024

Employment Based	All Charge-ability Areas	China — Mainland born	El Salvador, Honduras, Guatemala	India	Mexico	Philippines
4th	01Nov 20	01Nov20	01Nov20	01 Nov20	01Nov20	01Nov20

How would you explain the movement of the quota to young people you might be representing?

Several members of Congress introduced legislation to exempt Special Immigrant Juveniles from any quota allocation. Several of these bills remain pending. Text - H.R.5145 - 118th Congress (2023-2024): WISE Act of 2023, H.R.5145, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/5145/text; H.R.4285 - 118th Congress (2023-2024): Protect Vulnerable Immigrant Youth Act, H.R.4285, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/4285. To learn more, see: https://www.sijsbacklog.com/.

As is noted in Chapter 7, the DHS does have a prosecutorial discretion program for youth stuck in the 4th Preference backlog that allows them to have deferred action with work authorization and a stay of removal proceedings once their SIJS petition is approved. For more go to https://www.uscis.gov/working-in-US/eb4/SIJ.

Page 436 (§ 4.01[G][2]) Learning How to Estimate Permanent Resident Application Processing Times by Visa Bulletin Movement: Insert the following discussion after the third paragraph on page 436.

Examine the following excerpts of the Final Action Dates for Employment Based Preference Visa Bulletins. Note that the qualifications for EB-2 are higher than those of EB-3. Intuitively, this means that there are fewer total applicants that qualify for EB-2, and the wait time would *generally* be shorter. For China and India (the two most notoriously EB-backlogged countries), this intuitive perspective is not always accurate.
Why might this be?

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October 2019

Employment Based	All Chargeability Areas	China — Mainland born	India
2nd	C	01JAN15	12MAY09
3rd	C	01NOV15	01JAN09

October 2020

Employment Based	All Chargeability Areas	China — Mainland born	India
2nd	C	01MAR16	01SEP09
3rd	C	01JUL17	15JAN10

October 2021

Employment Based	All Chargeability Areas	China — Mainland born	India
2nd	C	01JUL18	01SEP11
3rd	C	08JAN19	01JAN14

October 2022

Employment Based	All Chargeability Areas	China — Mainland born	India
2nd	C	08JUN19	01APR12
3rd	C	15JUN18	01APR12

October 2023

Employment Based	All Chargeability Areas	China — Mainland born	India
2nd	08JUL22	01OCT19	01JAN12
3rd	01DEC21	01JAN20	01MAY12

What a rollercoaster! The difference in processing time between the EB-2 and EB-3 category grew considerably starting in October 2020. In many situations, it made sense for higher-qualified EB-2 applicants to reclassify their employment preference category to EB-3 to take advantage of the considerably faster EB-3 category. It seems that this sensible approach was taken by many applicants, and this could be a primary factor in why the year-to-year changes were so dramatic (and confusing) between the two categories. How might you explain these trends to a client who wants to sponsor their employee? How would you explain them to the beneficiary? How would you explain to an EB-2 beneficiary from India whose priority date was some time in 2013?

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?

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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.

Source: FREEPIK, https://www.freepik.com.

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:

One of the curious aspects of the conditional lawful permanent resident status is that the processing times to complete the overseas immigration process and even the adjustment of status process means that a couple has frequently been married longer than two years at the time of the visa issuance or the adjustment of status. For some couples it may be worth marrying and delaying making the visa application so that the burden of completing all the steps of the removal of the conditions become unnecessary. The stepchildren of these marriages are particularly burdened because the child's status remains contingent on their parent's status.

In August of 2024, the USCIS reported the average processing times for the marriage petitions exceed 14 to 60 months and the removal of the conditions petition exceeded 32 months for 80% of the cases. These are estimates and there are ways to minimize the impact of the delays and legitimate strategies to be sure clients are taking advantage of the best options for filing.
https://egov.uscis.gov/processing-times/

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Unconscionable Delays:

While the USCIS states that it is a goal to complete the marriage petition form within 6 months, the reality is far worse. Clients will expect their attorneys to know how to think through all the steps in the process and plan for delay. Trying to expedite cases or filing for mandamus to force more rapid processing is not always successful.

Considering the significant delay in removing the conditions, some people advocate that the spouse of a U.S. citizen seek to naturalize even before the processing of the removal of the condition.

The spouse is eligible to naturalize after holding conditional lawful permanent residence for three years if they remain married to their U.S. citizen spouse. USCIS guidance indicates that the agency will complete the removal of conditions at the same time as they consider the Naturalization application.

Given the delays who is entering with a Conditional status?

Here is some data that only reflects the admission of Conditional Lawful Permanent Residents (CPLR) as compared to the admission of immediate relative spouses. Note this data is not the entire universe of cases, for it does not include adjustment of status data. However, it is useful to consider whether marriage cases are effectively being vetted more than once under the conditional lawful permanent resident status scheme.

Year	2020	2021	2022	2023
Immediate Relative Spouse	38,088	64,964	76,399	73,212
Conditional Spouse	16,956	20,092	10,163	15,374
Child Conditional	1,952	2,116	1,412	1,653
Percentage of marriages Conditional in this sample	44%	31%	13%	21%

Data is from USCIS admissions reports.

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What Guides U.S. Policy on Marriage and Immigration?

Image Source: Wedding in Bali 2023 courtesy of Georgia Creer and Gerard McCallum, photo by Lenni Benson.

The U.S. Census estimates that 8% of the marriages involving a U.S. native woman are between people of mixed nativity. Meaning that a U.S. citizen married to a person born abroad. https://www.census.gov/library/stories/2021/05/marital-histories-differ-between-native-born-and-foreign-born-adults.html

This same report shares data comparing the number and length of marriages between native born and foreign born. Here is a brief quote from the report. Should it inform Congressional policy choices? "About two-thirds (67%) of native-born adults had ever married, compared with over three-quarters (76%) of foreign-born adults. However, among ever married adults, higher proportions of native-born people had divorced (36%) or ever been widowed (11%) compared to foreign-born people (20% and 7%, respectively). Native-born adults were also more likely to remarry. About one in four (26%) were married two or more times. Among the foreign-born, only one in seven (14%) had remarried. So, foreign-born people were more likely than those native born to ever marry and to be in their first marriage rather than in a second or higher marriage." *Id.*

Do you suspect the television show 90 Day Fiancé is more influential? https://go.tlc.com/show/90-day-fiance-tlc-atve-us

Test your assumptions?
We all are the product of our cultural and social histories. What makes a marriage appear valid to you? What factors are appropriate for the government to use in measuring the "truth" of a marriage?
Unfortunately, there is no government study evaluating whether racial, ethnic, or religious bias may influence USCIS or government evaluation of marriages.

Revocation of Approved Marriage Petitions
We have been considering the requirements to obtain immigration through marriage the many burdens of proving a valid marriage on the petitioners. In Chapter 5 and 6 we will explore some of the problems when the government alleges fraud in the inception of the marriage or upon entry to the United States.

But it is important to understand that the USCIS can also seek to revoke an approved immigrant petition whether it was based on marriage, family, or employment. *See generally* INA § 205 and 8 CFR § 205

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Petitioners may appeal CLPR rejections when USCIS denies their initial application on the basis of a *nondiscretionary* factor. 8 U.S.C. § 1154(c); 8 CFR 204.2(a)(1)(ii); 8 CFR 1003.1(b)(5). However, some of the federal circuits have ruled that there is no judicial review available when the USCIS revokes an approved petition. These courts characterize revocations as *discretionary* in nature. INA § 242(2)(B)(ii); 8 U.S.C. § 1252(a)(2)(B)(ii). Due to this split in the Circuits, the Supreme Court granted a Writ of Certiorari to consider whether the *discretionary* revocation of previously granted CLPR (which itself was based on *nondiscretionary* factors) status is judicially reviewable notwithstanding this judicial review bar. Petitioners argue that revoking CLPR status on the basis of *discretion* eliminates Petitioner's right to judicial review of a determination that would have been *nondiscretionary* if it was made at the initial adjudication. Petition for Certiorari at 2-3, *Bouarfa v. Mayorkas*, No. 23-583, 2023 WL 8316101 (U.S. Nov. 23, 2023).

Some of the background facts are found in the briefing submitted with the petition for review. MS. Bouarfa was married to her husband Ala'a Hamayel for three years before she filed a visa petition and application for adjustment of status on his behalf. The couple has three U.S. citizen children. He entered the country lawfully and is a citizen of the "Palestinian Authority." He was married two times before and both spouses initially filed marriage petitions but when the marriages ended in divorce, the petitions were abandoned. Mr. Hamayel denied that either prior marriage was fraudulent, and his first wife tried to withdraw her prior statements that he had paid her to enter into marriage. These facts are from the U.S. Solicitor General's brief at page 7.

If the USCIS had denied the original marriage petition on the allegation that it was barred by INA § 204(c), the couple could have appealed the denial and if placed in removal proceedings could contest the finding before the immigration judge. However, the 11th Circuit ruled that a revocation is discretionary and therefore barred from review. [In Chapter 6 problem 6-2 we will revisit this bar to adjustment of status and the related grounds for refusal.]

Many immigration practitioners look forward to more robust judicial review of agency adjudications now that the Court has disavowed the *Chevron* doctrine. *See Loper Bright Enterprises v. Raimondo,* __ U.S. __, 144 S.Ct. 2244 (2024). However, if Congress has curtailed or eliminated judicial review of agency action, the standard of review is irrelevant. The agency's determination will stand.

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

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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 495 (§ 4.04[D][1]): replace the rule cited as INA § 212(a)(5); 8 U.S.C. § 1182(a)(5) with the following, which was not clear in the text:

INA § 212(a)(5)(i); 8 U.S.C. § 1182(a)(5)(i)

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that–
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified…) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Page 495 (§ 4.04[D][1]): Add the following remarks after the third paragraph, before the citations to 20 C.F.R. § 656.17.

The first step of the PERM process is to determine that employment of a foreign national at a given wage will not "adversely affect" the wages of US workers. INA § 212(a)(5)(ii); 8 U.S.C. § 1182(a)(5)(i)(II). The Office of Foreign Labor Certification's (OFLC's) National Prevailing Wage Processing Center (NPWC) conducts this analysis by comparing the foreign worker's job description to the Bureau of Labor Statistics' (BLS') Occupational Employment Statistics (OES) database, which classifies normal wage ranges for similar occupations. 20 C.F.R. 656.40(a); 20 C.F.R. 656.40(b)(2). The wages for a given occupation are then further broken down into 'skill levels' that correspond generally to the 'seniority' of an occupation. As long as the foreign worker is not being paid less than the corresponding 'prevailing wage' identified by the NPWC, there will be no impact on a similar US worker working in a similar occupation and the foreign worker's wage is 'certified.' 20 C.F.R. 656.10(c)(1).

In October of 2020, the Trump Administration announced new regulations taking effect immediately, and changed the method by which a wage could be certified. The DOL alleged that the current methodology was producing "artificially low prevailing wages" which in turn allowed employers to hire foreign workers at lower salaries than their US counterparts. Strengthening Wage Protections for the Temporary and Permanent Employment of Certain

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Aliens in the United States, 85 Fed. Reg. 63872, 63877 (Oct. 8, 2020) (amending 20 C.F.R. §§ 655, 656). The DOL's new policy employed different statistical methodology which increased the average wage that a foreign worker would be required to be paid to be certified by the NPWC by as much as 41%. National Foundation for American Policy, *An Analysis of the DOL Final Rule's Impact on H-1B Visa Holders and Employment-Based Immigrants*, 19 (Feb. 2021), https://nfap.com/wp-content/uploads/2021/02/An-Analysis-of-the-DOL-Final-Rules-Impact-on-H-1B-Visa-Holders-and-Employment-Based-Immigrants.NFAP-Policy-Brief.February-2021-1.pdf.

The practical implication was that very few employers would have been able to complete a PERM Labor Certification. They would have needed to pay their non-US worker considerably more than the market salary to receive a certification from the NPWC. *Id.* The rule was fiercely opposed because the modifications to the statistical calculations attempted to arbitrarily price out foreign labor, *Id.* at 6-11, and violated the Administrative Procedures Act. *Chamber of Com. of United State v. United States Dep't of Homeland Sec.*, 504 F. Supp. 3d 1077 (N.D. Cal. 2020) (holding that the DOL's final rule may not circumvent the normal 'notice and comment' period). Ultimately, the Biden administration abandoned these changes altogether. Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States, Implementation of Vacatur, 86 Fed. Reg. 70729 (Dec. 13, 2021) (revoking proposed amendments to 20 C.F.R. §§ 655, 656).

Page 498 (§ 4.03[D][1]): Add the following to the last paragraph on Individual Labor Certification, before Problem 4-6:

The PERM process can be reduced to two primary objectives: (1) showing that there are no US workers that are able, willing, qualified, and available to take the position described in the PERM, and that there is no impact to US worker's wages, and (2) showing that the beneficiary is qualified for the sponsored position. Most of the statutory discussion thus far has outlined how an employer may accomplish the first objective. But what about the second objective?

Every PERM LC is filed with respect to a *proposed* occupation (the PERM-sponsored role) that the beneficiary will enter in to or be in at the time they obtain LPR. A beneficiary must be in the occupation described in their PERM when they obtain LPR status, 8 C.F.R. 245.25(a)(1); 8 C.F.R. 245.25(a)(3), or a role substantially similar to it, 8 C.F.R. 245.25(a)(2).

But notice that there is no requirement that the beneficiary of the PERM be in the PERM-sponsored role at the time the PERM is filed.[13] Therefore, sponsoring employers can proactively file a PERM for a position that a beneficiary is expected to be in at the time they obtain LPR status, rather than for the position a beneficiary is in at the time the PERM is filed. This is critical considering that the EB LPR status can take many years, and applicants may be in a different occupation by the time the process is completed.

[13] However, if the beneficiary is employed by the sponsoring employer at the time the PERM is filed, the DOL requires that the beneficiary show that they qualify for the sponsored role at the time the employee was hired rather than the time of filing the PERM, 20 C.F.R. 656.17(i)(3), unless the Labor Certification is for a substantially different position, 20 C.F.R. 656.17(i)(3)(i).

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This flexibility presents employers with another powerful tool: batch recruitment. Batch recruitment is when an employer uses one PERM labor market test for many beneficiaries who will be in the same position at the time they are eligible for their LPR status. As long as an employer can accomplish the first objective for a given occupation, the employer may use this labor market test to sponsor any beneficiaries who are expected to be in that occupation when they receive LPR status.[14]

Once a PERM Labor Certification is certified, a beneficiary may now be sponsored for an employment-based LPR. Applicants have the burden of proving that they possessed the skills necessary to meet the minimum requirements for their PERM-sponsored role *at the time the PERM was filed.* 8 C.F.R. 204.5(l)(3)(ii). Additionally, if the beneficiary's priority date is also current on the Visa Bulletin, they may obtain LPR status by adjusting status from within the United States, 8 C.F.R. 245.1(a), or enter the United States on this status as a new arrival, 22 C.F.R. 42.32. However, if the beneficiary is from a backlogged country and their priority date is not yet current, they must wait until their priority date becomes current to obtain LPR status.

Page 498 (§ 4.03[D][1]): add the following at the end of the EB-5 section:

In 2022, Congress approved modifications to the EB-5 program to incentivize specific types of investments. Broadly, the changes create a highly expedited pathway for rural areas, high unemployment areas, and infrastructure investments with specific "set asides" of 20%, 10%, and 2% of the total EB-5 quota respectively. Alongside the processing prioritization that comes with designated portions of the quota reserved for these investments, the minimum investment amount is also considerably lower.

Recall the immense waitlists discussed in the early pages of these revisions and *The Waiting List* figures (page 7). EB-5 is notoriously "current" with the usual exceptions of India and China. However, **all set aside EB-5 programs are current for all countries** as of August, 2024.

Again, processing delays are impacting potential investors. The USCIS is moving very slowly on approving the new EB-5 set aside programs. Still for those who qualify, especially from India or China, these new programs may allow a person to seek adjustment of status while the application is pending. Given the very long waits in the regular employment based categories for people born in India or China, the investment vehicle may be the most desirable path to permanent status.

Reliable sources for EB-5 information may be difficult to discern from investment pitches. Investors should act with caution.

Page 506 (§ 4.04[A]): Add the following immediately after the first paragraph of section [A]:

It's at this point that aspiring immigrants find their immigration bottle-necked by the quota delays reported in the State Department *Visa Bulletin*. For some, it may be a decade or more between the approval of a PERM and/or I-140. Congress has specifically authorized that in

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[14] A PERM Labor Market test is valid for 180 days from the first recruitment step taken in 20 C.F.R. 656.17(e)(1)(ii). Once expired, an employer will need to restart the process with a new Prevailing Wage analysis.

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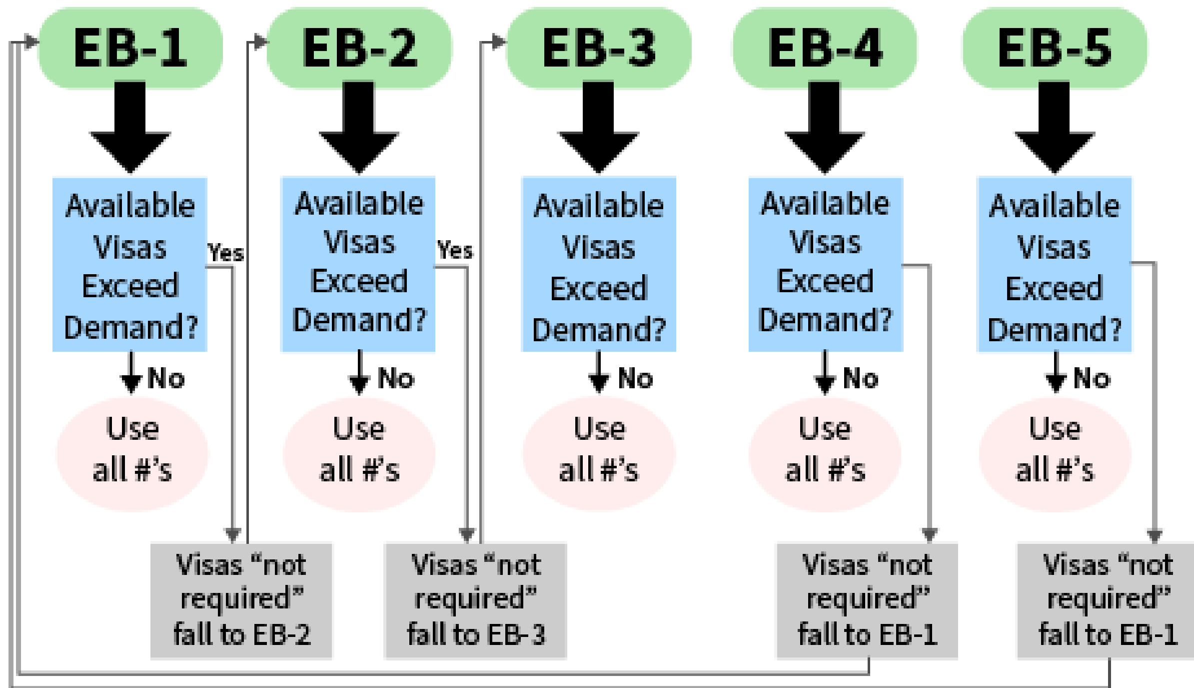
years where there are unused family visas, the prior year's unused allocation may "spill down." To the first three Employment Based categories. The same applies within the EB categories as well – though the movement is not as linear. Below is the USCIS's own visual explaining how unused visas in one category are made available to those below. USCIS refers to this process as "fall up/fall down."



USCIS, *Employment-Based Adjustment of Status FAQs* (May 20, 2024), https://www.uscis.gov/green-card/green-card-processes-and-procedures/fiscal-year-2023-employment-based-adjustment-of-status-faqs (expand the "Allocation of Visa Numbers" tab).

Page 508 (§ 4.04[B]): Add a Section 4 to the bottom of the page:

[4] Challenges

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

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(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.

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 through May of 2023 concerning Mandamus litigation.
https://trac.syr.edu/reports/717/

In a April district court decision, a federal district judge ruled that the court had no authority to mandate the issuance of diversity immigrant visas to past lottery winners, even when the delay was due to the government's inaction. Diversity lottery visas expire at the end of each fiscal year if not issued.

What follows is an excerpt from the Court of Appeals decision strongly rejecting the power of the courts to use equitable power to issue diversity visas post the expiration of the fiscal year.

Goodluck v. Biden

2024 U.S. App. LEXIS 15299 (D.C. Cir. Court of Appeals June 25, 2024)

KATSAS, *Circuit Judge*: In these four consolidated appeals, district courts held that the Department of State had unlawfully suspended, deprioritized, and delayed the processing of applications for diversity visas for fiscal years 2020 and 2021, at the height of the COVID-19 pandemic. As a remedy, the courts ordered the Department to continue processing applications and issuing visas after the statutory deadlines for doing so had passed. We hold that the courts lacked authority to order this relief.

I

A

The Immigration and Nationality Act creates an annual allotment of immigrant visas for aliens from countries with low rates of immigration to the United States. 8 U.S.C. § 1153(c). These visas are known as diversity visas. Congress capped the number of diversity visas at 55,000 per fiscal year. *Id.* § 1151(a)(3), (e).

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The State Department administers the diversity-visa program annually. Before the start of each fiscal year, it holds a lottery for applicants from qualifying countries. 22 C.F.R. § 42.33. Millions of individuals apply. *See* Bureau of Consular Affairs, U.S. Dep't of State, Diversity Visa Program, DV 2019-2021: Number of Entries During Each Online Registration Period by Region and Country of Chargeability. From among these applicants, the Department randomly selects a number that it estimates will ensure filling the authorized diversity visas "for the fiscal year in question." 22 C.F.R. § 42.33(c). Selectees become "eligible" to receive such visas "for the fiscal year involved." 8 U.S.C. § 1153(e)(2).

Selectees do not automatically receive visas. Rather, they must submit a full, written application for an immigrant visa and must personally appear for an interview before a consular officer. *See* 22 C.F.R. §§ 40.1(*l*)(2), 42.33(g). They must satisfy all admissibility requirements. *See* 8 U.S.C. § 1182(a). They must also complete the application process and receive a visa before "the end of the specific fiscal year for which they were selected." *Id.* § 1154(a)(1)(*I*)(ii)(II).

Selectees who timely complete the application process may receive immigrant visas, provided that the annual cap of 55,000 visas is not exceeded. *See* 8 U.S.C. §§ 1151(a)(3), 1151(e), 1201(a)(1)(A). They then may travel to the United States and seek admission. *Id.* § 1181(a). Like any other visa, a diversity visa does not guarantee admission; instead, it "merely gives the alien permission to arrive at a port of entry and have an immigration officer independently examine the alien's eligibility for admission." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1157, 339 U.S. App. D.C. 78 (D.C. Cir. 1999); *see* 8 U.S.C. § 1201(h).

B

The COVID pandemic significantly hampered the State Department's administration of the diversity-visa program.

Section 1182(f) of Title 8 permits the President to "suspend the entry of all aliens or any class of aliens" whenever he finds that their entry "would be detrimental to the [*4] interests of the United States." In April 2020, President Trump issued Proclamation 10014, which suspended the entry of aliens to protect domestic labor markets harmed by the pandemic. 85 Fed. Reg. 23,441 (Apr. 27, 2020). President Trump twice extended Proclamation 10014, but President Biden revoked it in February 2021. 85 Fed. Reg. 38,263 (June 25, 2020); 86 Fed. Reg. 417 (Jan. 6, 2021); 86 Fed. Reg. 11,847 (Mar. 1, 2021). During the ten months when the Proclamation remained in effect, the State Department declined to issue diversity visas. The Department took the position that a section 1182(f) proclamation, by rendering covered aliens inadmissible, also renders them ineligible for visas.

Around the same time, the Department also issued its own guidance instructing consular officers how to respond to COVID. In March 2020, the Department suspended all "routine visa services"—including the processing of applications for diversity visas—but permitted certain "mission-critical visa services" to continue. J.A. 411. The Department re-established more visa services over the summer, but the pandemic hampered its efforts to reduce backlogs in pending applications. In November 2020, the Department instructed consular posts to follow a four-tiered

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prioritization scheme for addressing the backlog, with diversity visas in the lowest-priority tier. J.A. 2281-84. The Department rescinded this guidance one year later.

[The parties succeeded in the lower courts obtaining equitable relief and a set aside of some of the visa allocation. The Court of Appeals reverses this action.]

[II. A.]

A court granting the equitable remedy of an injunction has discretion to "mold its decree to meet the exigencies of the particular case." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (quoting 11A Wright & Miller, *Federal Practice and Procedure* § 2947 (3d ed. 2013)). But this discretion has limits. One is that courts cannot order relief that conflicts with a clear and constitutionally valid statute. *See, e.g., Hedges v. Dixon Cnty.*, 150 U.S. 182, 192 (1893) ("Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law."); *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 122, 22 L. Ed. 72 (1874) ("A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law ....").[1] Another limit is that, unless Congress expressly provides otherwise, equitable remedies must track remedies traditionally afforded by the equity courts. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999).

Two cases highlight these points. *INS v. Pangilinan*, 486 U.S. 875 (1988), involved a statute that made citizenship available to aliens who had served in the United States military during World War II, but only if they filed naturalization petitions by December 31, 1946. *Id.* at 877-80. The plaintiffs were Filipino nationals who had met the service requirement but not filed timely petitions. *See id.* at 880-82. They argued that for nine months before the statutory deadline, the United States had unlawfully refused to appoint anyone in the Philippines with authority to accept and process the required petitions. *See id.* The Ninth Circuit agreed. *See id.* at 882. Then, it asserted an "equitable authority to craft a remedy" requiring the government to confer citizenship on the plaintiffs despite the 1946 cutoff. *Id.* at 883.

The Supreme Court unanimously reversed this remedial ruling. It stressed the longstanding principle that "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Pangilinan*, 486 U.S. at 883 (quoting *Hedges*, 150 U.S. at 192). Moreover, it reasoned, Congress had not conferred on the federal courts "the power to make someone a citizen of the United States," unlike other expressly conferred equitable powers "like mandamus or injunction." *Id.* at 883-84. Thus, the Ninth Circuit had erred by disregarding "the explicit cutoff date" in the statute and ordering the conferral of citizenship anyway. *Id.* at 884; *see also id.* at 885 ("Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of these limitations.").

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[1] Because the plaintiffs here assert no constitutional claims, we do not address equitable remedies for constitutional violations.

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Grupo Mexicano confirmed that equitable remedies must be historically grounded absent express expansion by Congress. As the Supreme Court explained, the federal courts' general power to hear equitable claims is "an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." 527 U.S. at 318 (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)). Thus, the "prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief ... depend on traditional principles of equity jurisdiction." *Id.* at 318-19 (quoting 11A Wright & Miller, Federal Practice & Procedure § 2941, at 31 (2d ed. 1995)). Of course, Congress may authorize new remedies in "departure from past practice," so long as the remedies are consistent with Article III. *Id.* at 322. But absent such clear legislative action, courts considering an equitable remedy "must ask" whether it "was traditionally accorded by courts of equity." *Id.* at 319.

B

The remedy ordered here—instructing the Executive Branch to reserve, process, and issue visas on terms devised by the courts—is irreconcilable with these settled principles.

Most obviously, it conflicts with the governing statutes. As noted above, selectees in the diversity-visa lottery become "eligible" to receive visas "for the fiscal year involved." 8 U.S.C. § 1153(e)(2). Moreover, selectees "shall remain eligible to receive such visa only through the end of the specific fiscal year for which they were selected." *Id.* § 1154(a)(1)(*I*)(ii)(II). And "[n]o visa or other documentation shall be issued to an alien" if "the consular officer knows or has reason to believe that such alien is ineligible to receive a visa." *Id.* § 1201(g). State Department regulations confirm these statutory limits: "Under no circumstances may a consular officer issue a visa or other documentation to an alien after the end of the fiscal year during which an alien possesses diversity visa eligibility." 22 C.F.R. § 42.33(a)(1). In other words, "when midnight strikes at the end of the fiscal year, those applicants without visas are out of luck." *Yung-Kai Lu v. Tillerson*, 292 F. Supp. 3d 276, 282 (D.D.C. 2018). Or as the *Gomez* court acknowledged, "[s]ection 1154 sets an absolute, unyielding deadline by which selectees must receive their visas." *Gomez I*, 485 F. Supp. 3d at 196. And "this strict interpretation of the diversity visa statute has been adopted by every circuit court to have addressed the issue." *Yung-Kai Lu*, 292 F. Supp. 3d at 282 (citing cases from the Second, Third, Seventh, Ninth, and Eleventh Circuits). The district courts here thus made the same error as the Ninth Circuit in *Pangilinan*—invoking a supposed equitable power to override an "explicit cutoff date" established by Congress. *See* 486 U.S. at 884.

Historical and contextual considerations also warrant restraint. The Supreme Court has long held that "any policy toward aliens is vitally and intricately interwoven with" both "the conduct of foreign relations" and "the war power"—and so is "largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 72 (1952). More particularly, it is "not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). Modern statutes, apart from the specific

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deadline directly at issue here, point in the same direction. For one thing, Congress has made decisions by consular officers to deny visas to aliens outside the United States not reviewable even by the Secretary of State. 6 U.S.C. § 236(b)(1). For another, while Congress has provided for judicial review of the removal of aliens present in the United States, 8 U.S.C. § 1252, it has expressly refused to afford judicial review for aliens outside the country "to challenge a decision of a consular officer ... to grant or deny a visa." 6 U.S.C. § 236(f). This general framework, plus the sensitivities noted above, undercut any contention that courts may order the processing and issuance of visas to aliens whom Congress has specifically made ineligible.

In sum, the statutory deadline is clear, and neither history nor context affords any basis for departing from it. The district courts had no authority to order the State Department to keep processing applications for diversity visas and issuing the visas beyond the end of the relevant fiscal years.[3]

[Remaining arguments by the plaintiffs and the court's rejection omitted.]

The next lottery opens October 7, 2024. https://dvprogram.state.gov/

Page 521 (§ 40.04[C]): add a paragraph at end of [9] Other Types of Adjustment:

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:

Mahnaz 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 Mahnaz would have had to wait until September of 2023 with no physical absences from the

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[3] Before this Court, the government no longer presses an argument that the doctrine of consular non-reviewability bars judicial review in this case. *Cf. Saavedra Bruno*, 197 F.3d at 1159-62. Accordingly, we do not consider that question.

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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 Mahnaz 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, Mahnaz 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. USCIS had 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.

In September 2023, a Texas Federal Court enjoined DHS from approving DACA applications received after July 15, 2021. *Texas v. United States*, 691 F.Supp.3d 763 (S.D. Tex. Sept. 13, 2023) (injunction for old DACA applications are stayed pending the government's appeal to the Fifth Circuit Court of Appeals). The appeal has been pending since the fall of 2023.

The District Court made two primary findings. First, that DACA's conferral of Advanced Parole violates the statutory limits of 8 U.S.C. § 1182(d)(5). Secondly, that the DHS' attempt to transition DACA from a "temporary" discretionary policy to one that is "indefinite" lacks legislative support, and therefore violates the Constitution and the APA.

> When the 2012 DACA Memorandum was issued, [President Obama] described it as a temporary measure. … [The DHS] has no plans to ever terminate the program unless and until Congress adopts DACA. … DACA has now entered its second decade and DHS clearly intends to continue this Congressionally unauthorized program indefinitely. While this Court and others—including at least two Presidents and two DHS Secretaries—have suggested that only Congress has the authority to implement a permanent DACA-like program, DHS's current position seems to indicate a contrary intention. This is epitome of "the Executive seizing the power of the Legislature."

Id. at 788 (citing *Biden v. Nebraska*, 600 U.S. __, 143 S. Ct. 2355, 2373 (2023)).

The pre-injunction DACA recipients remain unaffected by this ruling, and the court stressed that the holding did not compel the U.S. Government to take any action with respect to DACA recipients. *Id.*

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Do you think the Texas Court fairly characterizes DACA's mechanics and the DHS' implementation of DACA? What is the difference between an agency's long-term discretionary administrative policy and an agency 'legislating' in the absence of Congressional action? Read 8 C.F.R. 274a.12(c)(14), which defines "an alien who has been granted deferred action" as among those who may be granted employment authorization by USCIS.

As of this writing in June of 2024, the litigation over the validity of the DACA rule is not over. The Federal Government appealed *Texas v. United States (2023)*. Many institutions have filed amicus curae briefs in support of Appellant-Defendants and the DACA program generally (including municipalities across the country and within the plaintiff states, 2024 WL 532662, child welfare organizations, 2024 WL 532654, colleges and universities, 2024 WL 532652, and many of the largest private and public companies in the United States, 2024 WL 532650). The Appellee-Plaintiffs have the support of a singular non-profit (2024 WL 1810106).

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

A similar letter requesting parole in place for some long resident populations was shared with the Whitehouse in late spring of 2024. The letter is posted at https://www.lawschool.cornell.edu/wp-content/uploads/2024/06/Law-Professor-PIP-Letter-to-President-Biden-5-31-24.final_.pdf

While not everything requested in the letter was granted, the Biden administration did announce an expanded parole in place program to cure unlawful entry for spouses of U.S. citizens. This one change is estimated to help over 500,000 U.S. residents without status and their citizen family members. See discussion of parole in place on what is an admission or inspection for the purposes of adjustment of status. Text beginning **page 515** concerning inspection and admission and the update to that section below.

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

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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*, 596 U.S. 328 (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 331. This bar precludes judicial review of factual findings that underlie a denial of relief. *Id.* The case resulted in a 5 to 4 split. It arose in the context of Mr. Patel seeking adjustment of status. Because the USCIS denied his application as a matter of discretion, the government argued that 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. *** 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 347.

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Page 515 (§ 4.04[C][6] Inspection and Admission): 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. 409 (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. 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.

Parole in Place to Cure the Lack of Admission or Inspection:
On June 18, President Biden announced a new discretionary program that would allow spouses and stepchildren of U.S. citizens to file for adjustment of status even if they entered the country without inspection. To accomplish this, the government will consider the applicants for a grant of "parole in place." The formal announcement is expected in late August of 2024. The preliminary announcement listed these criteria:
- The applicant will have continuously resided in the United States since June 17, 2014;
- Was physically present in the United States on June 17, 2024;
- Has been legally married to a U.S. citizen as of June 17, 2024 (or is the stepchild);
- Entered the United States without admission or parole and does not currently hold any lawful immigrant or nonimmigrant status;
- Has not been convicted of any disqualifying criminal offense;
- Does not pose a threat to national security or public safety; and
- Merit a favorable exercise of discretion

See https://www.uscis.gov/keepingfamiliestogether. This is the USCIS page where the information will be updated.

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 Chapter 5.

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People who qualify for these provisional waivers may prefer to use Parole in Place discussed above in the update. This is a 2024 new program for spouses and stepchildren of U.S. citizens and full regulations are expected by late August of 2024.

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.

The USCIS is providing some data about the grants of humanitarian and other forms of parole in its monthly statistics. Not every category of parole is listed. See https://www.dhs.gov/sites/default/files/2024-07/2024_0403_dmo_plcy_parole_requests_q4.pdf. Reports on the grant of Parole are mandated as part of DHS Appropriations.

Below is a table adapted from the DHS April 2024 Parole report on Fiscal Year 2023 data:

Table 2.

Parole Grants by OFO: FY 2023

Parole Rationale	**Q1**	**Q2**	**Q3**	**Q4**	**Total**
Cuban Family Reunification (CFR)	141	348	1,044	882	**2,415**
Advance Humanitarian (CH)	1,350	1,212	1,073	1,233	**4,868**

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Process for Cubans (CHP)	NA	14,829	21,142	14,265	**50,236**
Significant Public Benefit (CP)	1,086	1,071	985	1,029	**4,171**
Advance Parole (DA)	34,028	41,108	36,335	46,966	**158,437**
Parole at a POE (DT)	15,858	18,489	12,655	17,435	**64,437**
Noncitizen issued a Form					
I-94 + NTA/released	67,026	67,543	92,441	135,245	**362,255**
Process for Haitians (HHP)	NA	18,450	32,924	33,971	**85,345**
Process for Nicaraguans (NHP)	NA	7,517	15,565	15,031	**38,113**
Parole for Individuals Abroad (PAR)	140	204	248	417	**1,009**
Family Reunify Task Force(PFR)	449	380	384	213	**1,426**
Uniting for Ukraine (UHP)	38,708	21,694	17,249	18,609	**96,260**
Process for Venezuelans (VHP)	11,449	21,392	17,558	16,588	**66,987**
All Other Categories [Note 1]	1,157	1,010	1,074	1,148	**4,389**
Total	**171,392**	**215,247**	**250,677**	**303,032**	**940,348**

NA here means parole category was not in place during this quarter.

Note 1: Includes parole categories with fewer than 100 grants each quarter and law enforcement sensitive categories.

Notes: Data cover 10/1/2022-9/30/2023. "Noncitizen issued a Form I-94 + NTA and released" data as of 10/18/23;all other data as of 12/12/2023. Paroles include noncitizens issued NTAs by OFO and released with an I-94, as wellas paroles granted by OFO based on authorization from ICE, USCIS, or OFO. Parole events counted include thosewith a Unified Secondary (USEC) sigma event with parole in title, admissibility inspections completed but notresulting in a USEC event being created despite the person having a parole disposition, and primary events not referred but having parole in the person's admissions class. Data are current as of report date; future reporting may include updates to previous reports' data.

Source: Office of Homeland Security Statistics analysis of OFO data.

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.*

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Mayorkas, 593 U.S. 409 (2021). 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.

End Chapter 4

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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.

Dept of State v. Muñoz, __ U.S. __ (2024) 5-1-3 decision denying a U.S. citizen judicial review of a finding that her husband is inadmissible. This is a significant new case that touches on the rights of families and due process.

Revocation of the 2017 Travel Bans by President Biden that were the subject of *Trump v. Hawaii* and a class action settlement allowing some people to reapply.

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.

CBP image, obtaining fingerprints at entry. CBP photo gallery.

Update Begin Next Page

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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 2022 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

FY 2023

	Immigrants	**Non-Immigrants**
Total Grounds of Ineligibility:	263,212	3,125,820
Grounds overcome:	221,198	758,450

The data is available at
FY22:
https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2022AnnualReport/FY22_TableXIX_vF.pdf

FY23:
https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2023AnnualReport/FY2023_AR_TableXIX.pdf

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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 540 (§ 5.03[B] National Security Concerns Expanded before subsection [C] add new cases and notes and questions that follow:

Update the citation for the discussion of *Kerry v. Din* to 576 U.S. 86 (2015).

Dep't of State v. Muñoz

__ U.S. __, 144 S.C.t. 1812, 219 L. Ed. 2d 507 (2024)

JUSTICE BARRETT delivered the opinion of the Court.

I

[Editors' summary: Luis Asencio-Cordero (a citizen of El Salvador) married Sandra Muñoz (a U.S. citizen) in 2010. Muñoz and Asencio-Cordero had filed their immediate relative petition with USCIS, which was accepted. However, because Asencio-Cordero had initially entered the United States unlawfully, he could not adjust from within the United States. Instead, he needed to return to El Salvador and if approved for his immigrant visa, be formally admitted as an immediate relative spouse. After several interviews in 2015, the consular officer eventually denied Asencio-Cordero's visa application on national security grounds. The officer cited INA §212(a)(3)(A)(ii); 8 U.S.C. §1182(a)(3)(A)(ii), which permits denial for "Any alien who a consular officer … knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in any other unlawful activity."

INA §212(b)(3); 8 U.S.C. §1182(b)(3), does not make disclosing the basis for denial of an applicant classified under INA §212(a)(3)(A)(ii), and the officer did not provide any further details. Eventually, after many queries, the couple learned that the officer believed Asencio-Cordero had belonged to a criminal gang MS-13 due a tattoo revealed in his medical exam. Muñoz challenged the officer's decision and argued that the Fifth Amendment includes a right to

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live with her husband and the officer violated this right to due process when the basis for denial was withheld.]

Muñoz's argument fails at the threshold. Her argument is built on the premise that the right to bring her noncitizen spouse to the United States is an unenumerated constitutional right. To establish this premise, she must show that the asserted right is "'deeply rooted in this Nation's history and tradition.'" She cannot make that showing. In fact, Congress's longstanding regulation of spousal immigration—including through bars on admissibility—cuts the other way.

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Asencio-Cordero guessed (as it turns out, accurately) that he was denied a visa based on a finding that he was a member of MS-13, a transnational criminal gang. He also guessed (again, accurately) that this finding was based at least in part on the conclusion that his tattoos signified gang membership. Asencio-Cordero and Muñoz denied that Asencio-Cordero was affiliated with MS-13 or any other gang, and they pressed the consulate to reconsider the officer's finding. When the consulate held firm, they appealed to the Department of State, submitting evidence that the tattoos were innocent. A Department official informed Asencio-Cordero and Muñoz that the Department agreed with the consulate's determination. The next day, the consul in San Salvador notified them that Asencio-Cordero's application had gone through multiple rounds of review—including by the consular officer, consular supervisors, the consul himself, the Bureau of Consular Affairs, and the State Department's Immigration Visa Unit—and none of these reviews had "'revealed any grounds to change the finding of inadmissibilty.'"

Asencio-Cordero and Muñoz sued the Department of State, the Secretary of State, and the United States consul in San Salvador. (For simplicity's sake, we will refer to the defendants collectively as the State Department.) They alleged, among other things, that the State Department had abridged Muñoz's constitutional liberty interest in her husband's visa application by failing to give a sufficient reason why Asencio-Cordero is inadmissible under the "unlawful activity" bar.

The District Court agreed and ordered discovery. In a sworn declaration, an attorney adviser from the State Department explained that Asencio-Cordero was deemed inadmissible because he belonged to MS-13. The finding was "based on the in-person interview, a criminal review of . . . Asencio[-]Cordero, and a review of [his] tattoos." In addition to the affidavit, the State Department provided the District Court with confidential law enforcement information, which it reviewed *in camera*, identifying Ascencio-Cordero as a member of MS-13. Satisfied, the District Court granted summary judgment to the State Department.

The Ninth Circuit vacated the judgment and remanded the case. Consistent with circuit precedent, it held that Muñoz, as a citizen, had a constitutionally protected liberty interest in her husband's visa application. Because of that interest, the Ninth Circuit said, the Due Process Clause required the State Department to give Muñoz a "'facially legitimate and bona fide reason'" for denying her husband's visa. The [Ninth Circuit also held that the] initial statutory citation did not qualify and the later affidavit was untimely. Delay carried a serious consequence for the State Department. Visa denials are insulated from judicial review by the doctrine of

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consular nonreviewability. But the Ninth Circuit held that by declining to give Muñoz more information earlier in the process, the State Department had forfeited its entitlement "to shield its visa decision from judicial review." The panel remanded for the District Court to consider the merits of Muñoz's suit, which include a request for a declaration invalidating the finding that Asencio-Cordero is inadmissible and an order demanding that the State Department readjudicate Asencio-Cordero's application.[2]

The Ninth Circuit denied *en banc* review over the dissent of 10 judges, and we granted the State Department's petition for certiorari.[3]

II

"For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Trump v. Hawaii*, 585 U.S. 667, 702 (2018). Congress may delegate to executive officials the discretionary authority to admit noncitizens "immune from judicial inquiry or interference." When it does so, the action of an executive officer "to admit or to exclude an alien" "is final and conclusive." The Judicial Branch has no role to play "unless expressly authorized by law." The [INA] does not authorize judicial review of a consular officer's denial of a visa; thus, as a rule, the federal courts cannot review those decisions. This principle is known as the doctrine of consular nonreviewability.

We have assumed that a narrow exception to this bar exists "when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen." In that event, the Court has considered whether the Executive gave a "'facially legitimate and bona fide reason'" for denying the visa. If so, the inquiry is at an end—the Court has disclaimed the authority to "'look behind the exercise of that discretion,'" much less to balance the reason given against the asserted constitutional right.

Asencio-Cordero cannot invoke the exception himself, because he has no "constitutional right of entry to this country as a nonimmigrant or otherwise." Thus, so far as Asencio-Cordero is

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[2] At oral argument in this Court, Muñoz suggested that she is asserting a constitutional entitlement only to information—a "facially legitimate and bona fide reason" why the consular officer deemed her husband inadmissible under the "unlawful activity" bar. Tr. of Oral Arg. 59-64. Elsewhere, though, she suggests that the Due Process Clause entitles her to both the information and "a meaningful opportunity to respond." Brief for Respondents 11. If appeal is no longer available under State Department regulations (and the Ninth Circuit said it was not), Muñoz presumably seeks what she sought below: judicial review of the inadmissibility finding and a court order requiring the State Department to reconsider Asencio-Cordero's visa application. 50 F.4th, at 912, n. 14. This level of judicial involvement in the visa process would be a significant extension of our precedent. The dissent, however, would remand to the Ninth Circuit for consideration of this relief. *Post*, at 10, n. 2 (opinion of SOTOMAYOR, J.).

[3] Inexplicably, the dissent claims that the Court is reaching out improperly to settle this issue. *Post*, at 2. We granted certiorari on this very question to resolve a longstanding circuit split. 601 U. S. ___, 144 S. Ct. 679, 217 L. Ed. 2d 342 (2024). And we did so at the request of the Solicitor General, who emphasized both the Government's need for uniformity in the administration of immigration law and the importance of this issue to national security. Pet. for Cert. 27-28, 31-33.

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concerned, the doctrine of consular nonreviewability applies. Muñoz, however, is an American citizen, and she asserts that the denial of her husband's visa violated *her* constitutional rights, thereby enabling judicial review. Specifically, she argues that the State Department abridged her fundamental right to live with her spouse in her country of citizenship—and that it did so without affording her the fair procedure guaranteed by the Fifth Amendment.

The Ninth Circuit is the only Court of Appeals to have embraced this asserted right—every other Circuit to consider the issue has rejected it. *** A plurality in *Kerry v. Din*, 576 U.S. 86, 96 (2015), concluded that a citizen does not have a fundamental right to bring her noncitizen spouse to the United States. Two Justices chose not to reach the issue, explaining that even if the right existed, the statutory citation provided by the Executive qualified as a facially legitimate and bona fide reason. Since *Din*, the existence of the right has continued to divide the Circuits.

Today, we resolve the open question. Like the *Din* plurality, we hold that a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country.

III

The Due Process Clause of the Fifth Amendment requires the Government to provide due process of law before it deprives someone of "life, liberty, or property." Under our precedent, the Clause promises more than fair process: It also "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). When a fundamental right is at stake, the Government can act only by narrowly tailored means that serve a compelling state interest. Identifying unenumerated rights carries a serious risk of judicial overreach, so this Court "exercise[s] the utmost care whenever we are asked to break new ground in this field." To that end, *Glucksberg*'s two-step inquiry disciplines the substantive due process analysis. First, it insists on a "careful description of the asserted fundamental liberty interest." Second, it stresses that "the Due Process Clause specially protects" only "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."

We start with a "careful description of the asserted fundamental liberty interest." Muñoz invokes the "fundamental right of marriage," but the State Department does not deny that Muñoz (who is already married) has a fundamental right to marriage. Muñoz claims something distinct: the right to *reside with her noncitizen spouse in the United States*. That involves more than marriage and more than spousal cohabitation—it includes the right to have her noncitizen husband enter (and remain in) the United States.

It is difficult to pin down the nature of the right Muñoz claims. The logic of her position suggests an entitlement to bring Asencio-Cordero to the United States—how else could Muñoz enjoy the asserted right to live with her noncitizen husband in her country of citizenship? Yet Muñoz disclaims that characterization, insisting that "[she] does not advance a substantive right to immigrate one's spouse." This concession is wise, because such a claim would ordinarily trigger

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strict scrutiny—and it would be remarkable to put the Government to the most demanding test in constitutional law in the field of immigration, an area unsuited to rigorous judicial oversight.

Though understandable, Muñoz's concession makes characterizing the asserted right a conceptually harder task. Here is her formulation: a "marital right . . . sufficiently important that it cannot be unduly burdened without procedural due process as to an inadmissibility finding that would block her from residing with her spouse in her country of citizenship." So described, the asserted right is neither fish nor fowl. It is fundamental enough to be implicit in "liberty;" but, unlike other implied fundamental rights, its deprivation does not trigger strict scrutiny. This right would be in a category of one: a substantive due process right that gets only procedural due process protection.

We need not decide whether such a category exists, because Muñoz cannot clear the second step of *Glucksberg*'s test: demonstrating that the right to bring a noncitizen spouse to the United States is "'deeply rooted in this Nation's history and tradition.'" On the contrary, the through line of history is recognition of the Government's sovereign authority to set the terms governing the admission and exclusion of noncitizens. And Muñoz points to no subsidiary tradition that curbs this authority in the case of noncitizen spouses.

From the beginning, the admission of noncitizens into the country was characterized as "of favor [and] *not of right*." Consistent with this view, the 1798 Act Concerning Aliens gave the President complete discretion to remove "all such aliens as he shall judge dangerous to the peace and safety of the United States." The Act made no exception for spouses—or, for that matter, other family members.

The United States had relatively open borders until the late 19th century. But once Congress began to restrict immigration, "it enacted a complicated web of regulations that erected serious impediments to a person's ability to bring a spouse into the United States." One of the first federal immigration statutes, the Immigration Act of 1882, required executive officials to "examine" noncitizens and deny "permi[ssion] to land" to "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." The Act provided no exception for citizens' spouses. And when Congress drafted a successor statute that expanded the grounds of inadmissibility, it again gave no special treatment to the marital relationship.

There are other examples. The Page Act of 1875, which functioned as a restriction on Chinese female immigration, contained no exception for wives. Or consider the Emergency Quota Act of 1921, which capped the number of immigrants permitted to enter the country each year. Although the Act gave preferential treatment to citizens' wives, "once all the quota spots were filled for the year, the spouse was barred without exception."[6] In 1924, Congress, showing favor

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[6] Given the then-existing law of coverture, the Act was only relevant to noncitizen wives—a citizen wife with a noncitizen husband was forced to assume her husband's nationality. K. Abrams, What Makes the Family Special? 80 U. CHI. L. REV. 7, 11 (2013) (Abrams). ("Giving wives the opportunity to sponsor their husbands would have been nonsensical; under the Expatriation Act of 1907, a wife automatically *lost* her US citizenship upon marrying a

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to men rather than marriage, lifted the quotas for male citizens with noncitizen wives, but did not similarly clear the way for female citizens with noncitizen husbands. This gender disparity did not change until 1952.

That is not to say that Congress has not extended special treatment to marriage—it has. For instance, the War Brides Act of 1945 provided that the noncitizen spouses of World War II veterans would be exempt from certain admissibility bars and documentary requirements. Closer to home, Asencio-Cordero's visa application rested on his marriage to Muñoz, which made him eligible for immigrant status. But while Congress has made it easier for spouses to immigrate, it has never made spousal immigration a matter of right. On the contrary, qualifications and restrictions have long been the norm.

Of particular relevance to Muñoz, Congress has not exempted spouses from inadmissibility restrictions like the INA's unlawful-activity bar. Precursors to that bar have existed since the early 20th century. For example, the Immigration Act of 1917 provided for the exclusion of "persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude." Consular officers applied this bar to spouses, and courts refused to review those visa denials, citing the doctrine of consular nonreviewability.

United States ex rel. Knauff v. Shaughnessy, 338 U. S. 537 (1950), is a striking example from this Court. In *Knauff*, a United States citizen (and World War II veteran) found himself similarly situated to Muñoz: His noncitizen wife was denied admission for security reasons, based on "information of a confidential nature, the disclosure of which would be prejudicial to the public interest." We held that the War Brides Act did not supersede the statute on which the Attorney General had relied. So, "[a]s all other aliens, petitioner had to stand the test of security." Nor was she entitled to a hearing, because "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." The Attorney General's decision was "final and conclusive," and he did not have to divulge the reason for it.

Knauff thus reaffirmed the longstanding principle "that the United States can, as a matter of public policy . . . forbid aliens or classes of aliens from coming within their borders," and "[n]o limits can be put by the courts upon" that power. Congress's authority to "formulat[e] . . . policies" concerning the entry of noncitizens "has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government," representing "not merely 'a page of history,' but a whole volume." "[T]he Court's general reaffirmations of this principle have been legion." While "families of putative immigrants certainly have an interest in their admission," it is a "fallacy" to leap from that premise to the conclusion that United States citizens have a "'fundamental right'" that can limit how Congress exercises "the Nation's sovereign power to admit or exclude foreigners."

To be sure, Congress can use its authority over immigration to prioritize the unity of the immigrant family. See, *e.g.*, §1151(b)(2)(A)(i) (exempting "immediate relatives" from certain

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foreigner, so there could be no such thing as a US citizen wife with an immigrant husband" (footnotes omitted)). This changed in 1922, when the Cable Act "largely undid derivative citizenship for married women." *Ibid.*

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numerical quotas). It has frequently done just that. But the Constitution does not *require* this result; moreover, Congress's generosity with respect to spousal immigration has always been subject to restrictions, including bars on admissibility. This is an area in which more than family unity is at play: Other issues, including national security and foreign policy, matter too. Thus, while Congress may show special solicitude to noncitizen spouses, such solicitude is "a matter of legislative grace rather than fundamental right." Muñoz has pointed to no evidence suggesting otherwise.

IV

As the State Department observes, Muñoz's claim to a procedural due process right in *someone else's* legal proceeding would have unsettling collateral consequences. Consider where her logic leads: Could a wife challenge her husband's "assignment to a remote prison or to an overseas military deployment, even though prisoners and service members themselves cannot bring such challenges"? Could a citizen assert procedural rights in the removal proceeding of her spouse? Muñoz's position would usher in a new strain of constitutional law, for the Constitution does not ordinarily prevent the government from taking actions that "indirectly or incidentally" burden a citizen's legal rights. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 788 (1980).

*** Muñoz has suffered harm from the denial of Asencio-Cordero's visa application, but that harm does not give her a constitutional right to participate in his consular process.

Lest there be any doubt, *Kleindienst v. Mandel*, 408 U.S. 753, 766-770 (1972), does *not* hold that citizens have procedural due process rights in the visa proceedings of others. The Ninth Circuit seems to have read *Mandel* that way, but that is a misreading.

In *Mandel*, the Attorney General refused to waive inadmissibility and grant Ernest Mandel, a self-described "'revolutionary Marxist,'" a temporary visa to attend academic conferences in the United States. A group of professors sued on the ground that the Executive's discretion to grant a waiver was limited by their First Amendment right to hear Mandel speak; they insisted that "the First Amendment claim should prevail, at least where no justification is advanced for denial of a waiver." In response, the Attorney General asserted that "Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any reason or no reason may be given."

But because "the Attorney General *did* inform Mandel's counsel of the reason for refusing him a waiver," the Court chose not to resolve this statutory argument. Instead, it said that so long as the Executive gives a "facially legitimate and bona fide reason" for denying a waiver under §212(a)(28) of the INA—the statutory provision at issue—"the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." The Court expressly declined to address whether a constitutional challenge would "be available for attacking [an] exercise of discretion for which no justification whatsoever is advanced."

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Thus, the "facially legitimate and bona fide reason" in *Mandel* was the justification for avoiding a difficult question of statutory interpretation; it had nothing to do with procedural due process. Indeed, a procedural due process claim was not even before the Court. The professors argued that the denial of Mandel's visa directly deprived them of their First Amendment rights, *not* that their First Amendment rights entitled them to procedural protections in Mandel's visa application process. To make an argument logically analogous to that of the professors, Muñoz would have to claim that the denial of Asencio-Cordero's visa violated her substantive due process right to bring her noncitizen spouse to the United States—thereby triggering the State Department's obligation to demonstrate why denying him the visa is the least restrictive means of serving the Government's interest in national security. But, as we have explained, Muñoz has disavowed that argument, which cannot succeed in any event because the asserted right is not a longstanding and "'deeply rooted'" tradition in this country.

The bottom line is that procedural due process is an odd vehicle for Muñoz's argument, and *Mandel* does not support it. Whatever else it may stand for, *Mandel* does not hold that a citizen's independent constitutional right (say, a free speech claim) gives that citizen a procedural due process right to a "facially legitimate and bona fide reason" for why someone else's visa was denied. And Muñoz is not constitutionally entitled to one here.

The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH, concurring in the judgment.

[Justice Gorsuch concurred on the grounds that the litigation of this case had rendered the original issue – a lack of explanation from the government for the denial of the visa – moot because the government had explained the basis for its decision. Justice Gorsuch also pointed out that Muñoz may now also use that information to apply again.]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting.

"The right to marry is fundamental as a matter of history and tradition." *Obergefell* v. *Hodges*, 576 U. S. 644, 671 (2015). After U.S. citizen Sandra Muñoz and her Salvadoran husband spent five years of married life in the United States, the Government told her that he could no longer reenter the country. If she wanted to live together with him and their child again, she would have to move to El Salvador. The reason? A consular officer's bare assertion that her husband, who has no criminal record in the United States or El Salvador, planned to engage in "unlawful activity." [INA §212(a)(3)(A)(ii);] 8 U.S.C. §1182(a)(3)(A)(ii). Muñoz argues that the Government, having burdened her fundamental right to marriage, owes her one thing: the factual basis for excluding her husband.

The majority could have resolved this case on narrow grounds under longstanding precedent. [In *Mandel*, this] Court has already recognized that excluding a noncitizen from the country can

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burden the constitutional rights of citizens who seek his presence. Acknowledging the Government's power over admission and exclusion, the *Mandel* Court held that "a facially legitimate and bona fide reason" for the exclusion sufficed to justify that burden. In this case, after protracted litigation, the Government finally explained that it denied Muñoz's husband a visa because of its belief that he had connections to the gang MS-13. Regardless of the validity of that belief, it is a "facially legitimate and bona fide reason." Under this Court's precedent, that is enough.

Instead, the majority today chooses a broad holding on marriage over a narrow one on procedure. It holds that Muñoz's right to marry, live with, and raise children alongside her husband entitles her to nothing when the Government excludes him from the country. Despite the majority's assurance two Terms ago that its eradication of the right to abortion "does not undermine . . . in any way" other entrenched substantive due process rights such as "the right to marry," "the right to reside with relatives," and "the right to make decisions about the education of one's children," the Court fails at the first pass. *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. 215, 256-257 (2022). Because, to me, there is no question that excluding a citizen's spouse burdens her right to marriage, and that burden requires the Government to provide at least a factual basis for its decision, I respectfully dissent.

I

A

Marriage is not an automatic ticket to a green card. A married citizen-noncitizen couple must jump through a series of administrative hoops to apply for the lawful permanent residency that marriage can confer. Noncitizen spouses coming from abroad must apply for a visa to enter the United States. In certain cases, however, the law requires even couples who meet and marry in the United States to send the noncitizen spouse back to his country of origin to do the same thing. In doing so, the couple must take an enormous risk to pursue the stability of lawful immigration status: the risk that when the noncitizen spouse tries to reenter the United States, he will face unexpected exile.

In technical immigration terms, a noncitizen spouse applying for a green card seeks to "[a]djus[t]" his immigration "status" from "nonimmigrant to that of [a] person admitted for permanent residence." 8 U.S.C. §1255[; INA §245]. To do so, the citizen spouse must petition the Government on the noncitizen's behalf. The citizen spouse first sends [USCIS] a petition to classify the noncitizen spouse as an "immediate relative." §§1151(b)(2)(A)(i), 1154(a)(1)(A)[; INA §§201(b)(2)(A)(i), 204(a)(1)(A)]. Once USCIS approves the petition, a noncitizen spouse who is already in the United States can then apply to adjust his status to lawful permanent resident without leaving the country. *See* §1255(a)[; INA §245(a)]. For a noncitizen spouse living outside of the United States, however, USCIS first approves the immediate-relative petition, but then sends it to the consulate of the country where the noncitizen spouse lives for processing. *See* §1154(b)[; INA §204(b]; 22 CFR §§42.42, 42.61 (2023). A consular officer

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interviews the noncitizen spouse and makes the final admission decision. *See* 8 U.S.C. §§1201, 1202(f)[; INA §§221, 222(f)].

Because of idiosyncrasies in our immigration system, not all noncitizen spouses living in the United States can adjust their status with USCIS. Even when a couple meets, marries, and lives in the United States, the noncitizen spouse may instead have to travel back to his country of origin for consular processing if he was never formally "inspected and admitted or paroled" at the Border. §1255(a)[; INA §245(a)]. A noncitizen who entered without "inspect[ion]" in this way typically cannot adjust his status from within the United States based on an immediate-relative petition. Once the citizen spouse submits the petition to USCIS, the noncitizen spouse must return to his country of origin and meet with a consular officer, who will then adjudicate his application.

Living in the United States after initially having entered without inspection is not unusual. In fact, the Government endorses the presence of many of these members of our national community. Recipients under the Deferred Action for Childhood Arrivals (DACA) program, for instance, may have been brought across the border by their parents without inspection. Even though DACA status entitles them to work and live in the country without the immediate threat of removal, see 8 CFR §236.21(c), it does not change their initial entry designation. As of the end of 2023, there were roughly 530,000 active DACA recipients in the United States.The same is true of the approximately 680,000 holders of Temporary Protected Status (TPS), who have been designated temporarily unable to return to their home countries because of war, natural disasters, or other extraordinary circumstances. Even when married to a U.S. citizen, DACA recipients and TPS holders are barred from adjusting status within the United States if they entered without inspection. See 8 U.S.C. §1255(a)[; INA §245(a)].

Ironically, the longer the noncitizen spouse has lived in the United States, the more difficult and uncertain the process to adjust to lawful status can become. A noncitizen who initially entered without inspection will accrue "unlawful presence," which can bar him from reentering the country if he leaves. §1182(a)(9)(B)[; INA §212(a)(9)(B)]. If a noncitizen who has lived in the United States between six months and one year leaves and tries to reenter, he will be subject to a 3-year reentry bar. §1182(a)(9)(B)(i)(I)[; INA §212(a)(9)(B)(i)(I)]. If he has lived in the United States for more than a year and tries to reenter, he faces a 10-year ban. §1182(a)(9)(B)(i)(II)[; INA §212(a)(9)(B)(i)(II)].

This scheme places couples who meet and marry in the United States in a difficult position if the noncitizen spouse entered without inspection. The couple can continue to live with one spouse in a precarious immigration status; or, they can seek the stability of permanent residency for the noncitizen spouse but face a potential multiyear exile when he leaves and applies for reentry.

Recognizing this difficult choice, USCIS allows a noncitizen spouse to apply for a waiver of inadmissibility for any accrued unlawful presence before departing the United States for his consular interview. To obtain such a waiver, the noncitizen spouse must show that the citizen spouse will suffer "extreme hardship" if her noncitizen spouse is not admitted. Then, once the

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noncitizen spouse returns to his country of origin, if a consular officer approves his visa application, he can reenter free from the inadmissibility bar.

Consular officers fall under the State Department, not DHS, which oversees USCIS. Even though DHS officers and consular officers make admission determinations under the same substantive laws, in reality, a noncitizen seeking admission via consular processing faces a far higher risk of arbitrary denial with far less opportunity for review than a noncitizen seeking admission from DHS.

DHS officers are constrained by a framework of required process that does not apply to consular processing. A noncitizen denied adjustment of status in the United States must receive notice and the reasons for a denial. He can renew his application in removal proceedings before an immigration court, where DHS must present any evidence against him in adversarial proceedings. From those removal proceedings, a noncitizen can petition for review to the Board of Immigration Appeals (BIA), and, ultimately, a federal court of appeals.

In contrast, a noncitizen denied admission via consular processing is entitled to nothing more than a cite to the statute under which the consular officer decided to exclude him. He has no opportunity for administrative or judicial review, and can only submit more evidence and request reconsideration. Former consular officers tell this Court that this lack of accountability, coupled with deficient information and inconsistent training, means decisions often "rely on stereotypes or tropes," even "bias or bad faith." Brief for Former Consular Officers as *Amici Curiae* 8. Visa applicants may "experience disparate outcomes based on nothing more than the luck or misfortune of which diplomatic post and consular officer . . . they happen to be assigned." The State Department's Office of the Inspector General has documented numerous deficiencies in consular processing across several continents. Supervisors are required by the State Department to review a certain percentage of visa denials but often fail to do so.

When the Government requires one spouse to leave the country to apply for immigration status based on his marriage, it therefore asks him to give up the process he would receive in the United States and subject himself to the black box of consular processing.

B

Muñoz, a celebrated workers' rights lawyer from Los Angeles, California, met Luis Asencio-Cordero in 2008, three years after he had arrived in the United States. They have been married since 2010 and have a child together. In 2013, Muñoz filed an immediate-relative petition for her husband, which USCIS approved. Because Asencio-Cordero had originally entered the United States without inspection, the Government required him to return to El Salvador, his country of origin, for consular processing to obtain his immigrant visa. Yet he also faced a bar to reentry if he left the country. DHS granted him a waiver of this bar upon his anticipated return to the United States because of the "extreme hardship" Muñoz would suffer if he were excluded. In April 2015, Asencio-Cordero traveled from California to El Salvador. That was the last time he stood on American soil.

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Asencio-Cordero attended the initial consular interview in San Salvador on May 28, 2015. In December 2015, a consular officer denied his visa application. As justification, the denial cited only to [INA §212(a)(3)(A)(ii);] §1182(a)(3)(A)(ii). That statute provides that any noncitizen "who a consular officer . . . knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in . . . any other unlawful activity . . . is inadmissible." In other words, the consular officer excluded Asencio-Cordero based on a belief that he planned to engage in some unspecified unlawful conduct upon return to the United States. "[U]nlawful activity" could mean anything from jaywalking to murder.

Asencio-Cordero has no criminal history in the United States or El Salvador. With no obvious justification for the consular officer's belief, Muñoz and Asencio-Cordero asked for reconsideration. Muñoz sought the help of Congresswoman Judy Chu, who sent a letter to the State Department on Muñoz's behalf. The following day, the consulate responded to the letter again with only a citation to [INA § 212(a)(3)(A)(ii);]§1182(a)(3)(A)(ii). In January and April 2016, Muñoz asked the State Department for the factual basis for her husband's inadmissibility. She and her husband provided evidence of her accolades at work and attestations of Asencio-Cordero's good moral character. A few days later, the consulate notified Muñoz that the State Department had reviewed the denial and concurred with the consular officer's decision. It denied reconsideration.

After the consulate denied reconsideration, Muñoz and her husband wrote to the State Department again requesting a factual basis for the inadmissibility decision. Asencio-Cordero has no criminal record, but he does have several tattoos from his teenage years. They depict a range of subjects, including "Our Lady of Guadalupe, Sigmund Freud, a 'tribal' pattern with a paw print, and theatrical masks with dice and cards." Some of these images have deep significance in Latin American culture. Some also happen to appear on gang members. Speculating about potential bases for a visa denial, Muñoz and her husband included additional evidence from a court-approved gang expert in their letter to the State Department. The expert reviewed Asencio-Cordero's tattoos and concluded that none were "'related to any gang or criminal organization in the United States or elsewhere.'" The State Department responded that it lacked authority to overturn consular decisions and "'concurred in the finding of ineligibility.'" The consulate followed up in May 2016, a year after Asencio-Cordero's initial interview, by listing all the entities that had reviewed the visa application and noting that "'there is no appeal.'"

It was only after Muñoz and her husband sued the Government in Federal District Court that they finally received the factual basis for the denial. After almost two years of litigation, the Government submitted a declaration from a State Department attorney-adviser. *Id.*, at 912. That declaration stated that the consular officer denied Asencio-Cordero's visa application under §1182(a)(3)(A)(ii)[; INA §212(a)(3)(A)(ii)] because "'based on the in-person interview, a criminal review of Mr. Asencio Cordero and a review of . . . Mr. Asencio Cordero's tattoos, the consular officer determined that Mr. Asencio Cordero was a member of a known criminal organization . . . specifically MS-13.'"

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The Court of Appeals ruled in Muñoz's favor. It held that the Government's reason was too little, too late. The denial of her husband's visa burdened Muñoz's right to marriage, and the Government had provided inadequate process. Even though the Government provided a "facially legitimate and bona fide" reason, that reason was not "timely" enough to satisfy constitutional due process requirements. This Court granted the Government's petition for a writ of certiorari.

II

There was a simple way to resolve this case. I agree with JUSTICE GORSUCH that "the United States has now revealed the factual basis for its decision to deny [Muñoz's] husband a visa," and she has thus received whatever process she was due. That could and should have been the end of it. Instead, the majority swings for the fences. It seizes on the Government's invitation to abrogate the right to marriage in the immigration context and sharply limit this Court's longstanding precedent.

Muñoz has a constitutionally protected interest in her husband's visa application because its denial burdened her right to marriage. She petitioned USCIS to recognize their marriage so that her husband could remain lawfully beside her and their child in the United States. It was the extreme hardship Muñoz faced from her husband's exclusion that formed the basis for USCIS's waiver of his inadmissibility. For the majority, however, once Muñoz's husband left the country in reliance on those approvals, their marriage ceased to matter. Suddenly, the Government owed her no explanation at all.

The constitutional right to marriage is not so flimsy. The Government cannot banish a U. S. citizen's spouse and give only a bare statutory citation as an excuse. By denying Muñoz the right to a factual basis for her husband's exclusion, the majority departs from longstanding precedent and gravely undervalues the right to marriage in the immigration context.

A

The constitutional right to marriage has deep roots. "[M]arriage," this Court said over a century ago, "is something more than a mere contract." It is "the most important relation in life," and "the foundation of the family." This Court has described it in one breath as the right "to marry, establish a home and bring up children," a right "long recognized at common law as essential to the orderly pursuit of happiness by free men." In upholding the right of Mildred and Richard Loving to have their marriage license from the District of Columbia recognized by Virginia, this Court emphasized that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." Indeed, the right to marriage was one of the first building blocks of substantive due process. The right was so "'fundamental'" and "'implicit in the concept of ordered liberty'" that the *Roe* Court invoked it as part of the foundation underlying the right to abortion.

Almost 10 years ago, this Court vindicated the expansiveness of the right to marriage. It upheld the right of James Obergefell and his terminally ill husband, John Arthur, to have their marriage from Maryland recognized in Ohio. Rejecting the idea that "Ohio can erase [Obergefell's] marriage to John Arthur for all time" by declining to place Obergefell as the surviving spouse on

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Arthur's death certificate, this Court reasoned that "marriage is a right 'older than the Bill of Rights.'" Marriage "'fulfils yearnings for security, safe haven, and connection that express our common humanity.'" "Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."

The majority, ignoring these precedents, makes the same fatal error it made in *Dobbs*: requiring too "'careful [a] description of the asserted fundamental liberty interest.'" The majority faults Muñoz's invocation of the "'fundamental right to marriage'" as "difficult to pin down." Instead, it tries to characterize her asserted right as "an entitlement to bring [her husband] to the United States," even though it acknowledges that Muñoz "disclaims that characterization."

Obergefell rejected what the majority does today as "inconsistent with the approach this Court has used in discussing [the] fundamental rights" of "marriage and intimacy." Cataloguing a half century of precedent on the right to marriage, the Court stressed that "*Loving* did not ask about a 'right to interracial marriage'; *Turner* did not ask about a 'right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.'" Instead, "each case inquired about the right to marry in its comprehensive sense" of "marriage and intimacy." Similarly, Muñoz does not argue that her marriage gives her the right to immigrate her husband. She instead advances the reasonable position that blocking her from living with her husband in the United States burdens her right "to marry, establish a home and bring up children" with him.

This Court has never required that plaintiffs be fully prevented from exercising their right to marriage before invoking it. Instead, the question is whether a challenged government action burdens the right. For example, the Court in *Zablocki v. Redhail*, examined the "burde[n]" placed on fathers by a statute that required a hearing to "counsel" them "as to the necessity of fulfilling" any outstanding child support obligations before being granted permission to marry. The Court in *Turner v. Safley*, applied *Zablocki* to incarcerated people to hold that the particular prison marriage restriction at issue "impermissibly burden[ed] the right to marry." There can be no real question that excluding a citizen's spouse from the country "burdens" the citizen's right to marriage as this Court has repeatedly defined it. This Court has never held that a married couple's ability to move their home elsewhere removes the burden on their constitutional rights. It did not tell Richard and Mildred Loving to stay in the District of Columbia or James Obergefell and John Arthur to stay in Maryland. It upheld their ability to exercise their right to marriage wherever they sought to make their home.

Muñoz may be able to live in El Salvador alongside her husband or at least visit him there, but not everyone is so lucky. The majority's holding will also extend to those couples who, like the Lovings and the Obergefells, depend on American law for their marriages' validity. Same-sex couples may be forced to relocate to countries that do not recognize same-sex marriage, or even those that criminalize homosexuality. American husbands may be unable to follow their wives abroad if their wives' countries of origin do not recognize derivative immigration status from women (as was the case in this country for many years). The majority's failure to respect the

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right to marriage in this country consigns U. S. citizens to rely on the fickle grace of other countries' immigration laws to vindicate one of the "'basic civil rights of man'" and live alongside their spouses.

B

Given that the Government has burdened Muñoz's right to marriage by excluding her husband from the country, the question is the remedy for that burden. Muñoz argues that this burden triggers procedural due process protections in her husband's visa denial. Emphasizing that substantive due process rights like the right to marriage usually trigger strict scrutiny, the majority faults Muñoz for creating a right "in a category of one: a substantive due process right that gets only procedural due process protection." Muñoz, however, did not create that category of rights. This Court did. [In *Mandel*, this] Court already set the ground rules for when the Government's exercise of its extensive power over the exclusion of noncitizens burdens a U.S. citizen's constitutional rights. In short, a fundamental right may trigger procedural due process protections over a noncitizen's exclusion, but such protections are limited.

Noncitizens who apply for visas from outside the United States have no constitutional entitlement to enter the country, and therefore typically have no constitutional process protections in the visa application themselves. In contrast, noncitizens who already live in the United States whom the Government seeks to remove have procedural due process protections during that removal. Had the Government sought to remove Muñoz's husband when they were living together in the United States, he would have had his own constitutional protections in those proceedings. Instead, because the Government forced him to leave the country and reenter in order to adjust his immigration status, he lost them.

Not only do noncitizens seeking to enter the United States lack constitutional process rights in their visa applications. This Court has further insulated the Government's visa determinations from review by declining to evaluate them at all. This judge-made "doctrine of consular nonreviewability" reflects the Judicial Branch's recognition that the "'admission and exclusion of foreign nationals'" is an area of unusually heightened congressional and executive power. When the denial of a noncitizen's visa burdens a U.S. citizen's constitutional rights, however, this Court has had to reconcile the importance of those rights with its recognition of Government authority over visa determinations. In *Mandel*, it set the remedy. The *Mandel* Court held that when a visa denial "implicate[s]" a citizen's rights, a court will not look behind a "facially legitimate and bona fide" reason for the denial.

In *Mandel*, a group of U.S. professors sued the Government over the visa denial of Dr. Ernest E. Mandel, a famous Belgian Marxist. The professors argued that excluding Mandel burdened their First Amendment right to hear and meet with him in person. The Court agreed that the professors had a First Amendment "'right to receive information'" from Mandel. It also emphasized, as the majority does today, Congress's power over the admission and exclusion of noncitizens. To avoid the need to balance "the strength of the audience's interest against that of the Government in refusing a waiver to the particular [noncitizen] applicant, according to some as yet undetermined standard," the Court instead noted that "the Attorney General did inform Mandel's

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counsel of the reason for refusing him a waiver. And that reason was *facially legitimate and bona fide*." Therefore, "when the Executive exercises [conditional power to exclude] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." In other words, when a visa denial burdens a noncitizen's constitutional rights, rather than attempt to balance the competing interests under strict scrutiny, a court should accept the Government's "facially legitimate and bona fide reason." That minimal requirement ensures that courts do not unduly intrude on "the Government's sovereign authority to set the terms governing the admission and exclusion of noncitizens," while also ensuring that the Government does not arbitrarily burden citizens' constitutional rights.

This Court has repeatedly relied on *Mandel*'s test in the immigration context. Indeed, less than a decade ago, six Justices ruling on the exact legal question the Court confronts today would have held that *Mandel* controlled or extended its protections even further in the marriage context.

Outside the immigration context, this Court has endorsed similar tests in circumstances where there is a heightened underlying governmental power. For instance, in *Turner*, the Court evaluated the right to marriage in the prison context. Even though an incarcerated person "'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system,'" the Court emphasized that "[t]he right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration." Only because the challenged prison regulation there was not "reasonably related" to the government's articulated penological interests, or "legitimate security and rehabilitation concerns," did this Court hold it unconstitutional.

Just as *Turner* looked at burdens on the right to marriage through the narrow lens of "penological interests" to defer to the government's control over prisons, *Mandel* used a "facially legitimate and bona fide reason" to defer to the Government's power over the exclusion of noncitizens. Neither case erased the constitutional right at issue. The Court simply recognized that the right can be substantially limited in areas where the government exercises unusually heightened control.

Applying *Mandel* and *Turner* here, the remedy is clear. The Government's exclusion of Muñoz's husband entitles her at least to the remedy required in *Mandel*: a "facially legitimate and bona fide reason" for the exclusion.

C

The majority resists this conclusion by worrying about its "unsettling collateral consequences." The majority poses a series of hypotheticals that it fears will result from recognizing the limited right Muñoz proposes. These fears are groundless.

First, the majority's concern that applying *Mandel* to Muñoz's right to marriage in this case will result in a slippery slope of constitutional challenges is unfounded. Muñoz's right triggers

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limited process protections in part because her husband lost his own procedural protections when the Government required him to leave the country. Muñoz's right to marriage raises that floor from zero process to some by requiring the Government to provide a "facially legitimate and bona fide reason" when her husband receives no process. In contrast, a citizen's liberty interest "in the removal proceeding of her spouse" in the United States would presumably be limited by the noncitizen's own due process rights in that same proceeding. Similarly, any challenge from a wife to her husband's "'assignment to a remote prison,'" would presumably be limited by the criminal procedural protections her husband already received.

Second, the majority's reliance on *O'Bannon* is misplaced and highlights the speculative nature of its concerns. *O'Bannon* rejected a freestanding constitutional interest in avoiding "serious trauma." The residents of a government-funded nursing home sought relief from transfer to alternative housing because of the emotional harm they would suffer from the move. Muñoz, however, does not rely on a free-floating emotional harm that separation from her husband will cause. She invokes her fundamental right to marry, live, and raise a family with her husband, the right recognized by this Court for centuries. Denying her husband entry to the country directly burdens that right.

In sum, the majority's concerns are unwarranted. There are few circumstances where the limited relief sought by Muñoz would be available.

III

A "facially legitimate and bona fide" reason may seem like a meager remedy for burdening a fundamental right. Yet even the barest explanation requirement can be powerful. The majority relies heavily on *Knauff*. A closer look at the story of Ellen Knauff, however, illustrates the importance of putting the Government to a minimal evidence requirement when a visa denial burdens a constitutional right.

Knauff's U.S. citizen husband sought to bring her to the United States after they married during his deployment to Germany. After this Court upheld her exclusion on undisclosed national security grounds, there was a public outcry. Both Houses of Congress introduced private bills for her relief and, after the Attorney General rushed to remove Knauff from Ellis Island before Congress could act, Justice Jackson (who had vigorously dissented in the case) issued a stay from this Court. After extensive advocacy, the Attorney General ordered immigration officials to reopen the case. Eventually, Knauff won her case before the BIA when the Government failed to prove up its national security concerns. She was finally admitted as a lawful permanent resident.

The majority relies heavily on "[t]he rule of *Knauff*": that "the Attorney General has the unchallengeable power to exclude" a noncitizen. Yet, "the full story of Ellen Knauff shows a populace and a Congress unwilling to accept the exercise of this sort of raw power." "Once the government was required to justify its exclusion decision with substantial and reliable evidence, in an open proceeding, Knauff gained admission into the United States."

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Knauff brought her own petition to challenge her exclusion. Her husband did not argue that her exclusion burdened his right to marriage. Twenty-two years after *Knauff*, however, when faced with such a challenge, this Court limited the justification that the Government must provide in these circumstances to a "facially legitimate and bona fide reason." The majority, not content to resolve this case on even those narrow grounds, instead relieves the Government of any need to justify itself at all. Knauff 's story illustrates why the right to marriage deserves more. By leaving U. S. citizens without even a factual basis for their spouses' exclusion, the majority paves the way for arbitrary denials of a right this Court has repeatedly held among the most important to our Nation.

***

A traveler to the United States two centuries ago reported that "'[t]here is certainly no country in the world where the tie of marriage is so much respected as in America.'" Today, the majority fails to live up to that centuries-old promise. Muñoz may be able to live with her husband in El Salvador, but it will mean raising her U.S.-citizen child outside the United States. Others will be less fortunate. The burden will fall most heavily on same-sex couples and others who lack the ability, for legal or financial reasons, to make a home in the noncitizen spouse's country of origin. For those couples, this Court's vision of marriage as the "assurance that while both still live there will be someone to care for the other" rings hollow. I respectfully dissent.

Notes and Questions:

1. **The Cruelty of Territorial Boundaries.** If Mr. Asencio-Cordero had been eligible to apply for adjustment of status within the Unite States, he still would have been subjected to a medical examination and if the USCIS adjudicator believed him to be inadmissible as a member of a gang, that officer would have to provide written reasons for the decision. The denial could have been reviewed internally with USCIS and potentially in a federal court. If his case was refused, USCIS would have the option of placing him into removal proceedings and his spouse could renew her application for his adjustment of status before the immigration judge and then had BIA and federal court review. But at least he would have been with his family. Now that you have read this case, would you advise your clients to process for their immigrant visa overseas? Do you see the larger risks the clients are taking?

2. **How to overcome this ground of inadmissibility?** As you may have already guessed, waiving this ground of inadmissibility which is related to national security is very difficult. Could Mr. Ascencio-Cordero return with a temporary visa and waiver under INA § 212(d)(3)? Read the statute carefully. What nonimmigrant visa might fit given his desire to permanently reside with his family in the United States?

3. **Do parents have greater due process rights to sponsor their children?** Some critics are reading this case as an attack on the substantive due process rights cases that establish a basis for same sex marriage. What about the rights of parents and children?

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4. **Should Congress require more?** How might Congress add procedural protection to ensure that this ground of inadmissibility is used with accuracy and factual support?

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.

Moreover, the Biden administration similar relied on this statutory authority to issue more controls on admission at the Southwest border. See chapter 2 discussion of the Circumventing Legal Pathways and other recent regulations.

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.

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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.

Post *Trump v. Hawaii*—Settlement with DHS and State

Several class actions continued to litigate the rights of the people harmed by the travel bans. One of these cases is *Emami v Mayorkas joined with Pars Equality Center v Blinken*, 18-cv-01587JD (N.D. Cal. 2024).

This case concerns the Presidential Proclamation 9645, which suspended entry of nationals from eight countries. The claim is that the Government had an egregious record of poor performance, causing issues and waste of time and resources. There are claims alleging violations of the administrative procedure and that the Waiver program implemented is a "fraud".

The class action litigation resulted in a settlement where individuals denied either a nonimmigrant visa or an immigrant visa interview due to the bar can seek a new interview. Nationals from the following countries are included: Iran, North Korea, Somalia, Syria, Venezuela, or Yemen,
There are time limits and special procedures to file.
https://travel.state.gov/content/travel/en/News/visas-news/emami-litigation-notice-to-class-members.html

This is a remarkable result for many people who were harmed by the Trump Presidential travel bars.

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.

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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.

[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).

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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 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

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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

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[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).

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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 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.

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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.

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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?

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.

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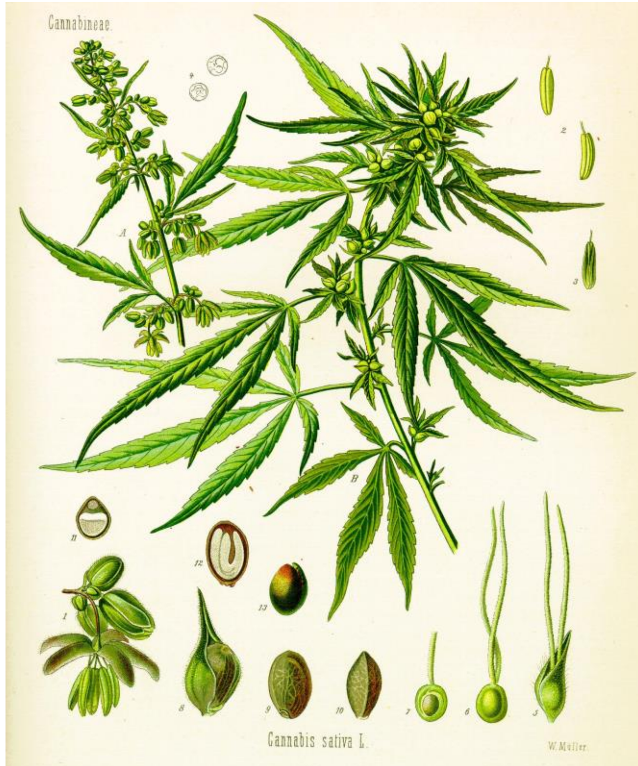

Image from CBP website, Cannabis Sativa.

1. 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]):
New Note:

1. **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?

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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.

2. No More Deference to Agency Statutory Interpretation?

Certainly for cases being litigated due to interpretations of the INA by USCIS at time of adjustment of status and potentially by the immigration courts, the recent Supreme Court reversal of the *Chevron* deference doctrine may lead to more challenges to agency classifications of behavior or convictions creating a ground of inadmissibility. *See Loper Bright Enterprises v. Raimondo* (2024) *(statutory interpretation does not require deference to agency interpretation).*Because judicial review of consular decisions is very difficult, it may be that a disparity grows between the interpretations by the Department of States and those of DHS.

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.

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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 July 2024, the provisional waiver procedures remain the same. The Biden administration is expected to allow some people to avoid departure from the United States and to apply for adjustment of status. This parole in place is especially important as the determinations of eligibility for adjustment of status are made within the United States and the family members are not separated. See Chapter 4 for a discussion of adjustment of status and admission.

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

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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.

Below, San Ysidro inspection station at U.S./Mexico border in Southern California. Image from CBP.gov newsroom pages.

Now that you know more about inadmissibility determinations…the task at the border may seem very daunting.

End Chapter 5

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Chapter 6: Deportability and the Removal Process

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***, 599 U.S. 600 (2023).

Additional notes on BIA cases addressing aggravated felony allegations.

Attorney General Garland 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). And how these holdings were codified in the regulations effective July of 2024.

2024 Supreme Court rulings on the adequacy of a Notice to Appear ***Campos-Chaves v. Garland, Attorney General***, 602 U.S. _, 144 S.Ct. 1637 (2024) (consolidated with *Garland v. Singh*) (rejecting reading requiring a complete Notice to Appear in one document).

2022 Supreme Court cases on bond and detention during removal. *Johnson v. Arteaga-Martinez*, 596 U.S. 573 (2022). Followed by a constitutional ruling that due process requires an individualized determination for pre-removal order detention by the Second Circuit Court of Appeals, ***Black v. Decker**,* 103 F.4th 133 (2d. Cir. 2024)

2022 and 2024 Supreme Court cases discussing access to judicial review under the INA. ***Patel v. Garland***, 596 U.S. 328 (2022) (no judicial review of denied adjustment of status) and ***Wilkinson v. Garland**,* 601 U.S. 209 (2024).

Updates begin next page

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Page 602 (6.01[A]): Update to: "As of April of 2019, there are nearly 900,000 cases pending before the EOIR."

As of July of 2024, TRAC reports that there are **3.7 million** cases pending before the EOIR. Just last year, there were nearly 2 million cases pending before the EOIR. *Immigration Court Backlog Tool*, TRAC Reports updated through 2023, http://trac.syr.edu/phptools/immigration/court_backlog/.

The rate of adding new cases continues to rapidly increase. Despite adding more judges, and 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. 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 glance 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 2023, the average length of time for the entire country was 762 days down from 852 days in the prior fiscal year. Here is a FY 22 chart followed by FY 23 listing the longest wait times. *See TRAC at 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

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Fiscal Year 2023
click on column headings to sort

State	Average Days
Entire US	762
Virginia	1,116
Nebraska	1,012
New Jersey	904
Georgia	871
Maryland	870
California	840
New York	840
Washington	823
Missouri	811
Illinois	801
Massachusetts	796
Texas	794
Oregon	778
Michigan	773

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.

Effective July 29, 2024 are the new final regulations called the Efficient Case and Docket Management in Immigration Proceedings rule. These rules, among other things, codify the power of the IJ to administratively close cases. The rules also clarify grounds for either *mandatory* or *discretionary* termination. *See* 8 CFR § 1003.18; 1003.1(m); and *see also* 8 CFR § 1239.2(b). The rules also impact termination at the BIA.

The National Immigration Project provides a useful practice advisory and history of the rulemaking process. Go to: https://nipnlg.org/sites/default/files/2024-06/2024_NIPNLG-EOIR-rule-alert.pdf.

Text page 602 updates:
Who is a Priority?
While the DHS has publicly stated for many years that the agency's priority is national security and public safety, most 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.]

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Charge on NTA	# FY21	# FY22	# FY23	# FY24
Total	**331,930**	**815,802**	**1,479,691**	**1,576,359**
Entry w/out inspection	232,005	527,907	798,889	969,693
Other	79,256	264,744	384,431	547,834
Criminal	3,108	3,648	3,711	4,108
Agg. Felony	2,792	2,324	2,117	2,085
Nat'l Security	26	28	30	39
Terror	12	9	8	12

Source: TRAC Data tools *supra*. Visited July 25, 2024.
https://trac.syr.edu/phptools/immigration/ntanew/ Table created for this text.

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.pdfInformation found on the ICE website about 2024 arrests by country.
https://www.ice.gov/spotlight/statisticsOther statistics from the FY 2023 include:

In FY 2023, ERO removed 3,406 known or suspected gang members, an increase of 27.7% over FY 2022, and 139 known or suspected terrorists, a 148.2% increase over FY 2022. It also removed

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six human rights violators.

ERO officials made 170,590 administrative arrests, representing a 19.5% increase in overall arrests from FY 2022. Of the total arrests ICE conducted in FY 2023, 43% of those arrested had criminal convictions or pending criminal charges, up from 32.5% in FY 2022. In the group of 73,822 individuals with criminal histories, there were 290,708 charges and convictions for an average of four per individual. These included many serious charges or convictions for offenses such as:

Homicide	(1,713).
Kidnapping	(1,655).
Sexual assault	(4,390).
Assault	(33,209).
Robbery	(3,097).
Burglary	(6,964).
Weapons offenses	(7,520).

https://www.ice.gov/features/2023-year-review

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.

On the Updated map for 2024, the ILRC indicate that there are now 137 total jurisdictions across the country that currently have 287(g) agreements. The map also shows 41 jurisdictions that terminated these programs.

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

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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 631 Fourth Amendment Rights and Warrant Requirements

In a class action civil action brought by an individual and several organizations, the federal district court for the Central District of California ruled that the constitutional rights of noncitizens were violated when ICE enters a home without a warrant. ICE argued that knocking on the door and talking was a permissible exception to the warrant requirement. Plaintiffs argued that ICE violated the constitution by misrepresenting themselves as policy and by entering constitutionally protected private areas without consent or warrant. In May of 2024, the district court granted summary judgment to the plaintiffs. *Kidd v. Mayorkas*, __ F. Supp. 3d __, 2024 WL 2190981 (C.D.Cal. 2024). While the cases was certified as a class action, the ruling is only binding on the Central District of California as of the summer of 2024.

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

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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.

But compare the note on *Kidd v. Mayorkas supra* where warrantless home visits were found to be unconstitutional as a matter of civil rights laws.

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Page 664 (§ 6.04 [E]Aggravated Felonies
Add this new Supreme Court case before Section [F] middle of page 664.

Pugin v. Garland

599 U.S. 600 (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 pendideferrThis 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).

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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

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"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]

***

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

[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***.

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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.

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

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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).

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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]

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

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[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").

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"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

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"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).

***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

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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. **Where is the Majority Going?** Compare the majority reasoning of J. Kavanaugh with that of the concurrence by Jackson. Which persuades you more?

2. **Congressional Drafting?** Should Congress amend the aggravated felony statute to be more express? What would be the negative consequences of being more precise?

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3. **Motive of the Dissent?** What is the main concern of J. Sotomayor's dissent?

4. **How to Advise a Defendant?** 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. **Theft?** 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 issue was not argued before the Immigration Judge.

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6. **Distributing Drugs?** The Second Circuit found that a conviction under New Jersey state law for distributing a controlled substance near a school was categorically not the same as the federal definition. *Stankiewicz v. Garland*, 103 F. 4th 109 (2d Cir. 2024). "The issue in this case is whether Petitioner Aleksandra Malgorzata Stankiewicz's conviction for distributing a controlled substance on or near school property, in violation of N.J. Stat. § 2C:35-7, is an aggravated felony that makes her ineligible for cancellation of removal. We hold that it is not. The "categorical approach" requires us to compare [this statute]to any federal controlled substance offense that is a felony subject to a prison sentence greater than one year. We conclude that neither of the parties' proposed federal analogs categorically matches [the N.J. statute], which is not divisible." This case followed a Third Circuit Court of Appeals ruling that had concluded that the same New Jersey law was not a match for the federal aggravated felony interpretation. *See Rosa v. Attorney General United States*, 950 F.3d 67, 76, 80–81 (3d Cir. 2020) (vacating a BIA determination in *Matter of Rosa,* 27 I&N Dec. 228 (2018) that the New Jersey statute was a categorical match for the federal controlled substance distribution statute that has specific provisions about school zones.

7. **Bottom line.** Research carefully and consider the Circuit Court of Appeals approach to the statutory interpretation. It is possible that the 2024 repeal of the *Chevron* doctrine may mean less deference to the BIA interpretations. *See Loper Bright Enterprises v. Raimondo,* __ U.S. __, 114 S.Ct. 224 (2024). However, most of the federal circuits viewed interpreting which convictions qualified as aggravated felonies or grounds of removal were usually statutory interpretation questions. Following its decision in *Loper Bright Enterprises*, the Supreme Court remanded several cases to the Circuit Courts of Appeals to evaluate statutory interpretations without any *Chevron* deference. Professor Nancy Morawetz has published an essay about other arguments the government is likely to make to argue for deference to the Department of Justice interpretation of the INA. *See* Nancy C. Morawetz," Immigration Law After *Loper Bright*: The Meaning of 8 U.S.C. § 1103(A)(1)*" forthcoming* 99 N.Y.U. L. REV. online. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4785466.

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

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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: 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. And by July of 2024, the EOIR reports over **1.1 million** pending asylum cases through April of 2024. The last report of the Asylum Office states a backlog of **1,262,449.** In fiscal year 2024 the Asylum directorate received more than 300,000 new filings. Some of these may be under the jurisdiction of the immigration courts. Many new arrivals have been confused about how to file and when the USCIS created on-line filing some asylum applicants mistakenly filed there instead of with the EOIR.

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),

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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 the summer of 2024, the EOIR adopted many new policy memoranda, quite a few repeal priorities and processing rules issued under the Trump administration. In addition, the Office of the Executive Director of the EOIR has issued over 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 electronical 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 Appear	Unrepresented
FY 2021	317,348	176,227
FY 2022	798,889	537,818
FY 2023	903,164	801,081
FY 2024(partial)	1,523,883	1,390,118

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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 during FY 23 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.

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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.

See the longer discussion of In Absentia below.

Efficient Case and Docket Management in Immigration Proceedings

As was mentioned above EOIR adopted a new rule effective July 29, 2024. It states that “On September 8, 2023, the Department of Justice published a notice of proposed rulemaking proposing to rescind an enjoined December 2020 rule (the “AA96 Final Rule”) that imposed novel limits on the authority of immigration judges and the Board of Immigration Appeals (“BIA” or “Board”) to efficiently dispose of cases. Because the AA96 Final Rule has been enjoined since shortly after its issuance, the proposed rule was designed to largely codify the currently operative status quo. After reviewing and considering the public comments received during the comment period, the Department is finalizing the proposed rule with the limited changes described in the preamble. The Department believes that this rule will promote the efficient and expeditious adjudication of cases, afford immigration judges and the Board flexibility to efficiently allocate their limited resources, and protect due process for parties before immigration judges and the Board.” 89 FR 46742-01 (May 29, 2024).

One area where changes have been implemented is in juvenile cases. This rule became effective on December 21, 2023. This rule is meant to provide guidance on children’s cases and juvenile dockets in immigration court. It ultimately states that “Immigration court cases involving children present special considerations. EOIR has established dedicated juvenile dockets, and provides specialized training to immigration judges, in light of these considerations. Fairness concerns and the need for a complete and accurate record dictate that immigration judges bear in mind the special nature of children’s cases when adjudicating these cases, whether or not a particular case is on the juvenile docket”. Director’s memorandum 24-01, Children’s Cases in Immigration Court. https://www.justice.gov/d9/2023-12/dm-24-01_1.pdf

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). And the new rule final July 29, 2024, reinstated administrative closure as was mentioned above.

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Page 682 [c] In Absentia Orders and Challenges to Notice

When is a Notice to Appear Defective?

In most areas of civil litigation, the proper filing of a complaint and service of process on the parties is essential to establishing the court's jurisdiction and power over the defendant or parties. Despite the INA strictures about the service of a Notice to Appear (NTA), the reality of the process at the borders and even within the interior of the United States, have meant that many people received a NTA without all of the specifics about where and when the first hearing would occur. While the DHS usually maintains that a personal service at time of apprehension is sufficient to alert the noncitizen that they must alert the DHS whenever they change their address. It is often unclear to the individuals that they also have a duty of filing a change of address with the immigration courts. In a series of cases, the BIA, federal courts of appeals, and the U.S. Supreme Courts address various aspects of the proper service of the NTA and when a defect might impede the jurisdiction of the immigration court or preserve eligibility for some forms of relief – in particular cancellation of removal and forms of voluntary departure. See chapter 7 for the description of those forms of relief.

In this update we address some of the current issues in proper service of the NTA.
Campos-Chaves v. Garland, Attorney General, 602 U.S. _ , 144 S.Ct. 1637 (2024) (consolidated with *Garland v. Singh* and *Garland v Mendez-Colín*).

This is an important 5-4 decision decided June 2024. The case focuses on NTA that are incomplete and missing information such as the time and place of the hearing when originally served on the individual respondent. The case revolves around the meaning of what is required in the NTA to begin proceedings but also whether later notice of the time and place satisfies the INA requirement of a written notice specifying the new time or place of the proceedings and the consequences of the failure to attend. INA § 239(a)(1); 8 U.S.C. §1229(a)(1). There is a separate statute addressing notice "in the case of any change or postponement in the time and place of" the removal proceedings. This is a called a notice of hearing under paragraph § 239(a)(2); 8 U.S.C. § 1229(a)(2).

If an individual fails to appear at the removal hearing, the immigration judge is instructed to issue an *in absentia* order of removal. The language appears to be mandatory once service of the NTA and nonappearance is established by the DHS. The statute states the individual "shall be ordered removed in absentia" INA § 239(b)(5)(A); 8 U.S.C. §1229a(b)(5)(A). If a person learns of the removal order, they can move the court to rescind the *in absentia* order. There are basically three ways to seek rescission of the order: 1) Seek a motion to reopen within 180 days of the order based on exceptional circumstances. 2) Show the failure to appear was due to the government custody and no fault of the individuals. Or 3) Establish they did not receive in accordance with either paragraph (1) or (2) of INA § 239.

The Supreme Court granted certiorari and consolidated several appeals because of a split in the circuit courts of appeals about how to interpret the requirements of Notice to set aside an in absentia order. Prior cases had not expressly dealt with in absentia orders but eligibility dates for forms of relief and in those cases, the Supreme Court had read the INA to require that the Notice

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to Appear be a complete document and not lack the essentials such as date and location of the hearing. See *Pereida v.* Wilkinson, 592 U.S. 224 (2021)(explain) and *Niz-Chavez v. Garland*, 593 U.S. 155 (2021)(the time, date, and place of hearing must be in a single document to establish a cut off date for accruing physical presence that may allow relief such as the ten years to qualify for some forms of cancellation of removal).

As recently as January of 2024, six months before the Supreme Court ruled in *Campos-Chavez,* the Board ruled that DHS cannot cure a defective NTA by filing a Form I-261--the DHS form used to amend an NTA to add allegations and/or charges. The BIA's reasoning is based on the text of the regulations, see * C.F.R. § 1003.30, which does not describe the form as to serve as a cure for defective service but to amend charges of removal. The BIA held that this form cannot be used to add or change the hearing time and place.

In the cases consolidated in *Campos-Chavez*, each of the respondents had received a Notice to Appear in person when arrested at the border but those Notices did not have all of the hearing information. They each later received a Notice of Hearing. These people argued that because the original NTA was defective, the later hearing notice could not cure the statutory requirements. By a vote of 5 to 4, the Supreme Court read the INA to eliminate a challenge to in absentia by, in effect, finding that the Notice of Hearing cured the defects of the initial service of the NTA.

Campos-Chaves v. Garland, Attorney General,

602 U.S. _ , 144 S.Ct. 1637 (2024)

Excerpt from majority, authored by Justice Alito, holds:
To rescind an in absentia removal order on the ground that the alien "did not receive notice in accordance with paragraph (1) or (2)," the alien[19] must show that he did not receive notice under either paragraph for the hearing at which the alien was absent and ordered removed. Because each of the aliens in these cases received a proper paragraph (2) notice for the hearings they missed and at which they were ordered removed, they cannot seek rescission of their in absentia removal orders on the basis of defective notice under §1229a(b)(5)(C)(ii).

Excerpt from Dissent authored by Justice Jackson:

> Today's cases arise because the Government persisted with its practice of issuing facially defective NTAs in the wake of our two prior pronouncements. But, apparently, the third time is the charm, for the majority now finally blesses the Government's abject noncompliance with the statute's unequivocal command. The Court concludes that a noncitizen whose NTA does not contain the time-and-date information that [INA § 239(a)(1);] §1229(a)(1) requires has no recourse from an in absentia removal order if the Government subsequently provides some follow-up notice identifying the time and date of the proceeding he missed. Dissent at page 2.

[19] Editors' Note: The majority opinion uses the term "alien" as well as the pronoun "he." The dissent used "noncitizens."

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Justice Jackson is particularly critical of the majority for its reading of the statute and the disregard for the prior rulings on what makes a NTA a complete notice as required by the INA. She rebuts the statutory and textual analysis of the majority and bolsters her reading with a discussion of the policy reasons for the requirement of full notice before a removal hearing could

> The Majority errs in interpreting "notice in accordance with paragraph (1) or (2)" § 1229a(b)(5)(C)(ii), by treating "or" as a standard disjunctive construct. …That might generally be so. But here, the word "or" simply cannot be taken to mean that *either* notice in accordance with paragraph (1) *or* in accordance with paragraph (2) suffices under the statute because those two notions are by no means equivalent alternatives… [emphasis in original]
>
> It is clear on the face of this statute, then, that a paragraph (2) notice merely alters information that Congress has required be given previously, and , "especially when properly read in sequence as integral parts of a whole," the statute plainly "anticipates a predicate" NTA that complies with Congress's mandate….As its "test and place within [the] comprehensive statutes scheme" show…., a notice under paragraph (2) cannot exist in the absence of a compliant NTA. The statute simply does not contemplate it.
>
> ***
>
> **Part III**
>
> One final flaw bears mention. By snipping the thread that connects the notices Congress required in paragraphs (1) and (2) of § 1229(a), today's decision mangles the broader statutory scheme.
>
> **A.**
>
> The long an short of this critique is tht reading the statute in the way the majority does fails to fully account for Congress's objectives when it comes to removal procedures, which have long included ensuring that noncitizens facing removal receive notice. The Government's statutory obligation to provide notice in removal context has been a crucial aspect of fedarl immigration policy since at least the early 1950s. To this end, The Immigration and Nationality Act (INA) of 1952 specifically provided that a noncitizen must be "given a reasonable opportunity to be present at [the] proceeding" in which his deportability or removability is to bee determined. …. With respect to in absentia removal, the INA further provided that if the noncitizen "without reason cause fail[ed] or refuse[d] to attend or remain in attendance," a [immigration hearing officer could proceed to determination as if the person were present.]
>
> Notably, at that time, an immigration officer's decision to remova a noncitizen in absentia was discretionary. … in 1990, however, Congress amended the INA to provide, in certain circumstances, for mandatory in absentia deportation of noncitizens who failed to appear for their proceedings. [citation omitted], codified at 8 U.S.C. § 1252b(c)(1) later repealed see 1996 amendment below]. Nonetheless, the Government still routinely encountered procedural issues. ….

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Congress endeavored to address these kinds of problems among other things, when it established the mandatory in absentia removal provisions that govern these cases as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. [INA §§ 239 and 240; codified as 8 U.S.C. §§ 1229(a), 1229a.] Notably, however, Congress did not absolve the Government of its obligation to provide notice of removal proceedings. Nor did it make receipt of a notice irrelevant to whether a noncitizen who does not show up to his hearing can later contest his removal. To the contrary, notice features prominently in IIRIRA's in absentia removal process – it is specifically mentioned in four of the five statutory subdivisions that constitute Congress's in absentia mandatory removal directives.[foodnote omitted] And, rather than devising a process in which a noncitizen who misses his hearing must be removed regardless, Congress has made clear that the consequence for failing to appear for scheduled removal proceedings can turn on whether notice was provided, or received, under the terms of the statuts. *See, e.g.,* [INA § 240(b)(5)(C)(ii);] § 1229a(b)(5)(C)(ii).

B.

The resulting in absentia removal scheme constitutes a balancing of interest and obligations that is well within Congress's policy prerogatives. …
Indeed, and perhaps most concerning, under the majority's reading of the statutory provisions at issue here, Congress's goals are plainly thwarted, for a noncitizen may be removed in absentia even if the Government fails to provide him with information that complies in both form and substance with Congress's commands….

Dissent at 17 to 22.

Notes and Questions:

1. **Notice Compared.** Consider Rule 4 of the Federal Rules of Civil Procedure. This rule requires both statutory and constitutional notice to begin a civil proceeding. If a person receives a defective complaint or notice in a form that is not compliant with the rules, that party may seek a motion to dismiss the case under Rule 12(b)(4) or (5). If the party does not make such a motion and a default judgment is entered for the plaintiff, the defendant may attack the sufficiency of notice under Rule 59 or 60. Even when years have passed, if a default judgment was based upon defective notice, an attack on the validity of the order may render the default void.

2. **Minimum Due Process?** Why should immigration proceedings be less protective of the respondents' rights and obligations? Are there categories of people who should be excused from the strictures such as unaccompanied minors or people with physical or mental illness?

3. **Practice Advisory.** The American Immigration Council with the National Immigration Project of the National Lawyers Guild have published a detailed practice advisory that

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analyzes *Aguilar-Hernandez* as well as the other precedent cases on challenging the adequacy of service and the jurisdiction of the immigration court. *See Strategies and Considerations in the Wake of Niz-Chavez v. Garland Practice Advisory,* Updated July 29, 2024 available at: https://nipnlg.org/sites/default/files/2024-07/2024_Niz-Chavez-advisory.pdf.

This practice advisory is very useful in guiding an attorney thought the analysis of how and when one can challenge a deficient Notice to Appear or Service. Put simply, *Campos-Chavez* and its 5 to 4 ruling is not the last word on challenging the adequacy of the NTA.

4. **Frequency of In Absentia?** Would you be concerned with Notice if in absentia orders were infrequent or rare?
The chart below was recreated from data published by the Executive Office for Immigration Review (EOIR), the agency that manages the immigration courts. Available at: https://www.justice.gov/eoir/media/1344906/dl?inline EOIR DATA on In Absentia Rates Published April 2024.

Fiscal Year	Individual case completions	In absentia removal orders	Percentage in absentia
2014	76,527	25,911	34%
2015	90,694	38,270	42%
2016	90,838	34,312	38%
9-Jul	96,618	42,051	44%
2018	119,359	46,221	39%
2019	197,939	91,308	46%
2020	177,214	87,854	50%
2021	86,768	8,541	10%
2022	283,534	62,714	22%
2023	481,600	159,977	33%
2024 (2 quarters)	303,080	95,428	31%

CAUTION: The percentage does not reflect the outcome in all cases but only those in which a removal order was issue. Other cases result in terminations or grants of relief. Why do you believe EOIR presents the data in this manner? It did not always do so but stopped publishing fuller statistical reports in 20:

EOIR Data on In Absentia Rates Published April 2024

Available at: https://www.justice.gov/eoir/media/1344906/dl?inline
With added data from: https://www.justice.gov/eoir/media/1344796/dl?inline

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Fiscal Year	Individual case completions	In absentia removal orders	EOIR reported Percentage in absentia	Total Completions	In Absentia Percentage of total completions
2014	76527	25911	34%	141,678	18.20%
2015	90694	38270	42%	143,645	26.60%
2016	90838	34312	38%	143,487	23.90%
9-Jul	96618	42051	44%	163,078	25.70%
2018	119359	46221	39%	195,142	23.60%
2019	197939	91308	46%	277,081	32.90%
2020	177214	87854	50%	232,296	37.80%
2021	86768	8541	10%	115,934	7.30%
2022	283534	62714	22%	314,638	19.90%
2023	481600	159,977	33%	525,819	30%
2024 (2 quarters)	303080	95428	31%	328,489	29.30%

5. **In Absentia Debates?** What other factors might be contributing to the increase in the rate of in absentia removal orders? In several recent studies and court observation projects, observers have reported challenges in entering the court buildings, misinformation provided to the respondents who confuse appearing at an ICE Check-In with the requirement of going to court, the misunderstanding that you can appear in court without an attorney, and, misinformation in communities that advise people not to appear because they are not likely to win their case. Can you think of other reasons that people may not be going to court? Here is a link to one study conducted in 2022 and 2023. New York City Immigration Court Monitoring Report, coordinated by the student chapter of the International Refugee Assistance Response Court Monitoring Team at NYU Law School and coordinate by one of the authors, Lenni Benson of NYLS. https://refugeerights.org/wp-content/uploads/2024/03/NYU-IRAP-Immigration-Court-Monitoring-Report-2022-23.pdf Professor Benson completed another 11 months of court observations with volunteers in the three NY city immigration courts and a report and analysis of that project will be forthcoming in the fall of 2024 or early 2025.
The Congressional Research Service also noted that many advocates believe that only looking at completed cases in a single year distorts the picture of the rate of in absentia and that the number of in absentia orders should be compared against the entire volume of pending cases. https://crsreports.congress.gov/product/pdf/IN/IN12318 also discussed in Chapter 7 below.

6. **Missing Addresses:** In recent years the EOIR created special dockets called the ENC dockets or E-33 Dockets. In these master calendars, the immigration court knows the individual has received a Notice of Hearing for a particular city, but at the time of their release, DHS did not provide a specific address for the respondent in that city. The individual is responsible for appearing at the assigned city and ENV docket. Anecdotal evidence from court observation seems to indicate that many people seek a change of venue at these dockets or complete the change of address form to allow them to receive

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future hearing notices. Still some people are receiving in absentia orders if they do not appear at these special dockets.

7. **Recent Arrivals Docket.** In a press release issued in May of 2024, the EOIR announce yet another specialize docket with a goal of completing adjudication within 180 days. This "Recent Arrivals" docket is described as applying in several cities and will only apply to single adults in removal who arrived within . The cities are: Atlanta, Boston, Chicago, Los Angeles, and New York, https://www.justice.gov/opa/pr/departments-homeland-security-and-justice-announce-recent-arrivals-docket-process-more. As of July 2024, the editors could not find more detailed information about the criteria for inclusion on these "rocket dockets."

8. **Evidence of Alienage.** When an immigration judge issues an in absentia order, they are relying on evidence introduced by the DHS to establish alienage. In most cases, that is a summary of the arrest form I-213. Is this form reliable? Does it satisfy the burden on the government to establish by clear, probative, and convincing evidence that the person is not a citizen?

   In a recent Second Circuit Court of Appeals case, *Vera Punin v. Garland,* the admissibility and probative nature of the I-213 was challenged. While this case did not involve an in absentia order, the reasoning of the court about why the form is probative is informative:

   "[A]gencies are not courts." *Garcia v. Garland*, 64 F.4th 62, 70 (2d Cir. 2023). And so, "[t]he Federal Rules of Evidence do not apply in removal proceedings ...." *Zerrei v. Gonzales*, 471 F.3d 342, 346 (2d Cir. 2006). Rather, "[e]vidence is admissible provided that it does not violate the alien's right to due process of law." *Lin v. U.S. Dep't of Just.*, 459 F.3d 255, 268 (2d Cir. 2006). And "[t]he due process test for admissibility of evidence in a deportation hearing is whether the evidence is probative and whether its use is fundamentally fair." *Felzcerek*, 75 F.3d at 115 (quotation marks omitted); *see also Matter of Ponce-Hernandez*, 22 I. & N. Dec. at 785 (similar).

   In this context, a Form I-213 is "properly characterized as hearsay" because it is "offered to prove the truth of the statements contained therein"—as relevant here, that the subject of the form is an alien. *Felzcerek*, 75 F.3d at 115. We have concluded that an I-213 "evidence[s] strong indicia of reliability" because it is a "record[ ] made by public officials in the ordinary course of their duties," and "public officials are presumed to perform their duties properly and generally lack a motive to falsify information." *Id.*at 116. In other words, a "Form I-213 contain[s] guarantees of reliability and trustworthiness that are substantially equivalent to those required of documents admissible under [Federal] Rule [of Evidence] 803(8)," or public records that are not excluded by the rule against hearsay. *Id.*; *see* Fed. R. Ev*Id.*803(8). Accordingly, we have explained that a Form I-213 is "presumptively reliable and can be admitted in deportation proceedings without

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giving the alien the opportunity to cross-examine the document's author, at least when the alien has put forth no evidence to contradict or impeach the statements in the report."[5] *Felzcerek*, 75 F.3d at 117; *see also Matter of Gomez-Gomez*, 23 I. & N. Dec. 522, 524 (B.I.A. 2002) ("[A]bsent any evidence that a Form I-213 contains information that is inaccurate or obtained by coercion or duress, that document, although hearsay, is inherently trustworthy and admissible as evidence to prove alienage or deportability."); *Matter of Ponce-Hernandez*, 22 I. & N. Dec. at 785 (similar); *Matter of Barcenas*, 19 I. & N. Dec. 609, 611 (B.I.A. 1988) (similar); *Matter of Mejia*, 16 I. & N. Dec. at 8 (similar). If, however, "the reliability of the form is somehow undermined," further scrutiny is required, including possibly requiring the officer who completed the I-213 to testify. *Felzcerek*, 75 F.3d at 117.

Vera Punin argues that the BIA has considered an I-213 to be "inherently trustworthy" only when the subject of the I-213 directly admitted his alienage to the officer preparing the I-213, which Vera Punin did not do. Instead, he contends that the information in his I-213 comes from unknown or unreliable third-party sources, such as the information regarding his apprehension under the alias Maximo Roberto Lopez by an unnamed Border Patrol agent in 1999. But Vera Punin misreads the BIA's precedent. The BIA has "consistently held" that an I-213 is generally considered "inherently trustworthy and admissible as evidence to prove alienage or deportability" unless it has been shown that the information is inaccurate or was obtained by coercion or duress. *Matter of Gomez-Gomez*, 23 I. & N. Dec. at 524. An I-213 contains information from a multitude of sources. The BIA has not limited the presumption of an I-213's reliability to instances where the alleged alien has directly admitted his alienage to the officer preparing the form. And this Court has agreed with the BIA, explaining that an I-213 is considered presumptively reliable because it is prepared by a public official in the ordinary course of his duties, with the presumption of regularity that entails. *Felzcerek*, 75 F.3d at 116.

To be sure, there might be unusual circumstances in which an alleged alien need not bring forth evidence to undermine an I-213's presumed reliability. It is conceivable that a particular I-213 might be so irregular as to be "facially deficient," which "would render it inadmissible." *Matter of Ponce-Hernandez*, 22 I. & N. Dec. at 786. Contrary to Vera Punin's assertion, however, his I-213 is not remotely so deficient. The I-213 includes several indicia of trustworthiness, including that (1) it includes Vera Punin's photo and fingerprints; (2) it identifies the official government databases that were searched, and which came back with positive results; (3) it reflects that Vera Punin was interviewed and gave responses about his family and health; (4) it identifies Vera Punin as having been previously apprehended and removed to Mexico in 1999 under the name Maximo Roberto Lopez (and having claimed to be a Mexican citizen); and (5) each page is signed by Deportation Officer Dickerson. By mentioning these indicators, of course, we do not suggest that any particular indicators (much less any combination of them) are required in any given case. The point is simply that this I-213 bears the usual hallmarks of regularity. And it is highly probative of Vera Punin's alienage because

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> it clearly reports that he is a citizen of Ecuador, not of the United States. Further, as has been noted, Vera Punin did not provide any evidence to dispute the accuracy of the information in his I-213 or claim that it was obtained through improper means, such as coercion or duress. Accordingly, the agency properly admitted the I-213 into evidence as a reliable document. And once the I-213 was admitted as evidence, the agency was free to rely upon it when determining that there was clear and convincing evidence of Vera Punin's alienage. *See, e.g., Barradas v. Holder*, 582 F.3d 754, 764 (7th Cir. 2009) (holding that a Form I-213 "constitute[d] reasonable, substantial, and probative evidence" of the petitioner's conviction listed on the form); *Matter of Gomez-Gomez*, 23 I. & N. Dec. at 524 ("[A] Form I-213 is admissible and ordinarily sufficient for a prima facie case of deportability ...." (quotation marks omitted)). [footnote omitted.]

Quote from *Vera Punin v. Garland*, __ F.4th __, 2024 WL 3418693 at *7-8 (2d. Cir. July 30, 2024)

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.

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* (Discussed in supplement to chapter 2). *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.543 (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. The DHS has also developed tools such as using cellular phones to monitor location and requiring that the individual answer the phone when ICE calls. Alternatives to detention raise concerns about privacy and government monitoring but for many people are much preferred to actual physical detention.

In a 2024 Second Circuit decision, two individuals were successful in arguing that prolonged detention during removal proceedings without a bond determination denied them of procedural due process. Here is an excerpt from the case that explores how the court applied the balancing test of *Mathews v. Eldridge*, a famous Supreme Court case, in the context of immigration detention.

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Note that as part of this analysis, the court orders the DHS to consider alternatives to detention and the ability to afford the bond.

Black v. Decker,
103 F.4th 133 (2d. Cir. 2024)

[The opinion is based on two consolidated appeals under the habeas corpus statutes seeking release from prolonged detention pending removal hearings. In both, the individuals were long term lawful permanent residents who had been convicted of crimes.]

I. A noncitizen's right to due process precludes his unreasonably prolonged detention under section 1226(c) without a bond hearing.

The Supreme Court long ago held that the Fifth Amendment entitles noncitizens to due process in removal proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993). The Constitution establishes due process rights for "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Accordingly, and as the Supreme Court recognized in *Zadvydas*, "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Id.*at 690. In light of the constitutional concerns identified by the Supreme Court and this Court in connection with the Executive's detention of noncitizens, and the authorities discussed below, we conclude that due process bars the Executive from detaining such individuals for an unreasonably prolonged period under [INA § 236(c); 8 U.S.C. § 1226(c)] without a bond hearing.

In *Zadvydas*, for example, the Court heard a noncitizen's challenge to prolonged detention under 8 U.S.C. § 1231(a)(6). Recognizing that the proceedings at issue were "civil, not criminal," and therefore "nonpunitive in purpose and effect," it pointed out that the government offered "no sufficiently strong special justification here for indefinite civil detention." *Id* .at 690. In response to the government's proffered justification of "preventing danger to the community," the Court explained that "[i]n cases in which preventive detention is of potentially indefinite duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger." *Id.* at 691 (emphasis in original). It ultimately avoided the constitutional challenge to section 1231(a)(6), however, by "constru[ing] the statute to contain an implicit 'reasonable time' limitation." *Id.* at 682. Thus, it held that the "statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." *Id.* at 689.

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Even in *Demore*, where the Court upheld the facial constitutionality of detention under section 1226(c) without a bond hearing, it did so while emphasizing the apparent brevity of detentions pending removal. 538 U.S. at 527–31. In concluding that such mandatory detention comported with substantive due process, the Court highlighted two key distinctions between section 1226(c) detention and section 1231(a)(6) detention, the detention authority at issue in *Zadvydas*.

First, it observed that the noncitizens in Zadvydas—having been ordered removed but still being detained in the United States—"were ones for whom removal was 'no longer practically attainable,' " depriving detention of "its purported immigration purpose" of facilitating removal. *Id.*at 527.

Second, the Court pointed out that "the period of detention at issue in Zadvydas was 'indefinite' and 'potentially permanent,' " while "the detention [in Demore] is of a much shorter duration." *Id.*at 528. It cited data presented by the government to the effect that, for 85% of section 1226(c) detainees, "removal proceedings are completed in an average time of 47 days and a median of 30 days," and that "[i]n the remaining 15% of cases, in which the alien appeals the decision ..., appeal takes an average of four months, with a median time that is slightly shorter."*Id.* The Court's emphasis on this "limited" period of detention strongly suggests a view that, while it found detention without an initial bond determination to be facially constitutional, "indefinite" and "potentially permanent" detention without a bond hearing would violate due process. *Id.*at 529–31.

More than a decade later, this Court applied *Zadvydas* and *Demore* to a challenge to prolonged detention under section 1226(c) without a bond hearing—the same type of challenge we now address. In *Lora v. Shanahan*, Alexander Lora was detained under section 1226(c) based on a drug-related conviction. 804 F.3d 601, 605 (2d Cir. 2015). After four months in detention, he sought habeas relief, challenging on due process grounds his continued detention without a bond hearing. *Id.* This Court, heeding the *Demore* Court's "[e]mphas[is] [on] the relative brevity" of section 1226(c) detention "in most cases," read Supreme Court precedent as having "made clear that the indefinite detention of a non-citizen raises serious constitutional concerns." *Id.* at 604, 606 (internal quotation marks and alterations omitted). We avoided those concerns, however, and followed Zadvydas by reading into section 1226(c) "an implicit temporal limitation" requiring that detainees be afforded a bond hearing after six months. *Id.* at 606.

The Supreme Court's subsequent decision in *Jennings* invalidated *Lora*'s statutory approach. *See Shanahan v. Lora*, 583 U.S. 1165 (2018). But in doing so, the Court did not answer the question whether due process places any limits on the government's detention authority under section 1226(c). The Court's reversal of

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our statutory holding in Lora did not resolve the constitutional concerns we expressed in that case.

Our post-*Jennings* decision in *Velasco Lopez v. Decker*, concerning the government's discretionary detention authority under section 1226(a), highlighted the gravity of these concerns.16 *Velasco Lopez* was taken into detention under section 1226(a). 978 F.3d at 846–47. Three and a half months later, he had an initial bond hearing, but bore the burden of proving that he was neither a flight risk nor dangerous. *Id.* at 847, 849 (*citing Matter of Guerra*, 24 I. & N. Dec. 37, 38 (B.I.A. 2006)). He had another bond hearing five months after the first, again unsuccessfully bearing the burden of proof. *Id.* at 847. After fourteen months in detention, he sought and was granted habeas relief. *Id.* at 847–48.

On appeal, we decided his petition on constitutional grounds. Recognizing the *Jennings* Court's admonition that section 1226(a) may not be read as implicitly imposing any specific procedural protections, *Id.*at 851, we concluded that "*Velasco Lopez*'s prolonged incarceration, which had continued for fifteen months without an end in sight or a determination that he was a danger or flight risk, violated due process," *Id.*at 855. Notably, we rejected the government's contention that *Jennings* foreclosed all relief for *Velasco Lopez*, observing that the Court in *Jennings* had "expressly declined to reach the constitutional issues." *Id.* at 857.

Accepting the government's assertion that the Constitution "provides no basis for requiring bond hearings whenever the detention of a criminal noncitizen under § 1226(c)" exceeds any set duration, *G.M. Gov't Br.* at 31, we nonetheless read *Zadvydas, Demore, Jennings, and Velasco Lopez* to suggest strongly that due process places some limits on detention under section 1226(c) without a bond hearing. We cautioned accordingly in Lora (as mentioned above) that "serious constitutional concerns" would arise absent "some procedural safeguard in place for immigrants detained for months without a hearing." 804 F.3d at 614. The Constitution does not permit the Executive to detain a noncitizen for an unreasonably prolonged period under section 1226(c) without a bond hearing; at some point, additional procedural protections—like a bond hearing—become necessary.

II. We evaluate procedural due process challenges to prolonged section 1226(c) detention under the *Mathews* framework.

When do additional procedural protections become constitutionally necessary? We begin by surveying other courts' approaches to this question post-*Jennings*. We then conclude that the *Mathews* framework applies generally, and will govern in individual cases.

A. Courts' Approaches Post-*Jennings*

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As described, neither the Supreme Court nor this Court has squarely decided a due process challenge to an individual's prolonged detention under section 1226(c). After *Jennings*, courts have taken a variety of approaches.

1. The S.D.N.Y. Approach

Courts in the Southern District of New York have used a multifactor, case-by-case analysis to determine whether the section 1226(c) petitioner's detention has become "unreasonable or unjustified." *E.g., Cabral v. Decker*, 331 F. Supp. 3d 255, 261 (S.D.N.Y. 2018); *see also Jack v. Decker*, No. 21-cv-10958, 2022 WL 4085749, at *10 (S.D.N.Y. Aug. 19, 2022) (collecting cases taking this approach). In Cabral, Judge Koeltl highlighted that the *Jennings* court "left open the possibility that individual detentions without bond hearings might be so lengthy as to violate due process" and stressed the *Jennings* Court's emphasis on "the flexible nature of the Due Process Clause." 331 F. Supp. 3d at 260. Observing that courts in the district had taken a "case-by-case approach to petitions for bail hearings," and rejecting the argument that the Constitution mandates a hearing in every case at six months, he identified the factors that had been considered as follows:
(1) the length of time the petitioner has been detained;
(2) the party responsible for the delay;
(3) whether the petitioner has asserted defenses to removal;
(4) whether the detention will exceed the time the petitioner spent in prison for the crime that made him removable;
(5) whether the detention facility is meaningfully different from a penal institution for criminal detention;
(6) the nature of the crimes committed by the petitioner; and
(7) whether the petitioner's detention is near conclusion.
Id. at 261 (spacing altered).

2. The Third Circuit Approach

Since *Jennings*, the Third Circuit is the only federal court of appeals to have squarely ruled on the questions posed here.17 *See German Santos v. Warden Pike County Corr. Facility*, 965 F.3d 203 (3d Cir. 2020). There, petitioner German Santos was detained under section 1226(c) for over two-and-a-half years without a bond hearing, and sought habeas relief on due process grounds. *Id.*at 207–08.

Like the S.D.N.Y. courts, the Third Circuit "explicitly declined to adopt a presumption of reasonableness or unreasonableness of any duration." *Id.* at 211. Instead, it undertook a "highly fact-specific inquiry" that considered four factors: "the duration of detention," "whether the detention is likely to continue," "the reasons for the delay," and "whether the alien's conditions of confinement are meaningfully different from criminal punishment." *Id.*at 210–11 (internal quotation marks and alterations omitted). Applying these factors, the court concluded that German Santos's detention had become unreasonably long and

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ordered a bond hearing at which the government must justify continued detention by clear and convincing evidence. *Id.* at 212–14.

3. The *Velasco Lopez* Approach

Our October 2020 decision in *Velasco Lopez* bears on our determination here. As discussed, *Velasco Lopez* dealt with a Deferred Action for Childhood Arrivals recipient's challenge to his prolonged detention under the government's discretionary section 1226(a) authority. 978 F.3d at 847. We identified the "dispositive" issue there as "whether *Velasco Lopez*'s ongoing incarceration posed due process concerns at the time of his habeas filing and whether additional procedural protections then became necessary." *Id.* at 851.

We held that the three-factor balancing test established in *Mathews*, 424 U.S. at 335, 96 S.Ct. 893, applied.18 *See Velasco Lopez*, 978 F.3d at 851. The Supreme Court in *Mathews* identified three factors bearing on the constitutional need for procedural protections: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335, 96 S.Ct. 893. Applying these factors to *Velasco Lopez*'s section 1226(a) detention, we determined that the district court "appropriately addressed the [asserted due process] violation by ordering a new hearing at which the Government was called upon to justify continued detention." *Velasco Lopez*, 978 F.3d at 855.

B. The *Mathews* framework applies.

Here, we conclude that due process challenges to prolonged detention under section 1226(c) should also be reviewed under *Mathews*. Many courts have applied the *Mathews* factors, as we did in *Velasco Lopez*, to determine what process is due to noncitizens in removal proceedings. *Velasco Lopez*, 978 F.3d at 851; *see, e.g., Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1203–07 (9th Cir. 2022) (collecting cases that applied *Mathews* to determine process due to section 1226(a) detainees, and then assuming without deciding that *Mathews* applied to petitioner); *Miranda v. Garland*, 34 F.4th 338, 358 (4th Cir. 2022) (applying *Mathews* to conclude that due process did not require additional procedural protections for section 1226(a) detainee); *Hernandez-Lara v. Lyons*, 10 F.4th 19, 27–28, 41 (1st Cir. 2021) (applying *Mathews* and concluding that government must prove that section 1226(a) detainee poses a danger to the community or a flight risk); *German Santos*, 965 F.3d at 213 (applying *Mathews* and concluding that at ordered bail hearing, government must show by clear and convincing evidence that section 1226(c) detainee should stay detained); *Guerrero-Sanchez v. Warden York County Prison*, 905 F.3d 208, 225 (3d Cir. 2018) (applying

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Mathews to identify due process requirements for noncitizen detained pursuant to ICE's section 1231 authority).

The Supreme Court has also, in other contexts, applied *Mathews* to examine the adequacy of procedures provided to individuals in custody, including noncitizens legally present in the United States. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29 (2004) (applying *Mathews* to assess whether due process entitled enemy combatant to evidentiary hearing to contest the basis for his detention); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (observing that *Mathews* governs evaluation of noncitizen's claim that she was denied due process at her exclusion hearing); *Addington v. Texas*, 441 U.S. 418, 425–33(1979) (observing that *Mathews* applies to assess adequacy of procedural safeguards for people subject to civil commitment).20

As the Ninth Circuit put it, *Mathews* "remains a flexible test," and takes account of individual circumstances. *Rodriguez Diaz*, 53 F.4th at 1206. It allows for what might appear to be "conflicting outcomes." *Id.* Applying *Mathews* comports with the Supreme Court's guidance in *Jennings* that " 'due process is flexible,' ... and ... 'calls for such procedural protections as the particular situation demands.' " 583 U.S. at 314 (alteration omitted) (*quoting Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). And it can account for those concerns that the S.D.N.Y. and the Third Circuit have considered when deciding when detention has become unreasonably prolonged, and the detainee entitled to a bond hearing.

Thus, *Mathews* provides the proper framework to assess Black's and G.M.'s respective due process challenges.

The government offers three reasons not to apply the *Mathews* framework here. We find none persuasive. First, it contends that *Velasco Lopez* does not govern. It stresses that *Velasco Lopez* was detained under section 1226(a), rather than section 1226(c). Because he was already entitled to a bond hearing, the government asserts, his challenge focused not on the threshold need for a hearing but rather on whether the hearing procedures utilized were satisfactory. See *Velasco Lopez*, 978 F.3d at 851–54.

None of this suggests to us that *Mathews* should not apply to Petitioners' claims here. That *Velasco Lopez* dealt with section 1226(a) detention means only that the case is not directly binding here, not that its reasoning is irrelevant.21 As to *Velasco Lopez*'s discussion of the differences between detention under section 1226(a) and under section 1226(c), that discussion followed the Court's determination that the *Mathews* framework governed the challenge. We discussed those differences, in fact, as part of our analysis of the first and second *Mathews* factors. *See Id.* So that observation carries little persuasive weight.

Second, the government argues that *Demore* applies directly here and forecloses our application of *Mathews*. But we do not read *Demore* so broadly. *Demore*

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upheld the government's authority under section 1226(c) to detain noncitizens without an initial bond hearing "for the brief period necessary for their removal proceedings." *Demore*, 538 U.S. at 513, 531. It said nothing about whether due process may eventually require a hearing. If *Demore* had, in fact, foreclosed the due process challenge now before us, the *Jennings* Court would have had no reason to remand to the Ninth Circuit "to consider ... in the first instance" the detainees' argument that "[a]bsent ... a bond-hearing requirement, ... [section 1226(c)] would violate the Due Process Clause of the Fifth Amendment." *Jennings*, 583 U.S. at 291, 312.

Third, the government posits that "the *Mathews* framework does not necessarily apply simply because a case involves a procedural due process claim." *Black Gov't Reply Br.* at 17–18. It seeks support in the observation that "the Supreme Court has not referred to the *Mathews* balancing test in any case involving a challenge to immigration detention—including *Demore*—since [*Landon*]," *G.M. Gov't Br.* at 27–28. Largely for the reasons already discussed, however, this contention, too, fails. Demore did not present a due process challenge of the sort we now address. And the absence of a *Mathews* reference in any immigration detention decision since Landon means little when, so far as we can see, the Court has not had any subsequent occasion to address such a constitutional challenge at all. We agree with the government that not all procedural due process challenges require courts to apply the *Mathews* framework. *See Dusenbery*, 534 U.S. at 167–68. But the *Mathews* framework is apt for Petitioners' challenges.

As a final note, we find it troubling that the government offers no alternative framework for application here. Rather, it states only that "in an extraordinary case, a noncitizen detained under § 1226(c) may have grounds to bring an as-applied challenge asserting that his detention is unconstitutional," and then summarily concludes that Black's and G.M.'s appeals "present[ ] no such case." *G.M. Gov't Br.* at 31; *see also Black Gov't Br.* at 25. In our view, these appeals raise precisely such as-applied challenges, and are properly assessed under *Mathews*.

In adopting the flexible *Mathews* framework to assess, case by case, whether an individual's prolonged section 1226(c) detention violates due process, we also join the First and Third Circuits in rejecting a bright-line constitutional rule requiring a bond hearing after six months of detention—or after any fixed period of detention—in the context of a Congressional mandate, in the immigration context, to detain. *See Reid v. Donelan*, 17 F.4th 1, 7–9 (1st Cir. 2021); *German Santos*, 965 F.3d at 211. More broadly, we, too, "explicitly decline[ ] to adopt a presumption of reasonableness or unreasonableness of any duration" of detention. German Santos, 965 F.3d at 211.

Demore and *Zadvydas* imply, we agree, that any immigration detention exceeding six months without a bond hearing raises serious due process concerns. We

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nevertheless conclude that the Supreme Court's pronouncements in this context do not support imposing a bright-line rule as a matter of constitutional law.

The Supreme Court's jurisprudence regarding the government's authority to detain removable noncitizens under 8 U.S.C. § 1231(a)(6), while not binding here, is instructive. In Zadvydas, the Supreme Court recognized a "presumptively reasonable period of detention" of "six months," and required that beyond this period, if "there is no significant likelihood of removal in the reasonably foreseeable future, the Government ... respond with evidence sufficient to rebut that showing" to justify continued detention. 533 U.S. at 701. This was the closest the Court has come to adopting a bright-line rule.

And *Jennings*, while also decided on statutory grounds, similarly suggests that a bright-line rule would be inappropriate in the constitutional context. The Court's remand order cautioned that "[d]ue process ... calls for such procedural protections as the particular situation demands." 583 U.S. at 314, 138 S.Ct. 830 (emphasis added) (internal quotation marks omitted).

Here, too, the flexible due process analysis counsels against establishing a bright-line rule. Instead, courts hearing due process challenges to prolonged section 1226(c) detention should apply the *Mathews* framework to determine, case by case, whether and when due process requires that a particular detained noncitizen receive a bond hearing.

III. Due process entitled Black and G.M. to individualized bond hearings to determine whether their continued detentions were justified.

Turning to Black's and G.M.'s claims, we evaluate their respective circumstances under the *Mathews* factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335, 96 S.Ct. 893.

A. Their Private Interests

In both cases, "the private interest affected by the official action is the most significant liberty interest there is—the interest in being free from imprisonment." *Velasco Lopez*, 978 F.3d at 851 (*citing Hamdi*, 542 U.S. at 529). As we have previously observed, "[c]ase after case instructs us that in this country liberty is the norm and detention 'is the carefully limited exception.' " *Id.* (*quoting United States v. Salerno*, 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). True, in *Velasco Lopez*, we contrasted section 1226(a) detention with section 1226(c) detention, observing that "[t]he deprivation that *Velasco Lopez*

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experienced was not the result of a criminal adjudication." *Id.* And Petitioners' detentions in some sense were "the result of a criminal adjudication," since a conviction was the premise for applying section 1226(c). But each had served his entire sentence. And their detentions did not arise from new or unpunished conduct.

Moreover, much like someone detained under section 1226(a), Black and G.M. had "no administrative mechanism by which [they] could have challenged [their] detention on the ground that it reached an unreasonable length." *Id.* At 852. In approving detention for the pendency of removal proceedings, *Demore* was careful to emphasize the relatively short duration of section 1226(c) detention, stressing data showing that detention under section 1226(c) lasts roughly a month and a half in 85% of cases, and four months where the noncitizen chooses to appeal. See *Demore*, 538 U.S. at 529. Both Petitioners here were detained for far longer, and their liberty interests more seriously infringed.

In addition, the private interests of both Petitioners were seriously affected by their prolonged detention. Black's seven-month-long detention led unsurprisingly to serious financial difficulties for his family. He was the sole income provider before his detention; he helped keep up their mortgage payments; and he cared for his wife as she experienced ongoing health issues. Similarly, G.M.'s family relied on him for financial support, and his mother counted on him for help in managing her medical conditions. G.M. is a father to three young children, two of whom were at his home when he was arrested by ICE. His third child was born while he was in ICE custody; when he filed his habeas petition, he had yet to meet her. G.M. also experienced his own health difficulties (in part leading to his [special Covid order] release), and his legal preparations were significantly delayed by COVID-19 restrictions at his detention facility. Many of these difficulties persisted throughout G.M.'s twenty-one-month detention—a detention that outstripped by two months his nineteen-month incarceration for the underlying assault.

For these reasons, we conclude that the first *Mathews* factor weighs heavily in favor of Black and G.M.

B. The Risk of an Erroneous Deprivation of Their Interests and the Probable Value of Additional Procedural Safeguards

The second *Mathews* factor is "the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. It, too, weighs heavily in favor of Black and G.M. The only interest to be considered at this part of the *Mathews* analysis is that of the detained individuals—not the government. *See Hamdi*, 542 U.S. at 530. Here, the almost nonexistent procedural protections in place for section 1226(c) detainees markedly increased the risk of an erroneous deprivation of Petitioners' private liberty interests.

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At the threshold, two general observations are in order with respect to section 1226(c) detention. First, the "procedures used" for section 1226(c) detainees are very few. *Mathews*, 424 U.S. at 335. They include no mechanism for a detainee's release, nor for individualized review of the need for detention. The only procedural protection in place is the Joseph hearing, at which noncitizens can contest whether they in fact committed a crime that makes them subject to mandatory detention. *See Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). Even in the context of *Velasco Lopez*'s section 1226(a) detention, where he received two bond hearings at which he bore the burden of proof, we concluded that "the procedures underpinning [his] lengthy incarceration markedly increased the risk of error." *Velasco Lopez*, 978 F.3d at 852. Section 1226(c) detainees receive even less procedural protection, and the risk of erroneous deprivation is correspondingly greater.

Further, as we remarked with concern in *Lora*, section 1226(c)'s broad reach means that many noncitizens are detained "who, for a variety of individualized reasons, are not dangerous, have strong family and community ties, are not flight risks and may have meritorious defenses to deportation at such time as they are able to present them." 804 F.3d at 605. Section 1226(c) sweeps in people convicted of many nonviolent offenses, see *Id.*at 616, and does not take into account when the prior crime was committed, suggesting that the prior conviction may well be a poor proxy for a finding of dangerousness.24

These concerns were vindicated in the years after we decided Lora: Before *Jennings* vacated Lora in 2018, data showed that 62% of section 1226(c) detainees given bond hearings under Lora were released, confirming the absence in many cases of a sound justification for detention.25 Similarly, in the First Circuit, where the district court in *Reid v. Donelan* had ordered bond hearings for a class of section 1226(c) detainees, almost half of those who had bond hearings were ordered released, having been found not to pose a danger or a flight risk. See Reid, 17 F.4th at 18 (Lipez, J., dissenting).

It is in this context that we consider Black's and G.M.'s respective circumstances under the second *Mathews* factor.

In Black's case, no doubt remains that these minimal procedures led to an unwarranted detention. For the almost twenty years since his criminal conviction in March 2000, he led a peaceful life, helping to support his family. When he ultimately had the bond hearing ordered by the district court, he was released because the government could not justify his continued detention. As to Black, therefore, rather than worrying of a "risk" of erroneous deprivation, we can be virtually certain that his prolonged detention was unjustified.

In G.M.'s case, the record appears to show that for the four years after he completed his sentence (and while on bail pending the criminal proceedings), he

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led a lawful life. When, in 2014, G.M.'s roommate was murdered in front of G.M. and his family, G.M. assisted law enforcement with the investigation and eventually testified at the trial of the murderer. During his four post-release years of freedom, he maintained steady employment and helped to provide for his family. And since his Fraihat release, no further criminal issues involving him have been brought to this Court's attention. Taken together with the general concerns noted above, G.M.'s circumstances similarly suggest a high likelihood that he was subject to an erroneous deprivation of liberty as his section 1226(c) detention was prolonged.

In the absence of any meaningful initial procedural safeguards, it appears to us that almost any additional procedural safeguards at some point in the detention would add value. The most obvious of these—and that sought by Petitioners—would be an individualized bond hearing at which an IJ can consider the noncitizen's dangerousness and risk of flight. As borne out by the bond hearings held under our decision in Lora, we expect that many detained noncitizens would be released after a bond hearing conducted to satisfy their due process protections.

We therefore conclude that the second *Mathews* factor, too, weighs heavily in favor of Black and G.M.

C. The Government's Interest

The third *Mathews* factor considers "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. The government has identified two primary interests in support of unlimited mandatory detention: (1) ensuring the noncitizen's appearance at proceedings, and (2) protecting the community from noncitizens who have been involved in crimes that Congress has determined differentiate them from others. These interests are legitimate and their importance well-established. See Demore, 538 U.S. at 518–21, 527–28 (noting that section 1226(c) detention serves these dual purposes).

The government contends that these concerns persist unaltered until the noncitizen's removal proceedings are complete. But the additional procedural safeguards we would allow here under *Mathews* do nothing to undercut those interests. At any ordered bond hearing, the IJ would assess on an individualized basis whether the noncitizen presents a flight risk or a danger to the community, as IJs routinely do for other noncitizen detainees. *See, e.g.,* 8 U.S.C. § 1226(a). And while the government's legitimate interests justify a relatively short-term deprivation of liberty, *Demore*, 538 U.S. at 513, the balance of interests shifts as the noncitizen's detention is prolonged without any particularized assessment of need.

Just as in *Velasco Lopez*, here, too, "the Government has not articulated an interest in the prolonged detention of noncitizens who are neither dangerous nor a

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risk of flight." 978 F.3d at 854. To require that the Government justify continued detention "promotes the Government's interest—one we believe to be paramount—in minimizing the enormous impact of incarceration in cases where it serves no purpose." *Id.* Where the noncitizen poses no danger and is not a flight risk, all the government does in requiring detention is "separate[ ] families and remove[ ] from the community breadwinners, caregivers, parents, siblings and employees." *Id.*at 855; *see also Rosales-Mireles v. United States*, 585 U.S. 129, 139 (2018) (observing that "any amount of actual jail time ... has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration" (internal quotation marks and alterations omitted)); *Mathews*, 424 U.S. at 347 (instructing that "the public interest" drives analysis of the third factor).

Both cases here illustrate this effect. Black was separated from his family, who relied on him as the sole income provider. G.M. lived peacefully with his mother, assisting with her medical needs while helping care for his two sons. By detaining them for many months without an individualized assessment, the government eliminated vital support for Petitioners' families and, potentially, served no public interest.

The government also argues that the "fiscal and administrative burdens" of additional bond hearings would strain the immigration adjudication system yet provide little additional value. But just as the "burdens" argument failed to convince us in *Velasco Lopez*, we are not convinced here. Certainly, having to do something instead of nothing imposes an administrative and fiscal burden of some kind. But the Department of Justice reported an average cost of detaining noncitizens, in 2019, of $88.19 per prisoner per day. Other estimates have placed the cost as high as $134 per day. See *Velasco Lopez*, 978 F.3d at 854 n.11 (citing Dep't of Homeland Security, U.S. Immigration and Customs Enforcement Budget Overview 14 (2018)). So, retaining and housing detainees imposes substantial costs as well. And, as far as we can tell, ICE may readily access the records of other law enforcement agencies for information bearing on its case for detention where necessary. *See* 8 U.S.C. § 1229a(c)(3)(B) (listing the various types of records that the government may reference in proving a criminal conviction for removal proceedings); *Velasco Lopez*, 978 F.3d at 853, 855 (observing that the government has "computerized access to numerous databases and to information collected by DHS, DOJ, and the FBI, as well as information in the hands of state and local authorities," and, for information not already at its fingertips, "broad regulatory authority to obtain it"). We expect that the additional resources that the government will need to expend to justify continued detention at bond hearings will be minimal—and will likely be outweighed by costs saved by reducing unnecessary detention. The government has therefore not substantiated its administrative burden argument sufficiently for it to weigh much against Petitioners' liberty interests.

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For these reasons, we conclude that this third factor, too, favors Petitioners.

* * *

Thus, applying the *Mathews* factors, we conclude that due process entitled Black and G.M. to individualized bond hearings by an IJ once their detentions became unreasonably prolonged.

IV. In the hearing it required for Black, the district court properly placed the burden on the government to justify Black's continued detention by clear and convincing evidence and directed the IJ to consider Black's ability to pay and alternatives to detention.

In Black's case, in addition to ordering a bond hearing, the district court held that "[t]he burden at the bond hearing is on the Government to justify by clear and convincing evidence that Petitioner poses a risk of flight or a danger to the community," and that "the IJ must ... consider Petitioner's ability to pay and the availability of alternative means of assuring his appearance." *Black*, 2020 WL 4260994, at *9. The government challenges each of these rulings, and we now address them.

In this, the *Mathews* factors again serve as our guide. Our analysis above of the first and third factors applies with equal force to these questions. We elaborate briefly on the second *Mathews* factor—the risk of erroneous deprivation and the probable value of additional procedural safeguards—in evaluating the specific procedures that will be required at Black's bond hearing, should one again be needed. *Mathews*, 424 U.S. at 335. We conclude that the district court properly directed the government to justify Black's continued detention by clear and convincing evidence and the IJ to consider both Black's ability to pay and any alternatives to detention.

Notes and Questions:

1. **Constitutional rather than Statutory Analysis.** How does the Second Circuit opinion distinguish its reasoning from the refusal to find a right to a bond hearing in *Jennings* or *Demore* earlier Supreme Court decisions? In FN 22 we omitted the opinion writes: "*Demore* ruled on a due process challenge to the facial constitutionality of section 1226(c); *Zadvydas* and *Jennings* were decided on statutory grounds

2. **Avoiding Constitutional Issues?** Note how carefully the opinion states that neither of those cases reached the full due process issue involving the prolonged detention of noncitizens. Would this reasoning also apply to noncitizens who had not acquired lawful permanent resident status?

3. **Costs of Detention.** How important is the factual point of the very high costs for the government of immigration detention. The opinion quotes this data: "the Department of

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Justice reported an average cost of detaining noncitizens, in 2019, of $88.19 per prisoner per day. Other estimates have placed the cost as high as $134 per day." One of the critiques of the older Supreme Court cases is that the government may have provided erroneous or misleading data about the average length of detention. In a footnote we omitted the Second Circuit writes: It appears that in Demore the government incorrectly informed the Court and that "[d]etention normally lasts twice as long as the Government then said it did." *Jennings*, 583 U.S. at 343(Breyer, J., dissenting); *see also* Letter from Ian Heath Gershengorn, Acting Solicitor Gen., to Scott S. Harris, Clerk, Supreme Ct. of the U.S. at 1 (Aug. 26, 2016), available at https://on.wsj.com/2sUWIGk [https://perma.cc/U3KR-C56W] (letter "to correct and clarify statements the government made in its submissions in *Demore v. Kim* ... which this Court relied upon in its opinion"). FN 14 in full opinion.

4. **Other Circuits and Bond.** As noted in *Black*, the Ninth Circuit remanded *Jennings* to the District Court after the Supreme Court vacated its ruling that due process required a bond hearing. The First Circuit has required individual hearings. *See Hernandez-Lara v. Lyons*, 10 F.4th 19, 27–28, 41 (1st Cir. 2021) but the Fourth Circuit rejected the argument, *see Miranda v. Garland*, 34 F.4th 338, 358 (4th Cir. 2022) (oncluding that that due process did not require additional procedural protections).

   Because the law of the circuit can vary, the power of the DHS to select the physical place of detention may shape the due process rights of the individual.

5. **Release.** Counsel for Mr. Black and Mr. G.M. both reported in August of 2024 that both remain free of detention pending the resolution of their appeals. Mr. Black did have to post a $15,000 bond.

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]:

Flores continues to be litigated despite the government adopting final regulations that the federal government argued were sufficient to protect the interest of children in DHS or Health and Human Services (HHS) custody. The most recent order by the Central District of California Federal Judge Gee reduced the some of the obligations of the HHS but allows continued monitoring of ICE and CBP. This order was issue on June 28, 2024. *See Flores v. Garland,* Case No. CV 85-4544-DMG (AGRx), 2024 WL 3467715 (C.D. Cal. June 28, 2024).

Earlier this year, on April 3, 2024, U.S. District Judge Dolly M. Gee issued an order granting in part the plaintiffs' motion to enforce the Flores Settlement Agreement, concluding that the conditions at the open-air detention sites (OADS) along the California-Mexico border violated the agreement.

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The court found that the conditions do not meet the "safe and sanitary" standard as required by the agreement, that the defendants were not providing adequate food and water to the detained children, and that CBP had not been processing class members as expeditiously as possible. The court ordered DHS to expeditiously process all class members in their custody and to cease directing minors to OADS or holding minors in OADS, except for the amount of time DHS reasonably requires preparing the minor and/or actively arrange for transport of the minor to a more suitable facility.

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*, 596 U.S. 328 (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 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.

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While the *Patel* case ruled that judicial review was not possible, in 2024 that the Justices preserved judicial review. The distinctions require close reading of the statutory language and the opinions to understand why review is preserved.

Wilkinson v. Garland,

601 U.S. 209 (2024)

In a 6-3 decision issued in March 2024, the Supreme Court held the Third Circuit erred in holding that it lacked jurisdiction to review the IJ's determination of eligibility for relief from removal. *Wilkinson v. Garland,* 601 U.S. 209 (2024). In this case, Wilkinson was arrested and detained by ICE. He had remained in the United States beyond his authorized tourist status and had met the ten years of continuous physical residence requirement of the cancellation of removal statute. INA § 240A(b); 8 U.S.C. § 1229b(b)(1)(D). The statute requires that the applicant prove that removal would result in "exceptional and extremely unusual hardship to [the noncitizen's] spouse, parent, or child". He argued that his removal would cause exceptional and extremely unusual hardship to his U. S. citizen son, who suffers from a serious medical condition and relies on Wilkinson for emotional and financial support. His petition was denied, and when he asked for review, the Third Circuit stated that it lacked jurisdiction to review the determination, by the IJ and BIA which found that the Petitioner did not reach the level of proof necessary to establish exceptional and extremely unusual hardship.

In an opinion written by Justice Sotomayor's, the Court found that determining as a matter of law what evidence establishes hardships is a "questions of law." "The application of a statutory legal standard (like the exceptional and extremely unusual hardship standard) to an established set of facts is a quintessential mixed question of law and fact". The majority rejected the Government's argument that "questions of law" referred only to mixed questions that are primarily legal rather than primarily factual" *Id.*

In the Dissent authored by Chief Justice Roberts, the dissenters argue that the Court read the language of the prior cases and INA § 242, "as broadly as possible," indeed "to the outer limits of its possible reach". 601 U.S. at __.

For more on Cancellation of Removal see chapter 7 of this text.

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.

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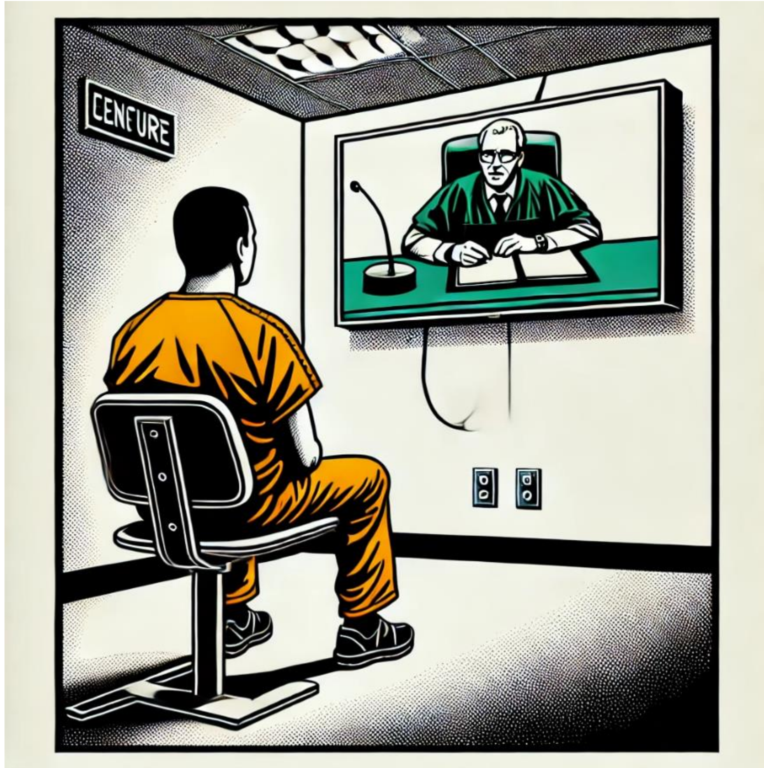

Picture below generated with AI by Professor Benson. Some estimates that over 45% of all removal hearings are conducted over video.

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. Alleman-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. 543 (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. 573 (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/

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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.

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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. A similar bill was reintroduced by Congressmember Logren in 2024. The immigration judges would serve terms of 15 years. See H.R. 7724 introduced March 19, 2024. The bill is entitled "Real Courts, Rule of Law."

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*.

Perhaps the legislation that came closest to passing was a Senate bill authorized by a bipartisan group of Senators. This bill had complex procedures for streamlining adjudication of asylum claims and also increased funding for border policiesy. *See* Senate Bill S. 4361 Border Act of 2024. The bill failed to garner sufficient votes to allow it to move beyond a procedural vote.

Each political party blames the other for failure to pass the immigration bills. While the Bill was drafted by a bipartisan group of Senators, candidate Trump, the former President, apparently urged the Republican leadership to kill the bill.

For a political analysis of why this $118 Billion dollar bill failed read:

From *the New York Times:* https://www.nytimes.com/2024/05/23/us/politics/border-deal-senate-democrats.html

An analysis of the bill by the American Immigration Council.
https://www.americanimmigrationcouncil.org/research/analysis-senate-border-bill

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From the Heritage Foundation   A disaster.   https://www.heritage.org/homeland-security/report/the-senate-border-bill-disaster-border-security

From Politico   It's All Political https://www.politico.com/newsletters/inside-congress/2024/05/20/senate-becomes-ground-zero-for-border-politics-00159018

End Chapter 6.

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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

There is another form of cancellation for people who qualify under the Nicaraguan Adjustment and Central American Relief Act (NACARA) that is not discussed here.

Precedent decision *Matter of J-J-G* (BIA 2020) on proving extreme and exceptional hardship.

Wilkinson v. Garland, 601 U.S. 209 (2024) preserving the ability to seek judicial review of the mixed issues of law and fact presented in cancellation cases.

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.

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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).

Picture generated with AI by Professor Benson

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 hear 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.

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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[20] 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

[20] 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.)

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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.

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.

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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.

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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

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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))[.]

In the spring of 2024, the Supreme Court affirmed the ability of people challenging the BIA denial of cancellation to seek judicial review of the mixed issues of law and fact presented in the cases. Justice Sotomayor writing for the majority concluded that in the Third Circuit Court of Appeals was incorrect in reading the INA limitations on judicial review to apply to every aspect of a challenge to the denial of cancellation.

***Wilkinson v. Garland*,**
601 U.S. 209 (2024)

Sotomayor
***

B

Wilkinson does not dispute that [INA § 242(a)(2)(B)(i);] §1252(a)(2)(B)(i) generally strips courts of jurisdiction to review cancellation-of-removal decisions. He argues, instead, that §1252(a)(2)(D) restores jurisdiction in this case because the threshold question whether a noncitizen is statutorily eligible for cancellation of removal requires a court to assess whether an IJ correctly applied the statutory standard to a given set of facts. This Court agrees that the application of the statutory "exceptional and extremely unusual hardship" standard to a given set of facts presents a mixed question of law and fact. *Guerrero-Lasprilla* compels this conclusion.

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Guerrero-Lasprilla held that "the statutory term 'questions of law'" in §1252(a)(2)(D) "includes the application of a legal standard to established facts." 589 U. S., at 234. That term included the application of the due diligence standard for equitable tolling to a given set of facts. Similarly, the "exceptional and extremely unusual hardship" standard in §1229b(b)(1)(D) is a legal standard that an IJ applies to facts. The standard may require an IJ to closely examine and weigh a set of established facts, but it is not a factual inquiry. It is, inescapably, a mixed question of law and fact.

Mixed questions "are not all alike." *** A mixed question may require "primarily legal or factual work." 888It may "require courts to expound on the law . . . by amplifying or elaborating on a broad legal standard." *Ibid.* Or it may "immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence." *** That a mixed question requires a court to immerse itself in facts does not transform the question into one of fact. It simply suggests a more deferential standard of review.

As interpreted by the BIA, the application of the "exceptional and extremely unusual hardship" standard requires an IJ to evaluate a number of factors in determining whether any hardship to a U. S.-citizen or permanent-resident family member is "substantially different from, or beyond, that which would normally be expected from the deportation" of a "close family membe[r]." *Monreal-Aguinaga*, 23 I. & N. Dec., at 65. That application concededly requires a close examination of the facts. Yet that was also true of the due diligence standard in *Guerrero-Lasprilla*, which required a court to evaluate whether a noncitizen was adequately conscientious in his pursuit of a filing deadline. A mixed question that requires close engagement with the facts is still a mixed question, and it is therefore a "questio[n] of law" that is reviewable under §1252(a)(2)(D).

Under *Patel*, of course, a court is still without jurisdiction to review a factual question raised in an application for discretionary relief. As in *Patel*, that would include the IJ's underlying factual determination that Wilkinson was credible, or the finding that M. had a serious medical condition. When an IJ weighs those found facts and applies the "exceptional and extremely unusual hardship" standard, however, the result is a mixed question of law and fact that is reviewable under § 1252(a)(2)(D).

*** end case

The Court remanded to the Third Circuit. In the past few months many of the circuit courts of appeals have revisited review of cancellation of removal. In all, the court affirmed the findings that the hardship was not sever enough. In some, where the IJ had given as an alternative basis, that the judge would deny the application as a matter of discussion, the Courts of Appeals have said that they have no jurisdiction to review that determination.In two cases decided after this decision, the 7th and the 8th Circuit refused to reverse the denial. See *Santiago v. Lopez,* (7th Cir. 2024). Accord the 4th Circuit in *Garcia-Bautista v. Garland*, 2024 U.S. App. Lexis 13272 (4th Cir 2024)(no review of discretionary denial). *See Gomez-Vargas v. Garland*, 2024 U.S. App. Lexis 12785 (5th Cir. 2024)(denying relief for a man who entered the U.S. in 1989, had three U.S. citizen children and had no convictions. He argued that State Department warnings about

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the dangers of travel to Mexico would make it untenable for his children to visit, including a daughter who had joined the U.S. military. Perhaps Mr. Gomez-Vargas can seek to obtain parole in place for a parent of a U.S. citizen on active military duty and then apply to reopen his removal case and adjust status as a parent of a U.S. citizens over the age of 21.)

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. 224 (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. [Not the identical Wilkinson in the *Wilkinson v. Garland*].

5. Discretion kills judicial review again. If an IJ or the BIA wishes to insulate a denial of cancellation of removal the best way to do so would be to state that the denial is being made as an exercise of discretion. In a recent case before the 7th Circuit, *Ndlova v. Garlad,* 99 F.4th 997(7th Cir. 2024) the circuit court ruled it had no jurisdiction to review the discretionary decision. While the applicant had convictions that did not bar his cancellation (DUI convictions and charges of battery dismissed), because the IJ said the denial was discretion, the court found they had no jurisdiction to review the matter.

6. Driving Under the Influence. While many people in the United States do not treat a DUI arrest or traffic vviolation or conviction as an automatically serious offense, many in the immigration agencies and Congress weigh these arrests and convictions very heavily. Hearings were held in the House of Representatives to add a DUI conviction as a removable offense.
PagePage 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

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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.

***

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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. <u>The Motion to Remand to the BIA is denied</u>.

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. <u>"Connect to" is Unambiguous, and the BIA's Construction of the Term is at Odds with its Unambiguous Meaning.</u>

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

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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

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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 has been 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). As discussed above the Supreme Court confirmed that where the decisions is based on the application of the law to facts, judicial review of the legal conclusion remains. *See Wilkinson v. Garland,* 601 U.S. 209 (2024). But as noted, several courts have found no jurisdiction if the Immigration Judge based a denial purely on discretion.

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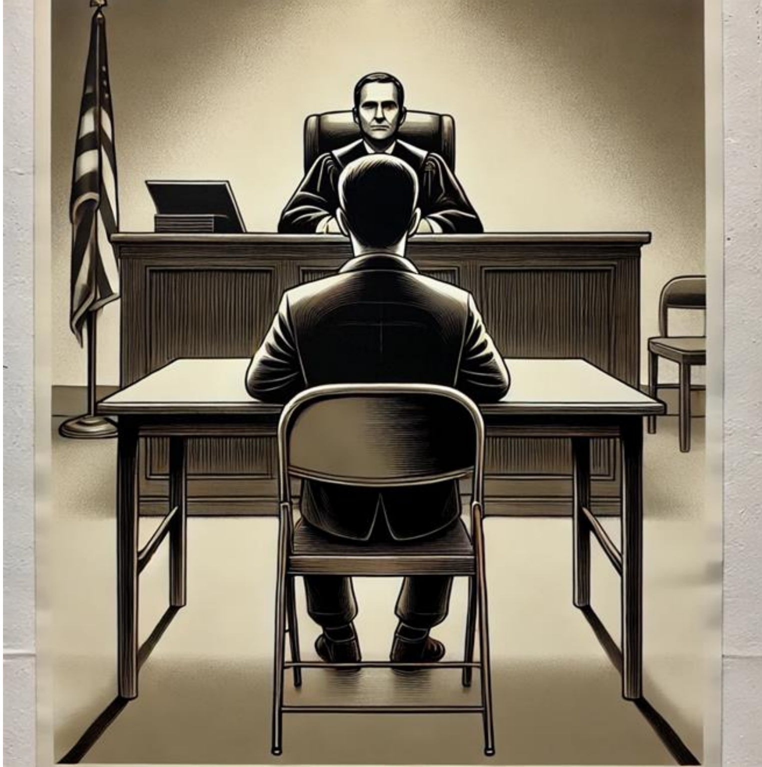
Image generated by AI by Professor Benson—facing removal.



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

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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

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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.

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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.

In 2024, the EOIR codified many of the rules and procedures that allow greater grants of administrative closure and even termination. See Final Rule: "Efficient Case and Docket Management in Immigration Proceedings," 88 **Fed. Reg.** 46742 (May 29, 2024) effective July 29, 2024. Amending 8 C.F.R. §1003 et seq.

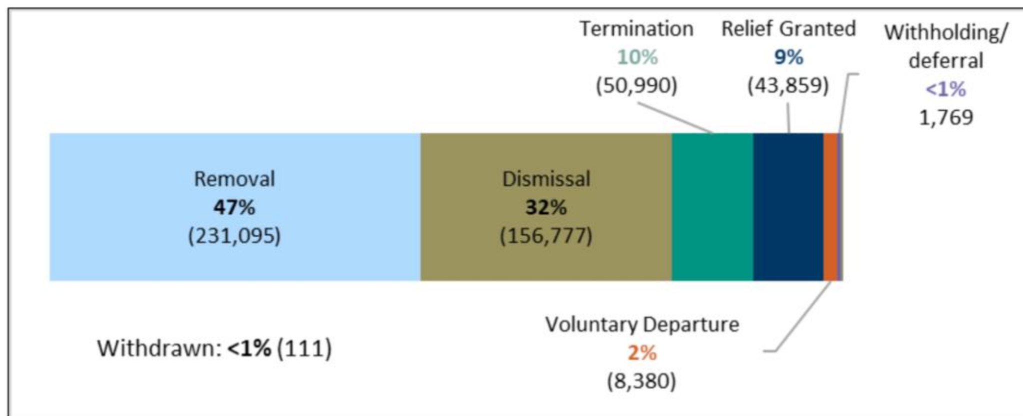
Some data on Prosecutorial Discretion in the context of removal orders from FY 2023

EOIR DATA	Prosecutorial Discretion	Other Closure	Dismissal or Termination
756,815 completions	3,063	34,669	226,193
251,281 removal orders	Not all cases coded as P.D.	Not defined	

Source TRAC immigration tools

Unfortunately, EOIR is not reporting data on the grants of other applications for reief separately. And the TRAC numbers do not match those of a recent Congressional Research Service report. See https://crsreports.congress.gov/product/pdf/IN/IN12318

Figure 1. Removal Case Outcomes, FY2023



Source: EOIR, "FY2023 Decision Outcomes," Adjudication Statistics, October 2023.

Notes: N = 492,981. Includes outcomes for removal proceedings and *deportation and exclusion* proceedings, the precursor to removal proceedings.

Screenshot from CRS source above.

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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.

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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 2024, the litigation over the validity of the DACA rule is not over. The validity of the Biden Administration regulations is still pending before the 5th Circuit Court of Appeals. 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 for parents. 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.

End Chapter 7.

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Chapter 8: Asylum and Relief for People Seeking Refuge

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. This chapter does not repeat the discussion of the rules in operation at the Southwest border. Please see chapter 2 supplement for more on current rules and procedures.

This supplement does provide a reminder that asylum eligibility and the burden of proof is altered due to the May 2023 Circumvention of Legal Pathways regulations and the interim final rule issued in June of 2024.

Two circuit court decisions are added. *Singh v. Garland* (2d Cir. 2021) (discussing the element of internal relocation) and *Rodriguez-Zuniga v. Garland* (9th Cir. 2023). This case has a lengthy discussion of proving the nexus between the persecution and a protected ground. The majority and dissent disagree about what the statutes required.

A chart comparing asylum process depending on the location of the asylum seeker and the date of entry. The new regulations will seriously impact people's eligibility for asylum, the burden of proof and the greater imposition of regulatory bars to asylum.

We have removed a longer discussion of the EOIR Asylum Merits Interview Review Process as limited resources in the Asylum Office have made the procedure rare.

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.

The critical importance of asylum seekers being able to seek a continuance in immigration court both due to prioritized dockets and the inability to find low cost or free counsel in many courts.

And we have created some charts from recent DHS asylum processing data. And from a critique written by the DHS Office of Inspector General published in July of 2024.

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Updates begin next page

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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 2022, 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 this 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/

In Fiscal Year 2024 President Biden set the ceiling once again at 125,000 and kept the same exception. https://www.whitehouse.gov/briefing-room/presidential-actions/2023/09/29/memorandum-on-presidential-determination-on-refugee-admissions-for-fiscal-year-2024/

Page 820 (§ 8.01[B]): Add new section before **§ 8.02** with the following information:

Asylum Merits Interviews New Procedures

In past updates we provided a longer description of this new process. However, due to the high workloads of the asylum corps, the new procedures are being used very rarely. In sum, the new procedures allow 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

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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.

The DHS issued 11 months of data revealing how the Asylum Merits Interview (AMI) and Review Process was proceeding. No data could be found to update this chart for FY 24. It is likely that due to a lack of resources the USCIS is not using the AMI procedure
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,

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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 of Asylum Merits Interview Process

The 2022 asylum merits 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/.

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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, the 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.

As you saw in Chapter Two, the initial claim for asylum may occur before an asylum officer as part of a credible fear or reasonable fear interview. Here are reported outcomes for 2024 through June.

The Asylum office also shared this outcome data for FY 24 to June:

FY 2024 to June	Total	Positive	Negative	Admin. Closed or Dismissed
CREDIBLE FEAR	144,786	67,851	55,429	38,930
Percentage Outcomes	100%	47%	38%	27%
REASONABLE FEAR	12,868	3,971	5,291	3,221
Percentage Outcomes		31%	42%	25%

But due to the limits of the Asylum Corps resources, DHS instead released people into the interior and issued a Notice to Appear with the immigration courts. Essentially, putting people into the regular removal hearing process. The Asylum Corps reported in July that it has a current compliment of 824 Officers with 250 of these in training. *See Response of USCIS page 21* to Office of Inspector General Report, OIG-24-36.

Notes and Questions: Use the chart that appears below to guide your advice about the new rules and regulations.

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

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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.

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Chart Next Page

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

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[21] 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[22]	"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	Most cases appear to be regular removal if a person is released with a NTA after a CBP one interview.	Option 1: confirm standard met and put into regular removal However, if person cannot establish exceptions to irregular entry in the removal hearing, asylum is barred and only withholding and CAT may be granted.	Grant = asylee status	Grant, ICE may appeal to the BIA
Option 2: Only hear as CFI, refused allows limited IJ review--	If regular removal, the person has full removal hearings Same as column one	Option 2: refuse and allow limited IJ review of "substantial probability" of persecution 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	BIA review if treated as § 240	Possibility of BIA review	BIA review	BIA review
No judicial review either under § 242 or habeas	Argue for judicial review if case was regular § 240	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.

explains the major steps in an asylum adjudication. Read the chart vertically.

[21] This is a very common problem in 2023. EOIR has exclusive jurisdiction if a NTA has been issued even if not lodged with the EOIR according to the USCIS. Filing online with the USCIS Asylum Office should preserve timing of filing but it is the burden of the applicant to make sure application is also filed with the EOIR and ICE. Pro Se respondents cannot use electronic court filing system but my submit at court window.

[22] It appears that most people entering with the CBP One application are being assigned to regular § 240 removal hearings.

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Litigation Continues
As noted in the update to Chapter 2, several lawsuits challenged the Circumventing Lawful Pathway Rules. While an initial injunction was issue, the Ninth Circuit Court of Appeals stayed the injunction allowing the rules to take effect. In February of 2024, the federal government and the plaintiffs ask for a stay of the appeal of the lower court injunction as the parties discuss settlement. As of July of 2024, settlement discussions continue.

Rules After June 4, 2024
The Biden administration issued interim final rules in June of 2024. These rules apply when apprehensions exceed thresholds of approximately 5,000 people a day at the SW border. The rules put more of the burden on the individual to articulate a fear of return and allow more refusals at the border. See discussion in Chapter 2. It is too early to know how these rules will impact asylum adjudications, but several nonprofits are trying to interview people at the SW border and to obtain information about treatment by DHS components. See Chapter 2 supplement for more.

Page 821 (§ 8.02): in chart in the text, correct BIS to "BIA"

Page 847: Add a new Section **[C(a)] Internal Relocation**

Page 828, Note 3 refers to internal relocation. This subtle component of asylum law can present a considerable hurdle to an applicant. Walking through the statutory language found in 8 C.FR § 1208.13, an applicant may meet their burden to establish classification as a refugee by either showing that they were persecuted in the past, 8 C.F.R. 1208.13(b)(1), or that there is a "well-founded fear" that they would be persecuted in the future if they returned to their country of nationality. 8 C.F.R. § 1208.13(b)(2).

However, even where an applicant **has shown past persecution**, an adjudicator may exercise discretion to refer an asylum application to immigration court (in the case of an asylum officer) or deny an asylum application (in the case of an Immigration Judge) if the applicant could relocate within their country of origin, and it is reasonable for them to do so. 8 CFR § 1208.13(b)(1)(i)(B).

While the internal relocation factor is discretionary with past persecution claims, it is part of the core analysis of future fear claims. 8 C.F.R. §1208.13(b)(2)(ii) defeats **a well-founded fear of future persecution** "if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality… if under all the circumstances it would be reasonable to expect the applicant to do so."

Who bears the burden to show whether this relocation is reasonable or unreasonable? In the case of past persecution, the government has the burden of showing that an applicant could relocate and that it is reasonable for them to do so. 8 C.F.R. § 1208.13(b)(1)(ii). However, in the case of future fear, the applicant bears the burden of showing that it would be unreasonable to relocate. 8 C.F.R. § 1208.13(b)(3)(i) (discussed further below).

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Note the considerable burden-shifting at work here: where an applicant has shown past persecution, the applicant is entitled to a presumption of future fear which may be rebutted by finding that the applicant can reasonably relocate. If this presumption is rebutted, the adjudicator may exercise discretion to refer or deny. However, if the applicant has a future fear claim, the applicant also has the burden to show that internal relocation is *not* reasonable.

But when is it even reasonable to expect someone who has shown – as a matter of fact – that they have been or will be persecuted? Keep an eye on these shifty presumptions and burdens in 8 C.F.R. § 1208.13(b)(3), reproduced below.

> (3) ***Reasonableness of internal relocation.*** For purposes of determinations under paragraphs (b)(1)(i) and (ii) and (b)(2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, numerosity, and reach of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for asylum.
>
> (i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.
>
> (ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the Department of Homeland Security establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.
>
> (iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.
>
> (iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors—including persecutors who are gang members, officials acting outside their official capacity, family members who are not themselves government officials, or neighbors who are not themselves government officials—shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

Read 8 C.F.R. §§1208.13(a) and 1208.13(b) and consider how fully cognizable asylum claims can still fail on relocation. Keep these moving parts in mind as you read the following case.

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Singh v. Garland

11 F.4th 106 (2d Cir. 2021)

Jagdeep Singh petitions for review of a decision of the Board of Immigration Appeals affirming an immigration judge's denial of his application for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). The agency found that Singh suffered persecution when members of a rival political party assaulted him after he refused to leave his own party. But the agency denied his application for relief because Singh could safely relocate within India. The issue before us is whether the agency erred in finding that Singh could safely relocate within India to avoid future persecution or torture and that it would be reasonable to expect him to do so. We conclude that the agency did not err. Accordingly, we deny the petition for review.

BACKGROUND

Singh is a citizen of India who arrived in Hildago, Texas, on or about November 5, 2014, without a valid visa or entry document. In December 2014, Singh expressed a fear of returning to India and was placed in removal proceedings. The Notice to Appear charged Singh with being removable under [INA § 212(a)(7)(A)(i)(I);] 8 U.S.C. § 1182(a)(7)(A)(i)(I) as an alien who arrived in the United Sates without valid entry documents. Singh was released from the custody of the Department of Homeland Security ("DHS") on bond.

I

Singh appeared before an immigration judge ("IJ") in Los Fresnos, Texas, on December 14, 2014. He admitted the allegations in the Notice to Appear, conceding his removability, and filed the application for asylum. The IJ granted a change of venue to New York City based on Singh's place of residence.

On November 21, 2017, the IJ in New York held a hearing on Singh's application for asylum, withholding of removal, and protection under the CAT. At the hearing, Singh testified that he left India because he feared being harmed by members of a rival political party. He said that he joined the Shiromani Akali Dal Amritsar ("Akali Dal Mann") political party in India in 2013 and that he worked for the party in the Hoshiarpur district in the state of Punjab by serving food and setting up tents at events. He explained that the party supports the establishment of an independent state of Khalistan and the release of Sikh prisoners from Indian jails. He further stated that he had no leadership role in the party, that he never engaged in political activity outside of Hoshiarpur, and that members of other parties realized he was a member of Akali Dal Mann when they saw him putting up flyers for an event. He also testified that he did not know any fellow party members who were persecuted within Punjab other than himself.

Singh testified that in July 2014 while he was attending one of his party's rallies, he received a call on his cell phone from an individual claiming to be a member of the rival Shiromani Akali Dal Badal ("Akali Dal Badal") political party. The caller purportedly told Singh that he should work for the Akali Dal Badal "and sell drugs" if he wanted to avoid being killed. Singh said that he reported the conversation to the police near the rally but that the police officers responded that

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they could not respond to the threat because they were "working for the government" and could not "do anything about it."

Singh also testified that in August 2014 he was approached in person by five individuals claiming to be members of the Akali Dal Badal who similarly told him that "we want you to come and sell drugs for us and work for our party." When Singh refused to do that, the five individuals beat him until he lost consciousness. Singh claimed that while he was unconscious, a passerby recognized him and took him home. After Singh woke up at home, his father took him to the hospital where he received intravenous fluid and "some ointment to put ... on my body." He was in the hospital for six or seven hours. Singh said that he never reported the beating to the police. He said that his father advised him not to contact the police because the police officers had not responded to the threatening phone call he had previously reported. Singh said he was "fearful for my life."

Singh said that he did not move to another part of India to avoid the rival party members because, when he rented a home or applied for a job, he would need to provide identification. If he showed his identification to anyone, he said, "[i]t's a very strong possibility that ... I would [be] tracked down and I would have been killed." Counsel for the government asked Singh how someone would know from his identification card—which contained his name, address, and birthdate—that he supported the Akali Dal Mann. Singh responded that "[t]his is how it is all over India. That's how they trace people and they kill them." He also suggested that members of an opposing party across India would recognize him because of his work hanging up posters and flyers in Hoshiarpur.

After considering Singh's testimony and the documentary evidence in the record describing political and social conditions in India, the IJ issued a decision denying Singh asylum, withholding of removal, and protection under the CAT. The IJ found that the "mistreatment" of Singh by "Badal party members" rose "to the level of persecution and that the assailants were motivated by [Singh's] political opinion." Because the IJ found that Singh had been persecuted in the past, the IJ applied a rebuttable presumption that Singh had a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b)(1). The IJ concluded that the government had rebutted that presumption, however, by showing that Singh could safely relocate within India to avoid further mistreatment. *See id.* § 1208.13(b)(1)(i)(B).

Regarding Singh's ability to relocate, the IJ observed that according to a State Department report, Indian law provides for freedom of movement and that the government generally respects that right. The IJ also examined other reports showing that police forces in each Indian state do not routinely communicate about the relocation of citizens. The IJ relied on a report of the Canadian Refugee Board stating that "several sources indicate that Sikhs do not face difficulties relocating to other areas of India." The IJ also noted that other reports indicated that "India is a country of some 1.2 billion people and that there are sizable Sikh populations through[out] the country."

In response to Singh's claim that he would be discovered in a different region of India on account of his identification card, the IJ observed that a report by the United Kingdom's Home Office explained that India lacks a national police force and a nationwide crime database. The Home Office found no "evidence that there is a central registration system in place which would enable

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the police to check the whereabouts of inhabitants in their own state, let alone in any other states or unions within the country." The IJ also described the Canadian Refugee Board's finding that "there is little interstate police communication [in India] except for cases of major crimes like smuggling, terrorism, and some high profile organized crime." Based on this evidence, the IJ concluded that Singh "would be difficult to locate outside of Punjab even if Punjabi police were seeking him." Moreover, the IJ noted that Singh did not even claim to have been targeted by Punjabi police but only by supporters of a rival political party who threatened him over the phone and assaulted him once. The IJ found that even though local police did not respond to the phone threats Singh reported, there was nothing in the record to show that the police were other than merely indifferent, let alone that the police would seek out Singh in another state or assist others in doing so.

Noting that Singh did not allege to be a high-profile member of the Akali Dal Mann, the IJ also relied on a report of the Library of Congress indicating that "only hardcore militants are of interest to Central Indian authorities" and that one does not qualify as a high-profile militant merely by holding pro-Khalistan views. The IJ also observed that "neither the 2016 U.S. Department of State Human Rights Report for India nor the most recent International Religious Freedom Report mentions the persecution of Shiromani Akali Dal Amritsar members in Punjab or elsewhere in India."

II

[Singh appealed the decision to the BIA, arguing that it was not reasonable for him to relocate given his political activity and India's social obstacles such as "unemployment, poverty, corruption, and illness." The BIA dismissed the appeal, agreeing that Singh had suffered past persecution and that the government had shown that Singh could safely relocate and that it was reasonable to do so.]

The BIA observed that the IJ properly shifted the burden to the government to demonstrate Singh's ability to relocate safely and that the government met that burden by a preponderance of the evidence. The BIA concluded that the record supported the IJ's findings that Indian law provides for freedom of movement and that there was no central registration system in India that would enable police to monitor the whereabouts of inhabitants throughout the country. The BIA also said the record supported the IJ's findings that there is no national police force in India, that police stations are unconnected, and that there is little communication between stations except in cases involving major crimes such as smuggling, terrorism, and organized crime. The BIA also found support in the record for the IJ's finding that Sikhs do not face difficulty relocating within India.

The BIA further concluded that the IJ properly found that Singh held no special position in the Akali Dal Mann and that his activities were limited to attending events and posting flyers. The BIA also found no error in the IJ's determination that only high-profile militants are of interest to Indian authorities and that "simply holding pro-Khalistan views would not make someone fit this description." The BIA also said the IJ properly found that the 2016 State Department report does not mention persecution of members of the Akali Dal Mann either in Punjab or elsewhere in

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India and that Singh did not know anyone else who had been persecuted for membership in that party.

In light of the record evidence, the BIA affirmed the IJ's denial of immigration relief. It explained that the IJ's findings "demonstrate that there are areas in India where [Singh] does not have a well-founded fear of persecution and these locations present circumstances that are substantially better than those giving rise to a well-founded fear of persecution on the basis of [his] claim," according to the BIA. Moreover, the IJ "permissibly relied on his findings concerning country conditions in determining that it would be reasonable for [Singh] to relocate there" and "properly evaluated the background evidence with respect to both [Singh's] Sikh faith and his membership in a political party."

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DISCUSSION

We have jurisdiction to review the decision of the BIA under 8 U.S.C. § 1252(a)(1), which authorizes judicial review of a final order of removal. When the decision of the BIA is consistent with the decision of the IJ, we may consider both decisions "for the sake of completeness."

In this context, Congress has specified that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). Accordingly, we review the agency's decision for "substantial evidence" and "must defer to the factfinder's findings based on 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" The scope of review "under the substantial evidence standard is exceedingly narrow, and we will uphold the BIA's decision unless the petitioner demonstrates that the record evidence was so compelling that no reasonable factfinder could fail to find him eligible for relief." By contrast, we review legal conclusions de novo.

[The Court goes on to distinguish the instant case from a recent case that altered the appropriate standard of review for credibility findings.]

I

Asylum is a discretionary form of relief that the Attorney General may grant to an applicant who qualifies as a refugee. 8 U.S.C. § 1158(b). To qualify as a refugee, an applicant must show that he or she is unable or unwilling to return to his or her country of nationality 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. 8 U.S.C. § 1101(a)(42).

An applicant who has established past persecution is "presumed to have a well-founded fear of persecution on the basis of the original claim." 8 C.F.R. § 1208.13(b)(1). That presumption will be overcome, and asylum accordingly will be denied, if (A) "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution," or (B) "[t]he applicant could avoid future persecution by relocating to another part of the applicant's country of nationality ... and under all the circumstances, it would be

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reasonable to expect the applicant to do so." *Id.* § 1208.13(b)(1)(A)-(B). When there has been a finding of past persecution, the government bears the burden of establishing, by a preponderance of the evidence, that an applicant could avoid persecution through internal relocation and that it would be reasonable to expect the applicant to do so. *Id.* § 1208.13(b)(1)(ii).

[The court's discussions of Withholding of Removal and CAT are omitted.]

II

***

Singh argues that the record demonstrates that he will face persecution even if he relocates within India. He points to country-conditions evidence showing various harms that have purportedly occurred in India: "corruption," "reports of political prisoners in certain states," "instances of censorship and harassment of media outlets," "[l]egal restrictions on religious conversion," and "discrimination based on religious affiliation, caste or tribe." He notes other country-conditions evidence suggesting that "[m]any police officers refuse to register crime complaints," "use illegal detention, torture, and ill treatment to punish criminals against whom they lack of time or inclination to build cases," and "arrest and detain individuals on false charges at the behest of powerful local figures or due to other forms of corruption."

This evidence, however, does not compel the conclusion that internal relocation would not avert future persecution. First, an applicant challenging a finding that internal relocation would avert future persecution—like all applicants challenging an adverse agency determination regarding future persecution or torture—cannot simply point to general country-conditions evidence without showing how that evidence compels the conclusion that a person in the applicant's "particular circumstances" would be unable to relocate to avoid persecution. General country-conditions evidence does not on its own compel the conclusion that an individual will be persecuted or that internal relocation is insufficient to avert persecution. Singh fails to show how the country-conditions evidence establishes that he—that is, a person in his particular circumstances—would be persecuted even after relocating internally. Instead, his argument suggests that living conditions generally throughout India are intolerable and amount to persecution. Asylum and other forms of immigration relief are individual remedies designed to avoid persecution inflicted on particular persons. General country-conditions evidence is insufficient to overcome an agency finding that a particular applicant would avoid future persecution through internal relocation.

Finally, Singh's evidence does not compel the conclusion that it would be unreasonable to expect him to relocate internally to avoid future persecution. Under the regulations in place at the time of Singh's proceedings, the agency determined the reasonableness of internal relocation by considering "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. § 1208.13(b)(3) (2017). The regulation provided that "[t]hose factors may, or may not, be relevant, depending on all the circumstances of the case,

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and are not necessarily determinative of whether it would be reasonable for the applicant to relocate." *Id.*

The agency's decision that it would be reasonable to expect Singh to relocate was supported by substantial evidence. The record contained evidence that there are 1.2 billion people, including 19 million Sikhs, living in India and that Indian citizens—Sikhs in particular—do not face difficulties relocating within the country. The record also reflected that there is no central countrywide registration system or nationwide police database that members of the Akali Dal Badal could use to track rivals and that only high-profile militants—not local party organizers such as Singh—are of interest to national authorities. As the IJ noted, there have been no recent reports of persecution against members of the Akali Dal Mann anywhere in India and Singh did not identify any, let alone enough to be arguably nationwide. Moreover, evidence of police abuse of prisoners was not material to the analysis because Singh did not claim to be a target of police or establish that he was likely to become a prisoner.

Singh additionally argues that it would not be reasonable for him to relocate because he was a farmer in Punjab and Sikhs cannot own land in the state of Gujarat, language barriers exist in some states, and unskilled Sikhs face difficulties finding employment. Singh does not provide evidence suggesting that such issues are widespread, and indeed not limited to a few Indian states. Moreover, these arguments are not compelling given that Singh was able to move to the United States and currently works in construction in New York City.

In the end, what we recognized fifteen years ago remains true today: An Indian citizen such as Singh "is unlikely to face persecution for his Sikh beliefs and his membership in Akali Dal Mann" and "any threat faced by [such an applicant] in India is not country-wide." *Singh v. BIA*, 435 F.3d 216, 219 (2d Cir. 2006). We hold again, on a current record, that these conclusions of the agency are supported by substantial evidence. The agency therefore did not err in deciding that, in this case, the government rebutted the presumption that Singh has a well-founded fear of persecution by showing that he could safely and reasonably relocate to avoid future persecution. *See* 8 C.F.R. § 1208.13(b)(1)(i)-(ii).

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CONCLUSION

"Asylum in the United States is not available to obviate relocation to sanctuary in one's own country." Here, the agency did not err in finding that Singh could safely and reasonably relocate within India to avoid future persecution or torture and that it would be reasonable to expect him to do so. We therefore **DENY** the petition for review. All pending motions and applications are **DENIED** and stays **VACATED**.

Notes & Questions

1. Here, the Second Circuit easily finds internal relocation in India is not only reasonable, but essentially practical. The opinion remarks that the language difficulties within India – however imposing they may be – are less imposing than the language difficulties between India

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and New York City. And the opinion states that freedom of movement within India is so accessible in part because the Indian state lacks central law enforcement or cross-state tracking. These very well may be relevant "under all the circumstances" as is required by 8 C.F.R. §1208.13, but what other factors could Singh have pointed to in order to show that it was unreasonable to relocate? Would the outcome have been different if Singh had tried to live in a different neighboring state and was persecuted again?

2. Would the same be conclusions be as reasonable with similar facts in a geographically smaller country like El Salvador or Albania? How about a country like Russia, with a far more capable state apparatus but equally vast geographic opportunities to relocate?

3. The Democratic Republic of Congo (DRC) has seen immense violence for nearly 30 years. In the early 2010s, armed conflict erupted and has remained at devastating levels for many complex reasons. The United Nations currently deploys roughly 14,000 peacekeepers to the country. United Nations Peacekeeping, MONUSCO Fact Sheet (accessed August 8, 2024) https://peacekeeping.un.org/en/mission/monusco. The United States Department of State's Human Rights Report for 2023 observed that "There were credible reports that armed [nonstate] groups and the [state security forces] perpetrated serious human rights abuses" in the DRC. 2023 Democratic Republic of the Congo 2023 Human Rights Report, U.S. Dep't of State (Apr. 22, 2024) (Section 1.i. at ¶ 1). However, the Armed Conflict Location & Event Data Project (ACLED) has observed that political violence is highly concentrated in the eastern portions of the country. Ladd Serwat, Democratic Republic of Congo: Rising Tensions with Rwanda Amid Escalating Violence and Upcoming Elections, ACLED (Feb. 8, 2023), https://acleddata.com/conflict-watchlist-2023/drc/. Said another way, the "geographic locus" of the persecution and "reach" of a persecutor could be dispositive for a DRC asylum applicant depending on who the persecutor is and what the protected ground is. 8 C.F.R. 1208.13(b)(3).

Review 8 C.F.R. 1208.13(b)(3) on pages 12-13 *supra*. How would you prepare for potential relocation obstacles while representing a client with a past persecution claim in an affirmative asylum application with USCIS? How would you prepare to address relocation burdens in litigation over a future fear claim in immigration court as an ICE attorney?

Photo Source: Jorkim Jotham Pituwa, Formation des FARDC à Bunia, MONUSCO Photos (Jul. 9, 2024), https://www.flickr.com/photos/monusco/53847125934/in/photostream/ (DRC Armed Forces (FARDC) train in Bunia in July 2024). Use with license after attribution.

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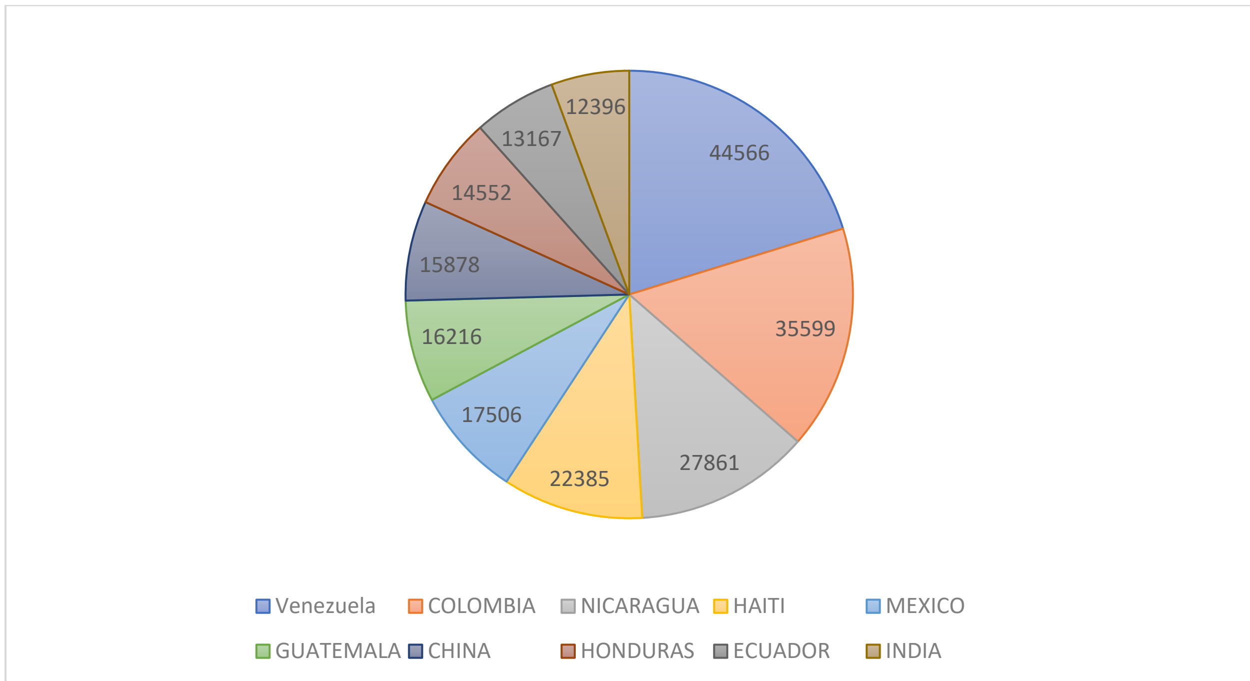
4. Chart depicting Affirmative Asylum Filings by Nationality for FY 24. Asylum Office Affirmative Applications by top ten nationalities in FY 2024 through June. In descending order by number.



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,

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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.

Despite the timeframe of 270 days, no such regulations have yet been produced. In January of 2024, Esperanza United requested an update on this rulemaking from DHS and DOJ. Executive Order 14010 - Sullivan, United States Customs and Immigration Service (Mar. 6, 2024) https://www.uscis.gov/records/electronic-reading-room (search "14010," select the "Correspondence regarding Executive Order directing…"). The response received indicated that "DHS and DOJ continue to work on addressing the membership in a particular social group" without any additional information. *Id.*

Page 857: Before §8.02[F], add §8.02[E]*[7] Economic Motivations as Non-Protected Grounds*

Persecution on imputed grounds is discussed on page 854. The inverse idea to the imputed ground is the idea that despite the inference of persecution on a protected ground, an actor may *not* perceive any protected grounds in an individual but nonetheless persecute them. Was the Russian opposition leader beaten by masked men because of the politician's political beliefs, or

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because the persecutors were robbing him? Was the Chinese priest's house raided by police because the persecutors believed they were Christian, or because the priest had been identified as a primary suspect in a car theft?

A common manifestation of this nexus issue is conflating protected grounds with so called 'economic motives' or 'common crime.' Put simply, economic motivations for persecuting an individual are not protected grounds. One tragic area where this has collateral impact is the context of gang violence.

RODRIGUEZ-ZUNIGA; Nelson Gabriel Tobar-Rodriguez, Petitioners,
v.
Merrick B. GARLAND, Attorney General, Respondent.
69 F.4th 1012 (9th Cir. 2023)

VANDYKE, Circuit Judge:

OPINION

Doris Amanda Rodriguez-Zuniga petitions for review of the decision of the Board of Immigration Appeals (BIA) dismissing her appeal from the removal order of the Immigration Judge (IJ). The heart of Rodriguez-Zuniga's petition is her fear that, because she experienced an attempted robbery in her native country, she will be subject to persecution in the future. But fear of generalized crime is not a sufficient basis for asylum or withholding of removal, nor do her other arguments show that she is entitled to relief. We have jurisdiction under [INA § 242;] 8 U.S.C. § 1252 and deny her petition.

I. BACKGROUND

In June 2016, Rodriguez-Zuniga and her son, Nelson Gabriel Tobar-Rodriguez, entered the United States without valid entry documents. They are both citizens and natives of Guatemala. Soon after, the United States initiated removal proceedings against Rodriguez-Zuniga. She was charged with being an "immigrant who, at the time of application for admission, [was] not in possession of a ... valid entry document."

Rodriguez-Zuniga conceded both the allegations against her and removability, but applied for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). She claimed that she was entitled to asylum because she "suffered past persecution and ha[d] a well-founded fear of future persecution based upon her political opinion and membership in a particular social group." Her purported political opinion was her "refusal to submit to violence by criminal groups/gangs." She claimed to be a member of three particular social groups: "Guatemalan families that lack an immediate family male protector," "Guatemalan women," and "immediate family members of Doris Amanda Rodriguez-Zuniga." She alleged she suffered past persecution generally because of the "bad state of gang affairs" in Guatemala and, more specifically, because a woman had attempted to rob her.

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Rodriguez-Zuniga also argued that she had a well-founded fear of future persecution because of her past persecution, the murder of her cousin and her cousin's child, and the generally "precarious current state of Guatemala." Rodriguez-Zuniga finally claimed that she was entitled to withholding of removal and CAT relief for the same reasons she was entitled to asylum.

At her hearing before the IJ, Rodriguez-Zuniga testified that she was afraid to return to Guatemala because a woman had attempted to rob her when she lived there. In March 2016, just a few months before she entered the United States, Rodriguez-Zuniga had gone to the bank to withdraw $150, money that her husband in the United States "had sent [her]." At that time, Rodriguez-Zuniga regularly received money from her husband. As she exited the bank, a woman threatened Rodriguez-Zuniga if she did not give her the money. Rodriguez-Zuniga believed the woman "belonged to a group of ... gangs or a group who harms people." The woman told Rodriguez-Zuniga that if she did not give her the money, she was going to hurt Rodriguez-Zuniga or her son. Rodriguez-Zuniga refused, and the woman told her that Rodriguez-Zuniga's "son was going to pay for it and that she was going to come and find [Rodriguez-Zuniga] again." The woman told Rodriguez-Zuniga that she targeted her because Rodriguez-Zuniga's "family was [in the United States] and [because she] had a lot of money that [she] could give them." Rodriguez-Zuniga never saw the woman again.

Rodriguez-Zuniga also told the IJ about her female cousin who had been killed by gangs when "she refused to give them money." Her cousin's son was also killed, but Rodriguez-Zuniga did not know whether it "was the gang members that killed him."

The IJ found that Rodriguez-Zuniga "testified credibly and accord[ed] her testimony full evidentiary weight," but denied relief. As for asylum and withholding, the IJ found that Rodriguez-Zuniga's past harms and fear of future harms lacked the requisite nexus to her statutorily protected grounds. The IJ rejected Rodriguez-Zuniga's proposed particular social group of "Guatemalan families that lack an immediate family male protector." The IJ found that Rodriguez-Zuniga's family was a particular social group because "family relationships are generally 'easily recognizable and understood by others to constitute social groups.' " The IJ also found that Guatemalan women were a particular social group because of the "high level of violence committed against Guatemalan women" and their "need [for] specialized protection" indicated they are viewed as a distinct group as compared to the general population in Guatemala. But the IJ found no nexus between the harm Rodriguez-Zuniga suffered and her membership in either cognizable particular social group, observing that the female robber "did not mention [Rodriguez-Zuniga's] gender or her lack of a 'male protector' in the family; rather, the perpetrator seemed to only want money." And because she presented no additional evidence for her feared future persecution beyond her nexus evidence for her past persecution, the IJ found that Rodriguez-Zuniga likewise lacked a nexus for her feared future harm. Finally, the IJ denied Rodriguez-Zuniga's claim for CAT relief because she did not establish that it was "more likely than not she will be tortured by or with the acquiescence of the government if [she] returned to Guatemala."

Rodriguez-Zuniga appealed to the BIA, and the BIA dismissed her appeal. It first "adopt[ed] and affirm[ed] the decision of the Immigration Judge for the reasons stated [in the IJ's opinion]" before explaining its own additional reasons for dismissing the appeal. As for asylum and withholding, the BIA agreed that one of Rodriguez-Zuniga's proposed social groups was not cognizable and

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that she failed to establish a nexus between her past harm or feared future harm and "either her family membership[ ] or her status as a Guatemalan woman." The BIA rejected Rodriguez-Zuniga's claim that she was persecuted because of her political opinion, concluding that "there [was] no evidence she ever expressed a political opinion."

II. STANDARD OF REVIEW

"Where, as here, the BIA agrees with the IJ's reasoning, we review both decisions." We review the agency's decision under the highly deferential substantial evidence standard. Under that standard, the agency's findings of fact are considered "conclusive unless any reasonable adjudicator would be *compelled* to conclude to the contrary." We review questions of law de novo.

III. DISCUSSION

The agency did not err in denying Rodriguez-Zuniga's asylum and withholding claims. Her arguments do not show that the agency erred in rejecting one of her proposed particularized social groups or in concluding that she failed to present evidence that she expressed a political opinion. And substantial evidence supports the agency finding of no nexus between Rodriguez-Zuniga's membership in the particularized social groups that the agency accepted as cognizable and any harm she experienced or feared. Substantial evidence also supports the agency's finding that Rodriguez-Zuniga did not establish it was more likely than not that the government would torture her upon her return to Guatemala. We therefore deny her petition for review.

a. The Agency Did Not Err in Denying Rodriguez-Zuniga's Asylum and Withholding of Removal Claims.

For both asylum and withholding claims, a petitioner must prove a causal nexus between one of her statutorily protected characteristics and either her past harm or her objectively tenable fear of future harm. These statutorily protected characteristics include "race, religion, nationality, membership in a particular social group, [and] political opinion." 8 U.S.C. § 1158(b)(1)(B)(i) (asylum); *see also* 8 U.S.C. § 1231(b)(3)(A) (withholding).

The agency denied asylum and withholding relief because Rodriguez-Zuniga failed to make a showing of nexus for either her past harm or feared future harms. Rodriguez-Zuniga contends that the agency erred in numerous respects: first, by rejecting one of her proposed particular social groups; second, in finding that she never expressed a political opinion; and third, in finding that there was no nexus between Rodriguez-Zuniga's cognizable protected social groups—family membership and "Guatemalan women"—and either her past harms or feared future harms.

i. Rodriguez-Zuniga does not show that the agency erred in rejecting her proposed particular social group.

[The court rejects Rodriguez-Zuniga's PSGs because the evidence did not show that these groups are perceived as distinct.]

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ii. Substantial evidence supports the agency's conclusion that Rodriguez-Zuniga did not present evidence that she expressed a political opinion.

[The court rejects Rodriguez-Zuniga's political opinion claim because the evidence did not show that any political opinion was expressed to a "sufficiently conscious and deliberate" degree.]

***

iii. Substantial evidence supports the agency's finding that Rodriguez-Zuniga's harms lacked a nexus to a protected characteristic.

For both her asylum and withholding claims, Rodriguez-Zuniga must show a nexus between her past harms or feared future harm and her statutorily protected characteristics. For asylum, she must provide evidence showing that her protected characteristics were "one central reason" for either her past harms or her feared future harms. 8 U.S.C. § 1158(b)(1)(B)(i). *** The reasons needed to prove a nexus refer to the persecutor's motivations for persecuting the petitioner. "Because a persecutor's actual motive is a matter of fact, we review that finding for substantial evidence."

The agency found Rodriguez-Zuniga had failed to establish any nexus whatsoever between past harm she suffered and either of her proposed social groups. Circuit precedent requires nexus showing of a "central reason" for asylum. *** Where, as here, the agency concludes that the petitioner has not shown *any* nexus whatsoever, then the petitioner fails to establish past persecution for both asylum and withholding.

The sole harm that Rodriguez-Zuniga contends amounted to past persecution was the female robber's threat against her and her son. She claims the robber was motivated to make this threat by Rodriguez-Zuniga's membership in two protected groups: Rodriguez-Zuniga's family and "Guatemalan women." The agency found that the robber was not motivated by her membership in either of those groups, but was instead solely motivated by money.

The agency first found that the woman did not target Rodriguez-Zuniga because of her status as a "Guatemalan woman," noting that the woman "did not mention [Rodriguez-Zuniga's] gender" at all during the attempted robbery. Rodriguez-Zuniga contends this was an error, but the only evidence she references is that "Guatemala ha[s] a notorious record in lacking in Guatemalan female protection." The general vulnerability of women in Guatemala tells us nothing about the female robber's particular motivations, and certainly does not compel the conclusion that the robber threatened Rodriguez-Zuniga because she is a woman. *See Barajas-Romero*, 846 F.3d at 357 (explaining that "the persecutor's motive" is what matters for nexus); *cf. Lalayan v. Garland*, 4 F.4th 822, 840 (9th Cir. 2021) (explaining that while "country reports and news articles" indicate problems in the petitioner's home country, "they in no way establish that [he] would 'more likely than not' be persecuted upon removal ... on account of his [protected ground]").

The agency next found that the woman did not threaten Rodriguez-Zuniga's son because of or on account of his kinship to Rodriguez-Zuniga. Instead, she "appeared to be motivated exclusively by monetary interest." Substantial evidence supports the agency's nexus finding because

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Rodriguez-Zuniga "did not demonstrate that the gang members who sought to extort money from [her] ... were motivated by anything other than an economic interest."

Rodriguez-Zuniga contends that the agency erred in finding no nexus between the threat and her family membership. She relies on the fact that gangs murdered her cousin and her cousin's son because they refused to pay the gangs, but this does not compel any conclusion about the robber's motivation in Rodriguez-Zuniga's case.

The heart of Rodriguez-Zuniga's argument, instead, is that the woman threatened her son to get her to pay money, which "displays the gangs' specifically targeting ... a specific family member to get petitioner to comply." To establish a nexus between her family membership and her harm, Rodriguez-Zuniga must show that her family membership was a reason motivating the robber to target her. Where the record indicates that the persecutor's actual motivation for threatening a person is to extort money from a third person, the record does not compel finding that the persecutor threatened the target because of a protected characteristic such as family relation. *See Baballah v. Ashcroft*, 367 F.3d 1067, 1075 n.7 (9th Cir. 2004) (explaining that this court's precedent precludes relief when persecution is "solely on account of an economic motive"); *Zetino*, 622 F.3d at 1016 ("An alien's desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground."); *see also Sanchez v. Sessions*, 706 F. App'x 897, 899 (9th Cir. 2017) (rejecting a nexus because threats to the petitioner's family were only a means of obtaining desired information, not "because of the family relationship per se"). In such a situation, the extorted person may be motivated to give the money because they care for their family member, but that doesn't transform the *persecutor's* motivation from money to actual animus against a protected characteristic.

Assuming for the sake of argument that harm against Rodriguez-Zuniga's son could support her own asylum claim, Rodriguez-Zuniga has failed to make the required showing of nexus. Substantial evidence supports the agency's finding that the robber threatened Rodriguez-Zuniga's son only as an instrumental means to obtain money, and was not motivated intrinsically by his familial relationship to his mother. Rodriguez-Zuniga repeatedly testified that the reason the woman targeted her was because she "had a lot of money that [she] could give them." "[I]f [Rodriguez-Zuniga] didn't give her that money[,] she was going to hurt" her or her son. The record in this case thus does not compel the finding that the robber's motivation for threatening to hurt Rodriguez-Zuniga's son was his familial relationship to Rodriguez-Zuniga. Rather, the robber targeted the son for the same reason she would target, say, the petitioner's life-long friend if the opportunity arose—merely because she thought Rodriguez-Zuniga cared about that person and thus the robber could use threats against that person as a means of obtaining money from Rodriguez-Zuniga.

Rodriguez-Zuniga attempts to refute this point by citing *Ayala v. Sessions*, where our court stated that "economic extortion on the basis of a protected characteristic can constitute persecution." 855 F.3d 1012, 1020 (9th Cir. 2017). Rodriguez-Zuniga misreads *Ayala.* Like this case, *Ayala* involved extortion. But as the court explained, it involved an "extortion-plus" claim, that is, a claim that the petitioner was independently targeted, not just for money, but also *because of* a protected ground. An "extortion-plus" nexus is simply one instantiation of our precedent's recognition that a persecutor can hold multiple motives for harming someone. To that end, the court in *Ayala* held

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that it was "legal error for the IJ to hold that extortion *could not* constitute persecution for the purposes of withholding[ ] where the petitioner's membership in a particular social group ... is at least 'a reason' for the extortion."

Our court identified two errors by the agency in *Ayala*: one legal and one factual. The agency's legal error was categorically holding that, if a persecutor is motivated by a financial goal, *i.e.*, to extort, he cannot also be motivated by a petitioner's protected characteristic. As *Ayala* recognizes, that is incorrect. Logically, a persecutor who extorts someone could in theory be motivated not just by the prospect of obtaining money but also by a petitioner's protected characteristic. The first error the agency in *Ayala* made was thus holding that a petitioner could never prove a nexus when the persecutor extorted the petitioner. But it also bears noting that just because an "extortion-plus" persecution is possible—someone could be motivated to extort a particular person by, say, actual animus towards their family—common sense tells us that will often, indeed usually, not be the case.

***

In short, there is no reason to remand in this case because the agency here didn't make the categorical legal mistake it made in *Ayala*, and it has already made the factual conclusion that was missing in *Ayala.* And nothing compels the conclusion that the robber in this case was motivated by anything other than underlying economic reasons, even though those economic motivations also resulted in threats to Rodriguez-Zuniga's son.

As for Rodriguez-Zuniga's fear of future harm, the agency again found no nexus. The BIA explained that she "did not establish a nexus between any feared harm and a protected ground." Instead, the BIA noted that her "claim [was] based on a fear of general violence and criminal activity in Guatemala." The record compels no different conclusion. As explained above, the record supports the agency's finding that the attempted robbery bore no nexus to a protected characteristic. The remainder of Rodriguez-Zuniga's evidence is from country conditions reports that do not compel the conclusion that her fear of future persecution was objectively reasonable.

***

[The Court declines to take issue with the IJ's unclear language about not finding future fear because Rodriguez-Zuniga only provided evidence of past persecution.]

***

In short, substantial evidence supports the agency's finding that Rodriguez-Zuniga's two protected grounds were not "a reason" for her past persecution or feared future persecution, necessarily defeating both her asylum and withholding claims. We therefore deny Rodriguez-Zuniga's petition for review of her asylum and withholding claims.

b. Substantial Evidence Supports the Agency's Denial of CAT Relief.

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c. The Dissent's Remaining Concerns Lack Merit.

The dissent vigorously disagrees with the foregoing analysis—in what seems to be practically every regard. But before we respond to those disagreements one-by-one and explain why they lack merit, it is worth taking a step back to consider the uncontested facts of this case. This is a case about an attempted robbery of a woman and her son who, upon leaving a bank, were threatened with violence if they didn't hand over some money. That's it. Relying on that unfortunate event, plus the regrettably unenviable conditions prevalent in Guatemala, Rodriguez-Zuniga seeks immigration relief that Congress made available for refugees who, if they are returned to their home country, face a particularized risk of persecution because of their status, or [face harm that CAT covers]. An oft-recognized corollary is that such relief is not available to those who have simply had the misfortune of becoming a victim of criminal misconduct abroad, motivated by the sorts of things (money, generally) that motivate criminals. Immigration law can be complicated, especially because courts have manufactured a byzantine and ever-increasing maze of procedural and substantive standards that are difficult for everyone—asylum-seekers, immigration officials, and courts alike—to navigate. And much of the discussion that follows relates to such arcane requirements. But something has gone terribly wrong when judges conclude that relief for persecution and torture is mandated just because someone was the victim of a brief and failed robbery attempt in their home country. Is that really what anyone thinks Congress meant by providing relief for refugees?

i. **The dissent's concerns regarding our nexus holding are unwarranted.**

The dissent offers several criticisms regarding both our explanation of this circuit's precedent on nexus determinations and how we apply that precedent in the above analysis. None of these concerns are warranted.

First, [the majority disagrees that the Court must differentiate the harm suffered by Rodriguez-Zuniga from the harm suffered by the harm suffered by her son. Instead, the majority "assume[s] that the threat could count as a harm to either person, and then decide whether there was a nexus between that harm and a protected characteristic."]

Second, the dissent argues that the record compels the conclusion that family membership was both "a reason" and "a central reason" petitioner was targeted for attempted robbery. The dissent strangely claims that we have, "in effect," concluded that the family membership of Rodriguez-Zuniga's son is a but-for cause of the robber threatening the son. That is the opposite of what we're saying—which is that there is zero evidence the robber targeted the son based on the son's family membership per se. The but-for cause of the robber targeting the son is not family membership, it is that the robber thought Rodriguez-Zuniga cared about her son.

To illustrate with an example, imagine the robber attempted to rob a woman who was accompanied, not by her son, but by a pet dog. This dog sports an ornately bejeweled collar and leash and its fur indicates frequent grooming, so the robber can infer the woman cares deeply for her pet. In an attempt to rob the woman, the robber might understandably threaten the dog. No one would think that such a threat was motivated by any animus toward the animal. It would instead

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be obvious that that the but-for cause of the robber threatening the dog was the robber's belief that the woman cared about the dog and would give the robber money if the dog was threatened. So too here: the but-for cause of the robber threatening the son is not his family membership but because the robber thought, probably correctly, that Rodriguez-Zuniga cared for her son.

Under the dissent's view, every kidnapping where a kidnapper demands money from the *family* of the kidnapped individual would necessarily establish a nexus. If that's what Congress had wanted, it would have made family membership an enumerated category—instead, family membership is sometimes, but not always, a particularized social group.

Third, the dissent argues that the nexus inquiry is not about "whether the persecutors' acts were motivated by an unprotected characteristic." The dissent tries to ground this innovation in the Supreme Court's decision in *Elias-Zacarias*. In that case, the purported persecution was a guerilla military organization attempting to conscript the petitioner into its forces. The Court explained that even if the persecutors were motivated politically to conscript people because they wanted to fill their ranks and "carry on their war against the government," that was "irrelevant." That is, a nexus could not be established by a motive "irrelevant" to whether the persecutor harmed a victim because of a victim's protected characteristic. Instead of relying on *Elias-Zacarias*, the dissent's argument that the persecutor's financial motivation is irrelevant ignores the plain import of the decision. The obvious takeaway is that if, like here, a persecutor is motivated *exclusively* by a consideration "irrelevant" to a victim's protected ground, that motivation is emphatically "relevant"—indeed, that motivation is decisive—for nexus. A persecutor that is exclusively motivated by something unrelated to a victim's protected characteristic is, tautologically, not motivated by the victim's protected characteristic. Thus here, where substantial evidence supports the agency's finding that the actual motivation of the persecutors was "exclusively" financial, not any protected characteristic, that exclusive financial motivation cannot establish a nexus.

***

IV. CONCLUSION

The majority is not unsympathetic to Rodriguez-Zuniga and her son's desire to stay in this country. But all that she has provided in support of her petition are country condition reports and one failed, non-violent robbery that the agency reasonably concluded was wholly economically motivated (as robberies usually are). Our legal system understandably places primary authority for immigration policy in Congress and the executive branch. If we stretched our law to grant the petition here, it would be clear that we have substituted ourselves for the immigration officials. Because she failed to show a nexus between her past or feared future harms and any protected grounds, we deny Rodriguez-Zuniga's petition for review of her asylum and withholding of removal claims. And because she forfeited any challenge to the agency's finding that she offered insufficient evidence that the Guatemalan government would acquiesce or consent to her torture, we deny her petition for review of her CAT claim.

PETITION DENIED.

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GILMAN, Circuit Judge, dissenting:

INTRODUCTION

This court has repeatedly emphasized that "the family remains the quintessential particular social group." "That is, an asylum-seeker who has suffered persecution 'on account of th[eir] familial relationship' has suffered persecution by reason of membership in a particular social group.' "

The majority apparently disagrees with the above legal principle by stating that "family membership is sometimes, but not always, a particularized social group." It therefore discounts persecution that occurs by reason of the petitioner's family membership if the persecutor's motives also contain a financial dimension. In the majority's view, such a petitioner would have to provide an alternative, "actual" reason for the alleged harm. This places an unjustified burden on those seeking relief based on their family membership by harkening back to the much-maligned (and now vacated) regime of *Matter of L-E-A-II*, which held that, "in the ordinary case, a nuclear family will not, without more," qualify as a particular social group.

Congress passed a statute in 1952—the Immigration and Nationality Act—that (1) offers a discretionary pathway to relief for those who reasonably fear persecution on account of their membership in a particular social group, *see* 8 U.S.C. § 1158(b), and (2) outright prohibits the removal of noncitizens to countries where they face a clear probability of persecution because of the same, *see* 8 U.S.C. § 1231(b)(3). I believe that the majority's holding is inconsistent with this statutory scheme and Ninth Circuit precedent.

A. An inherent contradiction exists in the majority's treatment of the nexus element with respect to Rodriguez-Zuniga's son Nelson because family membership cannot be both the primary reason for Nelson's persecution and no reason at all

The majority holds that, "[w]here the record indicates that the persecutor's actual motivation for threatening a person is to extort money from a third person, the record does not compel finding that the persecutor threatened the target because of a protected characteristic such as family relation." This proposition is ambiguous—intentionally so, the majority acknowledges—because it does not make clear whether the "target" is the direct target of the extortion (Rodriguez-Zuniga and others similarly situated) or the indirect target of the threat (Nelson and others similarly situated). In other words, the majority's holding forecloses not only Rodriguez-Zuniga's ability to satisfy the nexus requirement, but Nelson's as well.

On the one hand, the majority states that "the robber targeted [Nelson] for the same reason she would target, say, [Rodriguez-Zuniga's] life-long friend if the opportunity arose—*merely because she thought Rodriguez-Zuniga cared about that person* and thus the robber could use threats against that person as a means of obtaining money from Rodriguez-Zuniga." This in effect makes Nelson's family membership not only a but-for cause, but also the primary cause of his being placed in harm's way. On the other hand, the majority inexplicably holds that Nelson and those in like circumstances cannot satisfy the nexus requirement. This is inherently contradictory and unsupported by precedent.

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The majority claims that it does not mean to say that Nelson's relationship to his mother is a but-for cause of his threatened harm—this is apparently "the opposite of what [it is saying], *id.* at 1024—and yet it then repeats the contradiction by positing that "there is zero evidence the robber targeted the son based on the son's family membership per se. The but-for-cause of the robber targeting the son is not family membership, it is that *the robber thought Rodriguez-Zuniga cared about her son.*" This strikes me as double-talk.

The majority tries once more, this time likening Nelson to Rodriguez-Zuniga's hypothetical pet dog. If the robber had threatened to harm the dog, the majority suggests, "the but-for cause of the robber threatening the dog was the robber's belief that the woman cared about the dog." Here again, the majority's error is clear: the target of the threatened harm is a target *only because of his relationship*—in Nelson's case, his family relationship—to another person.

To satisfy the nexus requirement, an asylum applicant must show that a protected characteristic is "one central reason" for the feared harm. That "central reason" may be one among many, and "an asylum applicant need not prove which reason was dominant" so long as the protected characteristic is likely to be "a cause of the persecutors' acts." For an applicant seeking withholding of removal, an even "weaker motive" will suffice: a protected characteristic need only be "a reason" for the feared harm.

Because Nelson's would-be persecutors were interested in him only because of his relationship to his mother, he satisfies both the "a reason" nexus standard for withholding of removal and the "one central reason" nexus standard for asylum. Yet the majority holds that Nelson and others in his position cannot establish that family membership is even "a reason" for any potential persecution where financial gain also motivates the persecutor.

The IJ made the same error in holding that Rodriguez-Zuniga "presented no evidence that her son was threatened on account of his kinship to her," and that the threat to Nelson was instead "motivated exclusively by monetary interest." But the record compels the opposite conclusion: that Nelson was targeted, as the majority puts it, "merely because [the robber] thought Rodriguez-Zuniga cared" about Nelson. We should therefore reverse the agency's decision for lack of substantial supporting evidence.

[The dissent goes on to reason that both Rodriguez-Zuniga and her son's asylum claims should be afforded independent analysis.]

***

B. The majority's nexus holding with respect to Rodriguez-Zuniga conflicts with this court's decision in *Ayala*, which held that an extortionist's financial motivation does not preclude a nexus finding based on family membership

In *Ayala*, the petitioner claimed that "she and her husband were the subjects of extortion because of his family's ownership of hotels." The court held that the IJ erred in concluding that "the only motivation indicated throughout is extortion" despite Ayala's testimony that she was afraid of being targeted on the basis of her marriage to a hotel owner. The persecutors' financial motivation

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was insufficient to defeat a nexus finding because Ayala testified that she "faced extortion[ ] and threats of violence[ ] not only for economic reasons, but also because of her family ties."

The majority attempts to distinguish *Ayala*, alleging that Ayala brought "an 'extortion-plus' claim, that is, a claim that the petitioner was independently targeted, not just for money, but also *because of* a protected ground." But the majority asserts that "common sense tell us that will often, indeed usually, not be the case." although it "is possible—someone could be motivated to extort a particular person by, say, animus towards their family."

But nowhere in *Ayala* does the court suggest that a showing of "animus" on the part of the persecutor is necessary and, indeed, Ayala herself made no such showing. The IJ's error lay in discounting Ayala's testimony that she had been extorted in the past *on the basis of her family membership*, not in discounting testimony that she had been extorted *on the basis of hatred or animus toward her family*. *Ayala* is thus directly on point because we have before us a similar case of "extortion-plus."

Having failed to distinguish *Ayala*, the majority attempts to diminish its weight by claiming that the IJ in that case committed legal error by "categorically holding that, if a persecutor is motivated by a financial goal, *i.e.*, to extort, he cannot also be motivated by a petitioner's protected characteristic." But contrary to the majority's characterization, the IJ in *Ayala* made no such categorical pronouncement. The *Ayala* court was, in fact, quite clear that the IJ's mistake was akin to that made in this case:

During the hearing, Ayala claimed that a "group of people" was targeting her because "[m]y husband's family owned hotels and I believe they wanted to extort us and that is why we were being followed." At the end of the hearing, the IJ stated that he was affirming the asylum officer's decision "because the only motivation indicated throughout is extortion, criminal acts." *He did not offer any other explanation.*

In a last-ditch effort to escape *Ayala*'s clear implications, the majority argues that "even the panel in *Ayala* expressed some reservations ... over whether the petitioner would actually succeed before the agency." But such reservations are hardly surprising considering Ayala's failure to present the court with factual evidence to support her theoretically valid nexus theory. The *Ayala* court summarized the record as follows:

> [Ayala] first entered the United States in 1991 .... [S]he remained in the United States until December 1998, when she left with her husband for Guatemala.
> Ayala stayed in Guatemala for only one month. Soon after returning to Guatemala, she and her husband were followed by a car while riding their motorcycle. Although Ayala got off the motorcycle at her husband's urging, he continued riding, and the car followed him. Later that day, he was found badly beaten. Her husband then told her to return to the United States with their child. During that same month in Guatemala, Ayala also received threatening phone calls at her house.
> Ayala returned to the United States in January 1999 .... While she has been in the United States, her family in Guatemala has continued to face threats. In 2007, her

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> husband was murdered, and at some point in 2012, unknown assailants shot at her mother's house.

Based on these facts, "Ayala claimed that a 'group of people' was targeting her because '[m]y husband's family owned hotels and I believe they wanted to extort us and that is why we were being followed.' " On the record before it, the agency might well have found that Ayala had not provided "*some* evidence ..., direct or circumstantial" that her persecutors were in fact motivated by her relationship to her husband's family.

But in the present case, the record does not require that we simply infer a nexus between persecution and a protected ground. The agency here "accord[ed] ... full evidentiary weight" to Rodriguez-Zuniga's testimony that the robber warned her "that if she didn't give [the robber] ... money, [the robber] was going to hurt [her] son," and that she was being targeted because her "family was here and that [she] had a lot of money that [she] could give them." And when Rodriguez-Zuniga refused, the robber said that Rodriguez-Zuniga's "son was going to pay for it."

Rodriguez-Zuniga did not guess at the woman's motives; she instead credibly testified that her would-be persecutor *told her* why she was being targeted. And "there was no testimony or other evidence inconsistent with [Rodriguez-Zuniga's] recounting of her experiences, and there was no reason to doubt the truth, or 'persuasiveness,' of her narrative" concerning the words that were uttered to her by her would-be persecutor.

Unlike in *Ayala*, then, there is no ambiguity as to why Rodriguez-Zuniga was targeted. Rodriguez-Zuniga's potential persecutors knew her identity and the identities of her family members, and their representative targeted Rodriguez-Zuniga using her relationship to her son and because of her relationship to her husband. Rodriguez-Zuniga has therefore satisfied her burden of establishing that her family membership was at least "a reason" for her persecutors' actions.

C. The nexus standard for family-based particular social groups is not dependent on the persecutor's singular "actual" motivation

In determining whether a nexus exists between persecution and a protected ground, the majority erroneously limits consideration to the persecutor's singular "actual" or "intrinsic" motivation. But an asylum seeker need prove only that any prospective persecution "would be 'on account of' one of the five [protected grounds]," or that those protected grounds would be "one central reason" for the harm. In contrast, a person seeking withholding of removal must prove that her "life or freedom will be threatened in [her] home country ... 'because of' one of the five [protected grounds]," or that those protected grounds would be "a reason" for the harm.

Neither asylum claims nor withholding-of-removal claims require that a protected ground be "the persecutor's actual motivation" for inflicting the harm. Even under asylum's more stringent "at least one central reason" standard, "persecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant." By eliminating a petitioner's ability to establish a nexus to a protected ground where "the persecutor's actual motivation for threatening a person is to extort money from a third person," the majority departs from this court's

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precedents that affirm the principle that "[p]eople, including persecutors, often have mixed motives."

The majority states that it does not deny the "basic principle" that "a petitioner may be entitled to relief when a persecutor holds multiple or mixed motivations." But the effect of failing to consider alternative motives for persecutory acts when the persecutor also holds a financial motivation (which, in the majority's view, is "the persecutor's actual motivation") *is* to deny that basic principle.

The crux of the majority's rationale seems to be that family membership in a case such as this is not "the actual motivation" for persecution because it is a means to an end. But "[a] person may have 'a reason' to do something that is not his 'central' reason or even 'one central reason.' " And so, to the extent that the majority's holding is directed at Rodriguez-Zuniga and others similarly situated (rather than at Nelson), it is inconsistent with the more lenient nexus requirement for withholding-of-removal claims.

Moreover, a motive is not only "a reason" but also "a 'central reason' if the persecutor would not have harmed the applicant if such motive did not exist." To satisfy asylum's nexus standard, "an applicant must prove that such ground was a cause of the persecutors' acts." And a but-for cause is certainly a cause. Thus, for someone like Nelson, who becomes the indirect target of extortionist threats presented to his mother, both nexus standards are satisfied.

The majority's narrow focus on a persecutor's financial motivation is also difficult to reconcile with binding Supreme Court precedent. In *INS v. Elias-Zacarias*, the Supreme Court held that whether a persecutor's motives are themselves political is "irrelevant" to establishing a nexus to a protected political opinion. Instead, reviewing courts must ask whether the persecutor is motivated by what they perceive to be the *victim's* protected political opinion.

That same principle applies here. Our inquiry should not be based on whether the persecutors' acts were motivated by an unprotected characteristic, such as a desire for financial gain, but rather on whether they were related to one of Rodriguez-Zuniga's or Nelson's protected grounds—such as family membership. That the potential persecutors in the present case also had an economic motivation is thus an insufficient basis for us to dismiss their interest in Rodriguez-Zuniga's and Nelson's family membership, just as the nonpolitical motivations of the persecutors in *Elias-Zacharias* were insufficient to allow the court to dismiss their interest in the petitioner's protected characteristics.

***

Notes & Questions

1. Proving the nexus element is difficult. What is the motivation of the persecutor. Tthe fact that both the majority and dissent spend some five pages each to show their reasoning demonstrate the challenge of establishing nexus.

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2. The dissent characterizes the majority's opinion as reducing nexus to a 'means to an end,' where if the end is not persecution based on a protected ground, then the means cannot be. Is this a fair critique of the majority's reasoning, and does the dissent present a compelling alternative?

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—a brief summary

Perhaps no issue has created more furor in the press and political discussions than the attempts of both the Trump and Biden administrations to use Executive Action – policy and regulations – to reshape the procedures at the U.S. Border. The history between 2018 and 2024 is complex. At times courts have stepped in to freeze existing rules or prevent the repeal of prior restrictions.

Rather than recite the full history here, we summarize some of the key types of administrative actions that administrations have used to try to stop admission at the border, even for people seeking asylum or other treaty guaranteed protections. Some of this summary repeats and reinforces the supplement in Chapter 2 that discusses border inspections and expedited removal.

PUSH PEOPLE BACK APPROACH

*2018-- **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

2021--**The Biden Administration ended the MPP program.** and 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 reversed the Fifth Circuit and held that the Biden administration had the legal authority to end the program. See discussion in chapter 2 supplement.

SUMMARY EXPULSION UNDER HEALTH GROUNDS

*2020 -- **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

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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, at first President Biden announced he would not lift the Title 42 Order and has continued to expel foreign nationals based on the order.

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.

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.

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*, 598 U.S. __, 214 L.Ed.2d 312 (2022) and finally after the CDC ended the health emergency, the Supreme Court stepped in to order a vacation of the stay and dismissal of the case as moot. *See Arizona v. Mayorkas*, 143 S.Ct. 1312 (2023).

Justice Gorsuch concurred in this action but wrote separately to note how the reliance on public health emergencies had generated many problems. He explains some of the litigation history and critiques the government approach:

> This case concerns the "Title 42 orders." Those emergency decrees severely restricted immigration to this country for the ostensible purpose of preventing the spread of COVID-19. The federal government began issuing the orders in March 2020 and continued issuing them until April 2022, when officials decided they were no longer necessary.

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If that seems reasonable enough, events soon took a turn. In a federal district court in Louisiana, a number of States argued that the government's decision to end the Title 42 orders violated the Administrative Procedure Act (APA), 5 U. S. C. §551 *et seq.*, because agency officials had not provided advance notice of their decision or invited public comment. The States did not seriously dispute that the public-health justification for the orders had lapsed. The States also understood that their lawsuit would only require the government to take certain additional procedural steps before ending the Title 42 orders. But the States apparently calculated that even a short, court-ordered extension of those decrees was worth the fight. Worth it because, in their judgment, a new and different crisis had emerged at the border and the federal government had done too little to address it. Keeping the Title 42 orders in place even temporarily was better than the alternative. In the end, the district court agreed with the States' APA arguments and entered a nationwide injunction that effectively required the government to enforce the Title 42 orders until and unless it complied with the statute's notice-and-comment procedures.

Meanwhile, a thousand miles away, a group of asylum seekers filed a competing class-action lawsuit in a federal district court in Washington, D. C. This group argued that, from the start, the government lacked legal authority to issue its Title 42 orders. Ultimately, the D. C. district court agreed with the group's assessment and issued an equally sweeping form of relief—sometimes called "universal vacatur"—that purported to wipe the Title 42 orders off the books as if they never existed. So it is that the federal government found itself in an unenviable spot—bound by two inconsistent nationwide commands, one requiring it to enforce the Title 42 orders and another practically forbidding it from doing so.

If these head-spinning developments were not enough, more followed. Displeased with the D. C. district court's ruling, some of the States in the Louisiana case moved to intervene in the D. C. case. The States said they wanted to defend the Title 42 orders on appeal because the federal government was unlikely to do so with sufficient vigor. Ultimately, the court of appeals denied the States' motion to intervene as untimely. So, late in 2022, the States turned to this Court seeking two things. First, they asked for expedited review of the appellate court's order denying their motion to intervene. Second, they asked for a stay of the D. C. district court's decree vacating the Title 42 orders. The Court granted both requests. In doing so, the Court effectively extended the Title 42 orders indefinitely.

Now, almost five months later, the Court puts a final twist on the tale. It vacates the appellate court's order denying the States' motion to intervene and remands with instructions to dismiss the motion as moot. Why the sudden about-face? Recently, Congress passed and the President signed into law a joint resolution declaring that the COVID-19 emergency is over. The Secretary of Health and Human Services, too, has issued his own directive announcing the end of the public-health emergency underlying the Title 42 orders. Apparently, these developments are enough to persuade the Court that the Title 42 orders the

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> government wished to withdraw a year ago are now as good as gone and any dispute over them is moot.
>
> I recite all this tortured procedural history not because I think the Court's decision today is wrong. Nearly five months ago, I argued that the Court erred when it granted expedited review and issued a stay. As I explained at the time, I do not discount the States' concerns about what is happening at the border, but "the current border crisis is not a COVID crisis."[10] And the Court took a serious misstep when it effectively allowed nonparties to this case to manipulate our docket to prolong an emergency decree designed for one crisis in order to address an entirely different one. Today's dismissal goes some way to correcting that error.
>
> I lay out the history of this case only because it is so typical. Not just as an illustration of the quandaries that can follow when district courts award nationwide relief, a problem I have written about before. Even more importantly, the history of this case illustrates the disruption we have experienced over the last three years in how our laws are made and our freedoms observed.
>
> *Arizona v. Mayorkas* at Concurring Opinion 1313-315.

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REGULATIONS AS WALLS – NEW BORDER CONTROLS
***2023 Securing the Border By Creating Lawful Pathways and Punishing Irregular Entry*.**
Please see the discussion in Chapter 2 which summarizes these rules and provides quotes from the government's rationales in the promulgation of the rules.

June of 2024
President Biden announced a rule that limits eligibility to asylum and suspends entry based on the volume of encounters at the southern border. 89 Fed. Reg. 48487 (June 3, 2024) (see 8 C.F.R. §§ 1208.13(g) and 1208.35). "The entry of any noncitizen [with exceptions] into the United States across the Southern Border is hereby suspended and limited" is only suspended after two weeks have passed after seven consecutive days of "less than 1,500 encounters [with exceptions]" daily. *Id.* at §§1-2(a). If, however, the daily average exceeds 2,500 for seven consecutive days, the suspension is reinstated. *Id.* at §2(b). The quota exceptions are numerous and narrow. *Id.* at §3. *See* AILA, *Policy Brief: Analysis of Proclamation and Interim Final Rule on "Securing the Border"* (June 5, 2024), https://www.aila.org/aila-files/D16AD362-535E-4CED-93B3-4009633E75A1/24060510.pdf?1717629643.

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[10] *Arizona*, 598 U. S., at ___, 214 L. Ed. 2d 312 (GORSUCH, J., dissenting) (slip op., at 3).

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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 27 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)?

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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.]

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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 and Updated through May 2024

	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/*

Update for 2024—data through June 2024
Top Five Immigration Courts by NTA filed in 2024

Court State	Rank	Number
Texas	**1**	**247,724**
Florida	**2**	**198,041**
California	**3**	**183,488**
New York	**4**	**173,370**
Illinois	**5**	**107,006**
Total across U.S.		**1,576,359**

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.
As of June of 2024, Trac reports that the EOIR now has **3.698,580 pending cases.**
And for this same date TRAC reports that **1,397,126** asylum applications have been filed in these pending cases.

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

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Fiscal Year End*	Number of Pending Cases		
	All	Affirmative	Defensive
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
2024*	1,101,819	149,260	952,559

* The fiscal year ends on September 30. The 2024 data is from TRAC through Dec. 31, 2023.

Asylum Backlogs
More than 1.3 million asylum applications were awaiting processing as of May of 2023. 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. Reported by the Migration Policy Institute
Source: https://www.migrationpolicy.org/article/refugees-and-asylees-united-states#asylum-backlogs. No pin cite is provided for this estimate.

DHS Data:
As of the end of June 2024, the Refugee Asylum International Operations Direction (RAIO) reported a pending backlog of **1,262,449 applications.**

Between October and June, RAIO received **319,511** new asylum applications. These are affirmative applications. In their outcome report they share that in FY 24 of the "completed" cases, they report:
FY 2024 to June Outcomes in Affirmative Asylum Applications

Grant	14,426	14.3%
Deny	2,444	2.4%
Dismiss/Admin Close	83,524	83%
Total	100,394	100%

Source: DHS, USCIS, Asylum and International Operations Directorate Global queried 2024-07-19. Available at
https://www.uscis.gov/sites/default/files/document/reports/asylumfiscalyear2024todatestats_240630.xlsx

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Why are so many cases dismissed? RAIO states in their data release that these closures were largely due to lack of jurisdiction or failure to appear at a scheduled interview. In a July report published by the DHS Office of the Inspector General and in the USCIS response to that critique, the RAIO admitted that the public became confused about the method of filing for asylum and that many people used the affirmative asylum process but the USCIS lacked jurisdiction because the person was already in removal proceedings. See DHS Office of the Inspector General, Report) OIG-24-36, "USCIS Faces Challenges Meeting Statutory Timelines and Reducing Its Backlog of Affirmative Asylum Claims" (July 3, 2024) at page 24 in the USCIS response.

The USCIS explanation is worth quoting here:

> On November 9, 2022, the USCIS announced online filing for affirmative asylum applications, the availability for which made it easier for asylum applicants to file with USCIS. This efficiency also resulted in filings even when USCIS lacks jurisdiction to adjudicate the application. The volume of affirmative asylum applications received by USCIS nearly doubled between FY 2022 and FY 2023, from 240,787 to 454,339, even though USCIS lack jurisdiction over many of these applications. These erroneously filed applications artificially inflate the affirmative asylum backlog while still placing an operation burden on USCIS resources.
> *Id.* at page 20.

This OIG report confirms reports of many attorneys and advocates. It appears that some of the problems result from confusion about where and how to file the forms. In recent months the USCIS allowed an online filing of the form I 589 but if a person is in removal, the application was supposed to be filed with the EOIR, the immigration court. Many people were concerned about missing the one year deadline for filing asylum and made an affirmative or on line filing. Another large groups of filings were from people who had cases pending before the EOIR for many years and found the case was dismissed by the court without opportunity to oppose dismissal. Many people then had to refile with the asylum office to preserve their claim and to try to preserve work authorization.

There are many anecdotal stories of people receiving a notice to attend an asylum interview only to learn when they appear that the RAIO determined they lacked jurisdiction and would be issuing a Notice to Appear for the individual to continue with the application before the immigration court.

EOIR judges also do not have a database that provides notice of a filing with the RAIO and must rely on the respondent presenting evidence of filing, requesting that they refile with the court. OPLA attorneys do have access to databases that allow them to confirm a filing with the RAIO. Obviously, for the pro se, the process is very confusing. In the Editor's Opinion -- The process is hard on all the actors in the system but it is unfair of government to protect the asylum applicant who attempts to perfect their claim.

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Here is a link to the USCIS instructions that talks about when USCIS Asylum Office will reject jurisdiction over an asylum application and issue a new NTA if you case was dismissed by the EOIR. https://www.uscis.gov/newsroom/alerts/uscis-issues-new-instructions-for-filing-asylum-applications-with-uscis-after-eoir-dismissal-or

Some data on Asylum Grants

TRAC has a special tool to review final outcomes in defensive asylum application decided by EOIR.
https://trac.syr.edu/phptools/immigration/asylum/

This small table is based on using the tool for FY 23 all courts.

Total	Denials	Grants	Estimate of Percentage Grant
72,751	35,122	35,984	49.5%
Honduras	5,427	2,220	29%
Guatemala	4, 907	2602	35%
El Salvador	4,790	3179	40%
Mexico	3,179	849	21%
Ecuador	3,177	1050	25%
Venezuela	1,245	3,083	71%
China	803	3,798	82%
India	1,275	3,029	70%
Russia	266	1992	88%

Test Your Assumptions

These snapshots of data are never the full story. What are some of the factors that might explain the differences in approval rates in asylum applications? What explains the rates of adjudication?

Some variables not capture here include:

Represented or unrepresented
Number of Years Case was pending
Number of people in a family unit applying together
Location of Hearing and Circuit Court of Appeals Law
Identity of Judge
Position of the DHS ICE counsel
Type of Evidence Presented
Nexus to a Protected Ground Argued

Still, do you think this data might be important to inform both immigration policy and to prepare for litigation?

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There are several tools at TRAC that are important to explore. One is asylum decisions by Immigration Judge.

In the past EOIR published annual statistical yearbooks. The data used by TRAC and others is available each month for download but the cache of data requires the ability to use statistical software.

Working with a snapshot report published in last spring 2024, Professor Benson created this table below using data from the first two quarters of 2024 the only data available in summer of 2024 on the EOIR website.

Snapshot of data on **Asylum Applications Adjudicated in Fiscal Year 2024 through April 24** by rate of approval before EOIR. Data reported by EOIR at https://www.justice.gov/eoir/workload-and-adjudication-statistics

Nationality	Grants	Denials	Abandonment	Not Adjudicated	Withdrawn	Total Adjudicated	Total Filed	Approval Rate (Excluding Withdrawn, Abandoned, Not Adjudicated)	Approval Rate (Including All Filed)
AFGHANISTAN	191	27	4	117	*	218	339	87.61	56.34
ALBANIA	97	19	*	59	*	116	175	83.62	55.43
ALGERIA	*	*	*	5	*	*	5	NA	*
ANGOLA	124	58	17	49	9	182	257	68.13	48.25
ARGENTINA	7	8	*	20	7	15	42	46.67	16.67
ARMENIA	160	34	18	222	19	194	453	82.47	35.32
AZERBAIJAN	32	5	*	17	*	37	54	86.49	59.26
BAHAMAS	*	*	*	4	*	*	4	NA	*
BANGLADESH	453	128	16	173	18	581	788	77.97	57.49
BELARUS	120	9	*	28	5	129	162	93.02	74.07
BELIZE	10	15	6	37	*	25	68	40	14.71
BENIN	6	*	*	5	*	6	11	100	54.55
BERMUDA	4	*	*	*	*	4	4	100	100
BHUTAN	7	*	*	6	*	7	13	100	53.85
BOLIVIA	14	22	13	39	18	36	106	38.89	13.21
BOSNIA-HERZEGOVINA	*	*	*	6	*	*	6	NA	*
BRAZIL	316	1487	261	2656	177	1803	4897	17.53	6.45
BURKINA FASO	67	19	9	39	*	86	134	77.91	50
BURMA (MYANMAR)	17	5	*	8	*	22	30	77.27	56.67
BURUNDI	12	7	*	6	*	19	25	63.16	48
CAMEROON	262	74	4	119	5	336	464	77.98	56.47
CANADA	*	*	*	7	*	*	7	NA	*
CENTRAL AFRICAN REPUBLIC	*	*	*	*	7	*	7	NA	*
CHAD	4	*	*	4	*	4	8	100	50
CHILE	16	9	27	240	40	25	332	64	4.82
CHINA	1571	475	167	848	70	2046	3131	76.78	50.18
COLOMBIA	472	1938	608	1171	236	2410	4425	19.59	10.67
CONGO	33	14	5	40	*	47	92	70.21	35.87
COSTA RICA	*	5	*	28	5	5	38	*	*
CUBA	447	394	217	5992	656	841	7706	53.15	5.8

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Nationality	Grants	Denials	Abandonment	Not Adjudicated	Withdrawn	Total Adjudicated	Total Filed	Approval Rate (Excluding Withdrawn, Abandoned, Not Adjudicated)	Approval Rate (Including All Filed)
DEMOCRATIC REPUBLIC OF CONGO	56	32	8	69	*	88	165	63.64	33.94
DOMINICA	*	*	*	4	*	*	4	NA	*
DOMINICAN REPUBLIC	9	95	39	85	27	104	255	8.65	3.53
ECUADOR	346	1319	411	1928	287	1665	4291	20.78	8.06
EGYPT	98	46	10	62	10	144	226	68.06	43.36
EL SALVADOR	1023	1301	424	11312	604	2324	14664	44.02	6.98
ERITREA	73	17	*	6	*	90	96	81.11	76.04
ETHIOPIA	111	24	7	36	7	135	185	82.22	60
FIJI	*	*	*	7	*	*	7	NA	*
FRANCE	4	*	8	*	*	4	12	100	33.33
FRENCH GUIANA	*	*	*	4	*	*	4	NA	*
Former Countries	50	6	6	53	7	56	122	89.29	40.98
GABON	*	7	*	5	*	7	12	*	*
GAMBIA	16	7	*	14	*	23	37	69.57	43.24
GEORGIA	158	72	42	54	9	230	335	68.7	47.16
GHANA	104	39	12	72	7	143	234	72.73	44.44
GUADELOUPE	*	*	*	4	*	*	4	NA	*
GUATEMALA	914	1099	774	12549	950	2013	16290	45.4	5.61
GUINEA	58	25	12	22	*	83	117	69.88	49.57
GUYANA	*	*	*	14	5	*	19	NA	*
HAITI	39	66	193	1919	406	105	2623	37.14	1.49
HOLLAND	*	*	*	5	*	*	5	NA	*
HONDURAS	879	1791	895	12492	806	2670	16863	32.92	5.21
HUNGARY	*	*	*	4	*	*	4	NA	*
INDIA	1167	553	98	1150	67	1720	3035	67.85	38.45
INDONESIA	15	14	*	54	6	29	89	51.72	16.85
IRAN	101	10	*	28	5	111	144	90.99	70.14
IRAQ	93	10	7	34	5	103	149	90.29	62.42
ISRAEL	6	*	*	6	*	6	12	100	50
IVORY COAST (COTE D'IVOIRE)	17	13	6	36	*	30	72	56.67	23.61
JAMAICA	66	63	29	55	14	129	227	51.16	29.07
JORDAN	19	7	12	49	7	26	94	73.08	20.21
KAZAKHSTAN	75	16	11	29	8	91	139	82.42	53.96
KENYA	12	15	7	40	8	27	82	44.44	14.63
KIRGHIZIA (KYRGYZSTAN)	56	43	12	35	*	99	146	56.57	38.36
KOSOVO	51	14	*	13	*	65	78	78.46	65.38
KUWAIT	*	*	*	4	*	*	4	NA	*
LAOS	5	*	*	*	*	5	5	100	100
LEBANON	20	8	*	26	*	28	54	71.43	37.04
LIBERIA	*	11	*	25	*	11	36	*	*
LIBYA	7	9	*	*	*	16	16	43.75	43.75
MALAWI	*	*	*	5	*	*	5	NA	*
MALAYSIA	*	*	*	15	*	*	15	NA	*
MALI	27	14	6	17	*	41	64	65.85	42.19
MAURITANIA	39	158	44	32	5	197	278	19.8	14.03
MEXICO	356	1566	505	6834	1624	1922	10892	18.52	3.27
MOLDAVIA (MOLDOVA)	31	9	*	26	*	40	66	77.5	46.97

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Nationality	Grants	Denials	Abandonment	Not Adjudicated	With-drawn	Total Adjudicated	Total Filed	Approval Rate (Excluding Withdrawn, Abandoned, Not Adjudicated)	Approval Rate (Including All Filed)
MONGOLIA	15	9	*	42	11	24	77	62.5	19.48
MOROCCO	*	*	*	10	*	*	10	NA	*
NEPAL	274	65	4	112	7	339	462	80.83	59.31
NICARAGUA	879	997	658	1293	242	1876	4069	46.86	21.6
NIGER	5	4	*	11	*	9	20	55.56	25
NIGERIA	192	133	28	329	26	325	708	59.08	27.12
PAKISTAN	93	46	10	112	10	139	271	66.91	34.32
PALESTINE	*	*	*	7	*	*	7	NA	*
PANAMA	*	16	7	33	10	16	66	*	*
PERU	325	1028	383	670	100	1353	2506	24.02	12.97
PHILIPPINES	*	4	6	89	12	4	111	*	*
POLAND	*	*	*	9	11	*	20	NA	*
ROMANIA	28	76	70	113	26	104	313	26.92	8.95
RUSSIA	1754	200	142	403	49	1954	2548	89.76	68.84
RWANDA	12	4	*	14	*	16	30	75	40
SAUDI ARABIA	9	5	*	4	*	14	18	64.29	50
SENEGAL	53	122	22	53	13	175	263	30.29	20.15
SIERRA LEONE	*	9	4	7	*	9	20	*	*
SOMALIA	49	35	*	45	6	84	135	58.33	36.3
SOUTH AFRICA	*	24	5	13	5	24	47	*	*
SOUTH KOREA	*	*	*	4	*	*	4	NA	*
SPAIN	*	*	*	5	*	*	5	NA	*
SRI LANKA	20	13	10	31	*	33	74	60.61	27.03
STATELESS - ALIEN UNABLE TO NAME A COUNTRY	16	*	7	23	*	16	46	100	34.78
SUDAN	19	12	14	12	*	31	57	61.29	33.33
SYRIA	55	10	4	34	*	65	103	84.62	53.4
TAJIKISTAN (TADZHIK)	27	11	6	7	*	38	51	71.05	52.94
TANZANIA	*	*	*	4	*	*	4	NA	*
THAILAND	*	*	5	8	*	*	13	NA	*
TOGO	24	9	*	10	*	33	43	72.73	55.81
TRINIDAD AND TOBAGO	*	4	*	14	5	4	23	*	*
TUNISIA	4	8	*	4	*	12	16	33.33	25
TURKEY	231	64	35	98	13	295	441	78.31	52.38
TURKMENISTAN	5	*	*	*	*	5	5	100	100
UGANDA	41	4	*	30	*	45	75	91.11	54.67
UKRAINE	68	23	4	162	13	91	270	74.73	25.19
UNITED ARAB EMIRATES	*	*	*	*	4	*	4	NA	*
URUGUAY	*	*	*	10	*	*	10	NA	*
UZBEKISTAN	148	91	62	62	29	239	392	61.92	37.76
VENEZUELA	1402	641	844	7813	1096	2043	11796	68.62	11.89
VIETNAM	33	27	*	60	*	60	120	55	27.5
YEMEN	11	12	4	10	5	23	42	47.83	26.19
ZIMBABWE	5	7	*	13	*	12	25	41.67	20

The asterisk (*) means the data sample was not reported as being to small to protect privacy. The coloring was used to make the table easier to read.

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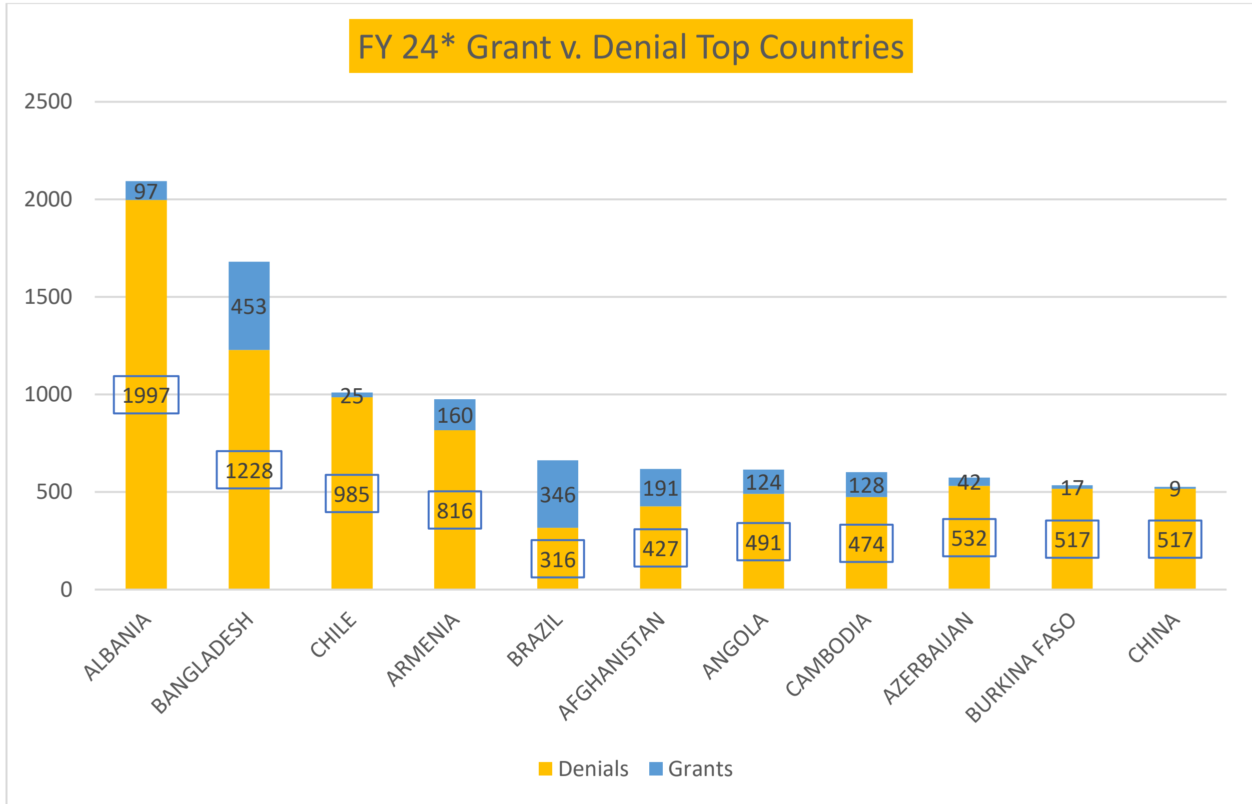
Here the data showing the Countries with the largest number of grants in the first two quarters of 2024.



End Chapter 8

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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 and nearly 900,000 in FY 2023.

New efforts to limit "birthright Citizenship."

How does USCIS view Admissions of the Use of Marijuana and the Naturalization requirement of "good Moral Character."

Updates on Renunciation of Citizenship and Denaturalization

Data on the populations of lawful permanent residents who are eligible for naturalization.

Updates begin on the next page.

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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.

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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.

The myth of illegal voting continues to be a topic in the 2024 federal election cycle.
Sadly, the detailed research by many organizations and data scientists that indicate voting by noncitizens is very rare does not seem to be reaching the rhetoric of some candidates.

Both the Cato Institute and the Brennan Center have conducted careful analysis of election details and found fewer than several hundred incidences of illegal voting in many years. In no situation, would the votes have changed the outcome of an election. See https://www.brennancenter.org/our-work/analysis-opinion/noncitizens-are-not-voting-federal-or-state-elections-heres-why citing the work by Cato and others.

Image created by Professor Benson using AI. At naturalization ceremonies, there are frequently civic groups offering to register voters. Students and attorneys can volunteer to assist.

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*

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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

Several U.S. Senators have introduced a bill that provides guidance on how to interpret the 14th Amendment guarantee of citizenship. The text states plainly that a person who is born to parents who are not residing in lawful status in the United States, cannot convey citizenship to their children. See Senate Bill 4459 Constitutional Citizenship Clarification Act of 2024. The Bill was introduced on June 5, 2024, by Senators Cotton (AR), Vance (OH), Blackburn (MS) and Cruz (TX).

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

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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 22, which represented a 22% increase from the prior year. In FY 2023, the government reported 878,500 naturalizations.

"Among the top five countries of birth for people naturalizing in FY 2023, Mexico was the lead country, with 12.7% of all naturalizations, followed by India (6.7%), the Philippines (5.1%), Cuba (3.8%), and the Dominican Republic (4.0%). The top five countries of birth comprised 32% of the naturalized citizens in FY 2023."
Graphic from USCIS.

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 400,000 new citizens in FY 2023.

One of the interesting data points is to look at the eligible population who could seek naturalization. As of July of 2024, there are over 10.3 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:

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Nationalities of Lawful Permanent Residents Eligible for Naturalization

Country	Number
Ghana	**80,180**
Russia	**83,247**
Egypt	**87,240**
Ukraine	**89,531**
Honduras	**99,309**
Nepal	**102,601**
Venezuela	**107,594**
Ecuador	**105,361**
Peru	**114,690**
Ethiopia	**114,506**
Guatemala	**117,788**
Canada	**118,101**
United Kingdom	**117,743**
Iran	**121,261**
Burma	**124,248**
Nigeria	**134,485**
Brazil	**139,731**
Bangladesh	**142,120**
Iraq	**149,097**
Pakistan	**157,868**
Haiti	**193,412**
Korea, South	**197,935**
Jamaica	**202,716**
Colombia	**200,932**
El Salvador	**212,826**
Vietnam	**320,891**
Dominican Republic	**462,843**
Cuba	**491,063**
Philippines	**511,448**
India	**639,056**
China, People's Republic	**709,302**
Mexico	**1,514,601**

Questions:

1. **What Blocks Naturalization?** 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. **Unearthing Past Errors or Fraud:** 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

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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. **"Chain Migration?"** 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. **Dual Nationality?** 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: [footnotes omitted]

> 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" or "recreational" use of marijuana. Marijuana, however, remains classified as a "Schedule I" controlled substance under the federal CSA. Schedule I substances have no accepted medical use pursuant to the CSA. 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,

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> continues to constitute a conditional bar to GMC for naturalization eligibility, even where such activity is not a criminal offense under state law.
>
> Such an offense under federal law may include, but is not limited to, possession, manufacture or production, or distribution or dispensing of marijuana. 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).

In *Morfa Diaz v. Mayorkas*, the Eleventh Circuit United States Court of Appeals held that government can deny a naturalization application if the applicant had been convicted for sale of cocaine under a state law. 45 F.4th 1198 (11th Cir, 2022). The court held that such convictions constitute an aggravated felony which can disqualify a naturalization application. In 1996, Elvis Morfa Diaz was convicted for the prohibited sale of hCG under the New York Penal Law, but the substance was not regulated by the federal Controlled Substance Act. The court concluded that Diaz's conviction under the NYPL qualifies as an aggravated felony because, even though substance was not specifically by the CSA in 1996, the CSA still bars the sale of any controlled substance—the state statue categorically matched the federal statute. *Morfa Diaz v. Mayorkas*, 45 F.4th 1198 (11th Cir. 2022).

Department of Justice Alphabetical Lists of Controlled Substances
https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf

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

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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 October 6, 2022, President Bwiden announced a full,,people with those prior convictions

Page 903 (§ 9.02): Add the following to the end of **Note 3 after Problem 9-5**:

Slow Rate of Adjuciations
Naturalization applications have frequently had 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 2023, the USCIS reports average waiting times of 10.5 months in FY 2022 and 6 months in the first three quarters of FY 2023.This link shows historical mean waiting times for many different immigration petitions and applications: https://egov.uscis.gov/processing-times/historic-pt

As of July 2024, USCIS reports a big improvement with average waiting times of 6.1 months in FY 2023 and 4.9 months in the first three quarters of FY 2024. This is down from 10.5 months in FY 2022.

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. 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 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

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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

According to the Immigrant Legal Resource Center, the new technique is considered to be much more difficult than the current standards for English as a second language learners. "The photo-based speaking test would include vocabulary and topics beyond the applicant's immediate needs, and this puts us into the content of High Beginning ESL Level 3." https://bill-bliss.medium.com/uscis-naturalization-test-redesign-flaws-in-design-and-transparency-d94f2e79b7dc

The USCIS does provide free resources to help individuals prepare for the examinations: https://www.uscis.gov/citizenship/find-study-materials-and-resources

Naturalization Oath, Image from USCIS media. https://www.uscis.gov/newsroom/video-and-photo-gallery

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.

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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 of 2023 the bill has been referred to a House committee. As of August 2024, there has been no further action on the bill.
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 1,717 people renounced. 89 Fed. Reg. 62843 (August 1, 2024). The data includes long term residents who were treated as citizens for tax purposes. Here is a link to the IRS page with the quarterly postings. https://www.federalregister.gov/quarterly-publication-of-individuals-who-have-chosen-to-expatriate

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.

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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 **Notes** after *Kungys v. United States*:

3. **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

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4. 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).

Image generated by AI and Professor Benson. Taking the Oath of Naturalization.

End Chapter 9.

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