IMMIGRATION AND NATIONALITY LAW: PROBLEMS AND STRATEGIES

Lenni B. Benson
Stephen W. Yale-Loehr
Shoba Sivaprasad Wadhia

Summer 2021 Update

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

TABLE OF CONTENTS

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

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, Commerce Secretary Wilbur Ross sought to include a citizenship question on the 2020 census, supposedly for purposes of improving enforcement of the Voters Rights Act. In *Department of Commerce v. New York*, 588 U.S. ___, 139 S. Ct. 2551 (2019), the U.S. Supreme Court struck down the inclusion of the question on the 2020 census under the Commerce Department's stated reasoning for adding the question as being pretextual, but Chief Justice Roberts left open the possibility of the inclusion of such a question if the administration could produce an acceptable rationale. The Trump Administration made further attempts to include the question on the census. Before the printing of the 2020 census, three federal courts – in New York, California, and Maryland – found the Commerce Department violated federal procedural law and called the Commerce Department's rationale – to improve enforcement of the voting rights act – a cover for another motive.

Page 7 (§ 1.01[A][1]) Family Law: Replace the chart for apprehensions made by Customs and Border Protection with the following:

Country	FY 14	FY 15	FY 16	FY 17	FY 18	FY 19	FY 20	FY 21*
El Salvador	16,404	9,389	17,512	9,143	4,949	12,021	2,189	3,755
Guatemala	17,057	13,589	18,913	14,827	22,327	30,329	8,390	18,372
Honduras	18,244	5,409	10,468	7,784	10,913	20,398	4,454	11,949
Mexico	15,634	11,012	11,926	8,877	10,136	10,487	14,359	11,785
Total:	67,339	39,399	58,819	40,631	48,325	73,235	15,033	45,861

*FY 21 YTD MARCH

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

FY 2020	FY 2019	FY 2018	FY 2017	FY 2016	FY 2015	FY 2014	FY 2013
15,381	69,488	49,100	40,810	59,170	33, 726	57, 496	24, 668

Page 8 (§ 1.01[A][2]) Business and Trade Attorneys: Replace second paragraph under [2] *Business and Trade Attorneys* with the following:

The federal government tracks foreign direct investment in the United States. A recent report indicated that while investments to purchase, create, or expand businesses in the United States had decreased, the total investment was over $259 billion in 2017. "Expenditures were down 37.7 percent from $312.5 billion (revised) in 2018 and below the annual average of $333.0 billion for 2014–2018. As in previous years, acquisitions of existing businesses accounted for a large majority of total expenditures." 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.

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."

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

Recently, many states have passed laws decriminalizing or even legalizing possession and use of marijuana. Although marijuana is still illegal under federal law, New York's Marihuana Regulation and Taxation Act ("MRTA") includes a provision to expunge prior convictions related to marijuana. 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 MRTA, visit https://www.nysenate.gov/legislation/bills/2021/S854.

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

13. State Regulation of Federal and State Tax Withholding Forms for Noncitizens. In *Kansas v. Garcia*, 589 U.S. __, 140 S. Ct. 791 (2020), the Supreme Court ruled on one aspect of the intersection between federal and state law. In the case, the respondents, three noncitizens, used false social security numbers to complete federal and state tax withholding forms. They used the same social security numbers when completing the I-9 forms for employment. The Immigration Reform and Control Act of 1986 makes it unlawful to hire a noncitizen knowing that he or she is unauthorized to work in the United States. INA §§ 274A(a)(1), (h)(3); 8 U.S.C. §§ 1324a(a)(1), (h)(3). Through the I-9 process, employers are required to attest that each employee is "verified" that he or she "is 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 that make 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 110 (§ 1.02[D]): ***City and County of San Francisco v. Sessions***

The text provides 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. Dept. 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/.

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.*, *City of N.Y. v. DOJ*, _ U.S. _, 141 S. Ct. 1291 (2021).

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. 19-v-22927, 2020 U.S. Dist. LEXIS 233854 (S.D. Fla. Dec. 14, 2020) (enjoining Florida law as preempted by federal statutes). 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 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* 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. https://www.ncsl.org/research/immigration/immigration-laws-database.aspx.

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

Page 129 (§ 2.01[B][1]): The Inspection Process: Supplement the summary of the scope of CBP activity with the following report posted in FY 2020—October 1, 2019 to September 30, 2020:

Processed: 650,178 passengers and pedestrians

- 169,842 incoming international air passengers and crew
- 35,795 passengers and crew on arriving ship/boat
- 444,541 incoming land travelers
- 187,049 incoming privately owned vehicles
- 77,895 truck, rail, and sea containers

Processed: $6.64 billion worth of imported goods

90,000 entries of merchandise at our air, land, and sea ports of entry

- Conducted 1,107 apprehensions between U.S. ports of entry
- Arrested 39 wanted criminals at U.S. ports of entry
- Encountered 634 inadmissible persons at U.S. ports of entry
- Discovered 250 pests at U.S. ports of entry and 3,091 materials for quarantine—plant, meat, animal byproduct, and soil
- Seized: 3,677 pounds of narcotics
- $386,195 undeclared or illicit currency
- $3.6 million worth of products with Intellectual Property Rights violations
- Collected approximately $216 million in duties, taxes and other fees, including more than $204 million in duties

Conducted operations in:

- 106 countries with more than 697 CBP employees working internationally
- 328 ports of entry within 20 field offices
- 31 Border Patrol stations within 20 sectors including 35 immigration checkpoints
- 74 Air and Marine Operations locations

Source: https://www.cbp.gov/newsroom/stats/typical-day-fy2020 (based on FY 2020 data)

Even with pandemic conditions, the CBP documented significant activity.

Page 131 (§ 2.01[B][1]): The Inspection Process: Supplement the snapshot Comparing Apprehensions at the Border and Overstay Rates for Fiscal Year 2018 and the last available 2019 report:

Fiscal Year	Total Lawful Admissions	Est. Overstays	CBP Apprehensions	Percent of Overstays	Percent of CBP Apprehensions	Total Percent of Unlawful stays/enters
2018	54,706,966	666,582	404,201	1.20%	0.74%	1.96%
2019	55,928,990	676,422	859,501	1.21%	1.54%	2.75%

Sources:

Main page: https://www.dhs.gov/publication/entryexit-overstay-report

DHS Overstay Report 2019, available at https://www.dhs.gov/sites/default/files/publications/20_0513_fy19-entry-and-exit-overstay-report.pdf
DHS Overstay Report 2018, available at https://www.dhs.gov/sites/default/files/publications/19_0417_fy18-entry-and-exit-overstay-report.pdf

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*, 2019 U.S. Dist. LEXIS 88210 (N.D. Cal. May 24, 2019), add the following:

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. 1620 (2021). 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). These policy changes could render the cases moot. Amy Howe, *Justices take immigration cases off February calendar*, SCOTUSBLOG (Feb. 3, 2021, 2:32 PM), https://www.scotusblog.com/2021/02/justices-take-immigration-cases-off-february-calendar/.
As of June 30, 2021, the Court has not ruled on the Biden administration's request for the Court to vacate the lower court decision and to remand for dismissal based on changed circumstances. https://www.supremecourt.gov/docket/docketfiles/html/public/20-138.html.

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 the majority of 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. No report has yet been issued.

Some critics have argued 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* 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.

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. The full report can be found at https://www.gao.gov/assets/gao-21-386.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).

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. May 2, 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).

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:

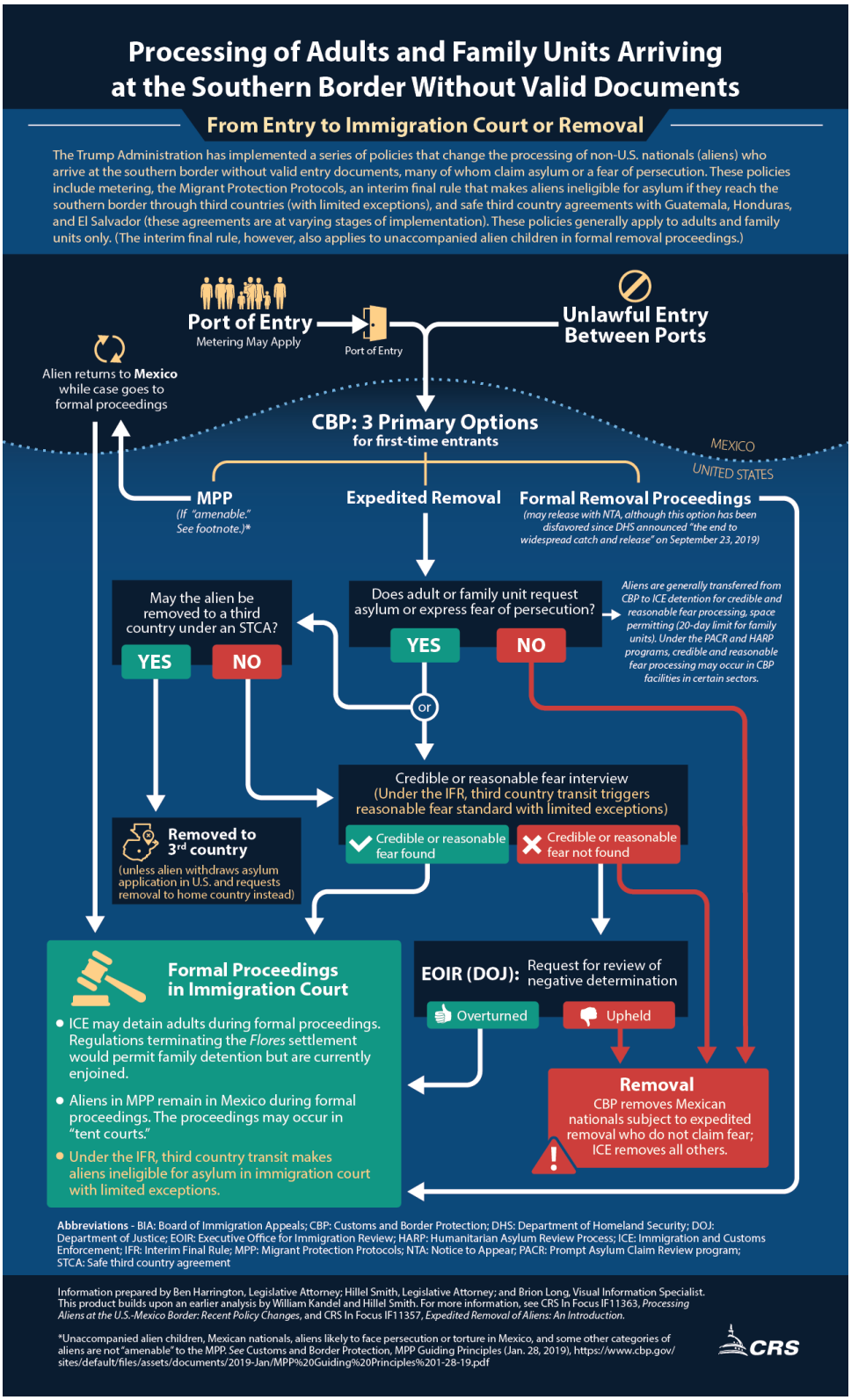
On June 13, 2012, the motion by Respondent to dismiss the petition for review for lack of jurisdiction and vacate the court's opinion was granted and the opinion was vacated. The court based its decision on the incorrect representation of the Department of Homeland Security that the petitioner was admitted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

Page 158 (§ 2.01[D][1][Note 3]): 3. Does a Statutory Right to Claim Asylum Create Guaranteed Procedural Rights?: Replace the sentence stating "Expedited removal had grown to represent more than 44% of all of the orders of removal in FY 2013." with the following:

"Expedited removal had grown to represent more than 46% of all of the orders of removal in FY 2019." See the DHS 2019 Statistical Yearbook, available at https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf

Page 159 Problem 2-3-2 Martiza Xec-Oxlaj [Asylum Seeker at the Port of Entry].

This problem incorporated the program initiated by the Trump Administration called Migrant Protection Protocols ("MPP"). In essence, these protocols allowed the DHS to reject asylum seekers at the ports of entry along the southern border of the United States and required them to wait in Mexico. Below is an infographic produced by the Congressional Research Service in 2020 to help explain how the MPP altered the expedited removal process:



Page 164 (§ 2.01[D][1][Notes and Questions]): Additional Notes and Questions to *Innovation Law Lab v. McAleenan*: Under Note 1, add the following case update to *Innovation Law Lab v. McAleenan,* 924 F.3d 503 (9th Cir. 2019) after "The litigation continues, and the government has further altered procedures."

On February 28, 2020, the Ninth Circuit affirmed an injunction against the remain in Mexico rule. *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020). One of the inadequacies of the program was that it did not adequately allow individuals to seek protection under the international obligation of non-return or non-refoulement. As you will learn in Chapter 8, the obligation on the government to avoid return is mandatory if a person meets certain standards of protection.

Later the Supreme Court issued a stay of the injunction, 140 S. Ct. 1564 (2020). The Supreme Court also agreed to review the case during the court's October 2020-2021 term. The case was renamed as *Mayorkas v. Innovation Law Lab*, renamed for Biden's Secretary of Homeland Security, Alejandro Mayorkas. *Mayorkas v. Innovation Law Lab*, __ U.S. __, 141 S. Ct. 1289 (2021). However, the Court postponed oral argument and Secretary Mayorkas issued a memorandum on June 1, ending enrollment of new immigrants in the Migrant Protection Protocols program.

On June 21, 2021, the Supreme Court, in a one paragraph order, vacated the Ninth Circuit opinion and gave instructions to remand to the district court to vacate the injunction of the Migration Protection Protocols. The order can be found at https://www.supremecourt.gov/orders/courtorders/062121zr_d18e.pdf.

Here is an excerpt from Secretary Mayorkas' memorandum explaining the decision to suspend the Migrant Protection Protocols:

> As an initial matter, my review confirmed that MPP had mixed effectiveness in achieving several of its central goals and that the program experienced significant challenges.
>
> • I have determined that MPP does not adequately or sustainably enhance border management in such a way as to justify the program's extensive operational burdens and other shortfalls. Over the course of the program, border encounters increased during certain periods and decreased during others. Moreover, in making my assessment, I share the belief that we can only manage migration in an effective, responsible, and durable manner if we approach the issue comprehensively, looking well beyond our own borders. Based on Department policy documents, DHS originally intended the program to more quickly adjudicate legitimate asylum claims and clear asylum backlogs. It is certainly true that some removal proceedings conducted pursuant to MPP were completed more expeditiously than is typical for non-detained cases, but this came with certain significant drawbacks that are cause for concern. The focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their immigration proceedings. In particular, the high percentage of cases completed through the entry of *in absentia* removal orders (approximately 44 percent, based on DHS data) raises questions for me about the design and operation of the program, whether

the process provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief, and whether conditions faced by some MPP enrollees in Mexico, including the lack of stable access to housing, income, and safety, resulted in the abandonment of potentially meritorious protection claims. I am also mindful of the fact that, rather than helping to clear asylum backlogs, over the course of the program backlogs increased before both the USCIS Asylum Offices and EOIR.

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

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

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

migration surges more effectively and more sustainably than MPP, while better ensuring procedural safeguards and enhancing migrants' access to counsel. We will closely monitor the outcomes of these reforms, and make adjustments, as needed, to ensure they deliver justice as intended: fairly and expeditiously.

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

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

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

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

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

Given the analysis set forth in this memorandum, and having reviewed all relevant evidence and weighed the costs and benefits of either continuing MPP, modifying it in certain respects, or terminating it altogether, I have determined that, on balance, any benefits of maintaining or now modifying MPP are far outweighed by the benefits of terminating the program. Furthermore, termination is most consistent with the Administration's broader policy objectives and the Department's operational needs. Alternative options would not sufficiently address either consideration.

Therefore, in accordance with the strategy and direction in Executive Order 14010, following my review, and informed by the current phased strategy for the safe and orderly entry into the United States of certain individuals enrolled in MPP, I have

concluded that, on balance, MPP is no longer a necessary or viable tool for the Department. Because my decision is informed by my assessment that MPP is not the best strategy for implementing the goals and objectives of the Biden-Harris Administration, I have no intention to resume MPP in any manner similar to the program as outlined in the January 25, 2019 Memorandum and supplemental guidance.

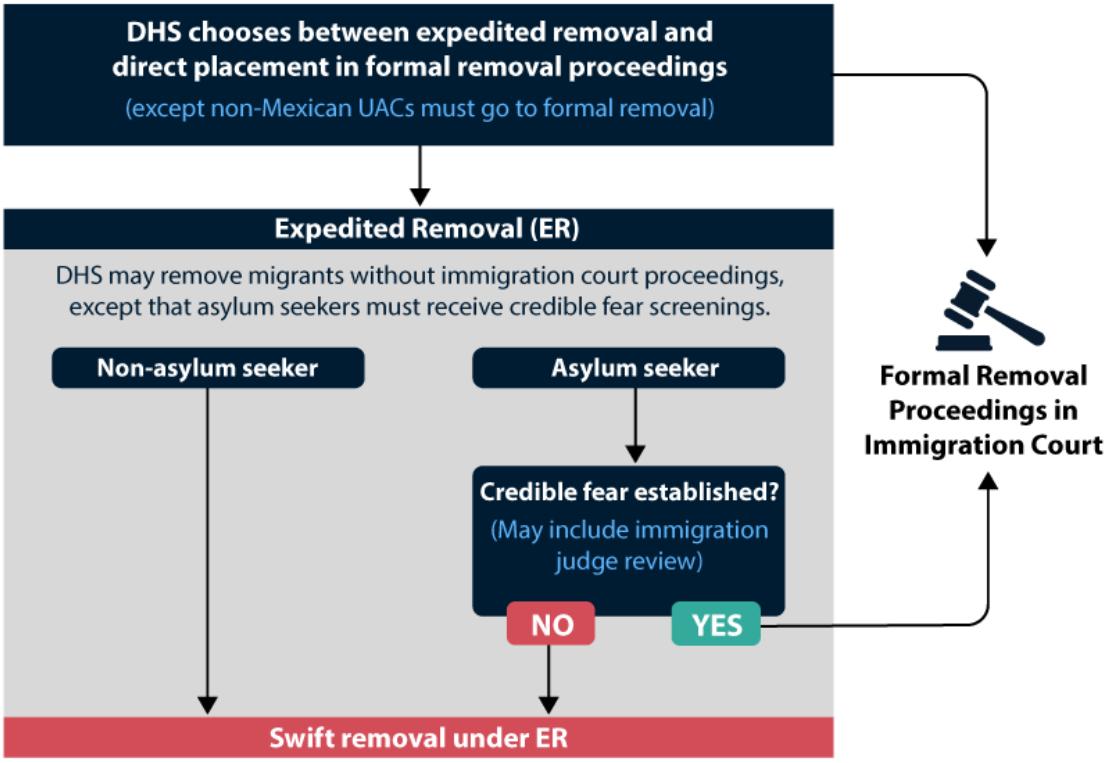
Accordingly, for the reasons outlined above, I hereby rescind, effective immediately, the Memorandum issued by Secretary Nielsen dated January 25, 2019 entitled "Policy Guidance for Implementation of the Migrant Protection Protocols," and the Memorandum issued by Acting Secretary Pekoske dated January 20, 2021 entitled "Suspension of Enrollment in the Migrant Protection Protocols Program." I further direct DHS personnel, effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP. Furthermore, DHS personnel should continue to participate in the ongoing phased strategy for the safe and orderly entry into the United States of individuals enrolled in MPP.

The termination of MPP does not impact the status of individuals who were enrolled in MPP at any stage of their proceedings before EOIR or the phased entry process describe above.

* * * * *

The full memorandum can be found at https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf

Here is a graphic eliminating the "Remain in Mexico" option:



Source: CRS Report of April 9, 2021 discussed below.

Page 180 (§ 2.01[C][3]): Include the following new paragraph after the paragraph that states: "Several organizations filed a suit challenging the constitutionality and legal authority of DHS to make this expansion. *Make the Road v. McAleenan*, No. 19-cv-2369 (D.D.C. Aug. 6, 2019)."

In September 2020, a federal district court enjoined the expansion of expedited removal as a violation of the due process rights of people within the interior and as a violation of the Administrative Procedure Act because of irregularities in its adoption. However, in June 2020, the D.C. Circuit reversed and remanded. *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

In the spring of 2021, President Biden ordered a review of the expansion:

> "(b) Ensuring a Timely and Fair Expedited Removal Process.
>
> (i) The Secretary of Homeland Security, with support from the United States Digital Service within the Office of Management and Budget, shall promptly begin a review of procedures for individuals placed in expedited removal proceedings at the United States border. Within 120 days of the date of this order, the Secretary of

> Homeland Security shall submit a report to the President with the results of this review and recommendations for creating a more efficient and orderly process that facilitates timely adjudications and adherence to standards of fairness and due process.
>
> (ii) The Secretary of Homeland Security shall promptly review and consider whether to modify, revoke, or rescind the designation titled ‘‘Designating Aliens for Expedited Removal,’’ 84 FR 35,409 (July 23, 2019), regarding the geographic scope of expedited removal pursuant to INA section 235(b)(1), 8 U.S.C. 1225(b)(1), consistent with applicable law. The review shall consider our legal and humanitarian obligations, constitutional principles of due process and other applicable law, enforcement resources, the public interest, and any other factors consistent with this order that the Secretary deems appropriate. If the Secretary determines that modifying, revoking, or rescinding the designation is appropriate, the Secretary shall do so through publication in the Federal Register.” 3 CFR Executive Order 14010.

As of the summer of 2021, there has been no evidence that DHS is using the expanded expulsion authority. The litigation was remanded to the lower court and no new orders or injunctions have issued as of June 2021.

Page 181 (§ 2.01[C][4]): Add the following to Notes and Questions:

4. Is Expedited Removal Essential in the Interior? If you were asked to help the DHS make the review requested by President Biden, what evidence would you want to see to evaluate the need for expanded expedited removal?

5. Civil Rights Protections? If Expedited Removal is utilized throughout the U.S. territory, how can DHS ensure that its enforcement will not exacerbate racial profiling by law enforcement? How would you counsel your community to prepare for expanded Expedited Removal? Do you know what documents you might need to establish your status?

6. Expansion of ‘Expedited’ Removal Under COVID-19. On March 20, 2020, the Centers for Disease Control and Prevention (CDC), under pressure by the Trump administration, issued an order authorizing the immediate expulsion of persons under a U.S. health law known as Title 42 § 265. This is not a form of expedited removal under the INA and does not result in a final order of removal.

Title 42 permits the President to prohibit the entry of persons into the United States when the Director of the CDC believes that “there is serious danger of the introduction of [a communicable] disease into the United States.” U.S. immigration authorities can now use Title 42 to immediately expel individuals without processing them in border facilities. As such, individuals expelled under Title 42 are returned to a transit country or country of

origin and are not afforded the right to make a case to stay in the United States before an immigration judge, even if the individual is seeking asylum. Despite pressure from immigration advocacy groups, human rights organizations, and public health experts, the Biden Administration has not expressed any intent to modify, revoke or rescind the expanded use of expedited removal. Since March 2020, U.S. immigration officials have expelled more than 80 percent of immigrants using the Title 42 Order.

On February 2021, the ACLU of Massachusetts filed a complaint against the Department of Homeland Security challenging the lawfulness of Title 42 expulsions. According to the complaint, seven asylum-seekers—including four children—were each unlawfully expelled by the Department of Homeland Security (DHS) in the fall of 2020 without the legally-required inquiry into whether they would face persecution. In November 2020, the ACLU won a preliminary injunction in a class action lawsuit challenging the Title 42 order on behalf of unaccompanied children fleeing danger and seeking protection in the U.S. On January 29, a federal appeals court stayed the injunction.

You can read the complaint at https://www.aclum.org/en/cases/poe-v-mayorkas. In January 2021, the ACLU Immigrants' Rights Project, along with others, filed a class action suit seeking to stop the expulsion of migrant families under Title 42. This litigation is also ongoing. You can follow the status of the lawsuit at https://www.acludc.org/en/cases/huisha-huisha-v-gaynor-defending-due-process-rights-children-seeking-refuge-us-during-covid19.

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

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

Updating Section 2.01[D] Expedited Removal and the Asylum Seeker

This supplemental material will allow you to review **Problem 2-3-1** concerning Marta from Ethiopia (page 154); **2-3-2** Maritza from Guatemala (page 158); and **2-3-3** Yovilli from Honduras (page 165). Each of these problems asked you to consider the statutory and regulatory process 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 she has to wait to pursue her claim, 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. 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 produced a short report summarizing 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, "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.

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

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

Image next page

Apprehensions and Enforcement Actions reported by CBP through May of 2021:

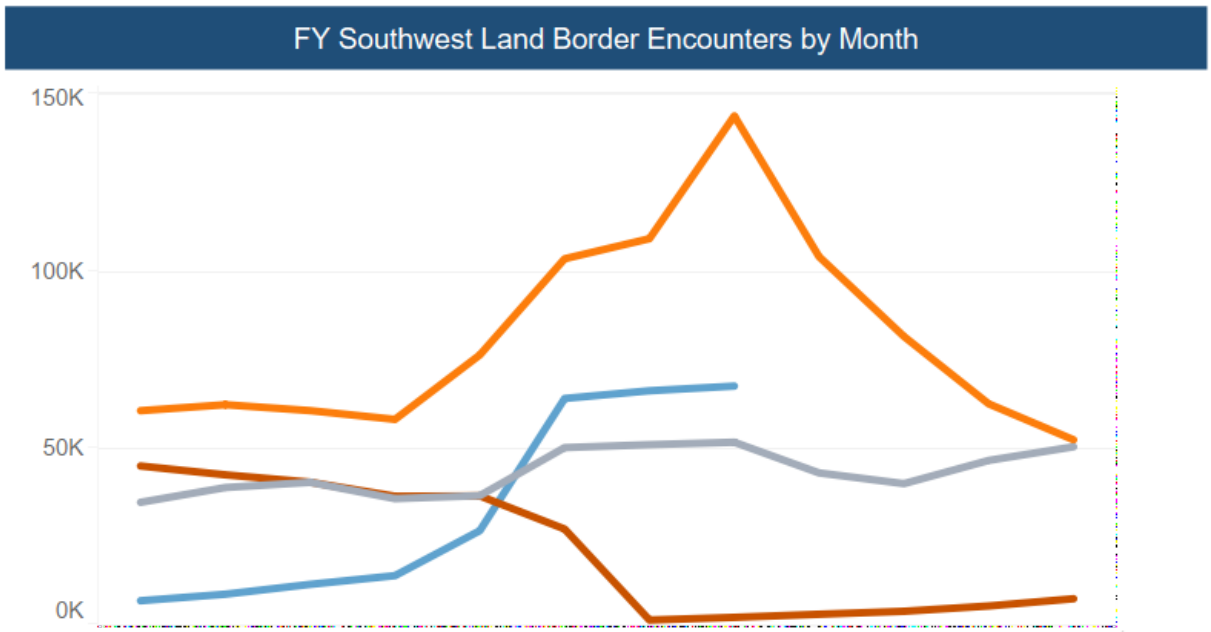
U.S. Customs and Border Protection

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

FY: All | Component: All | Demographic: All

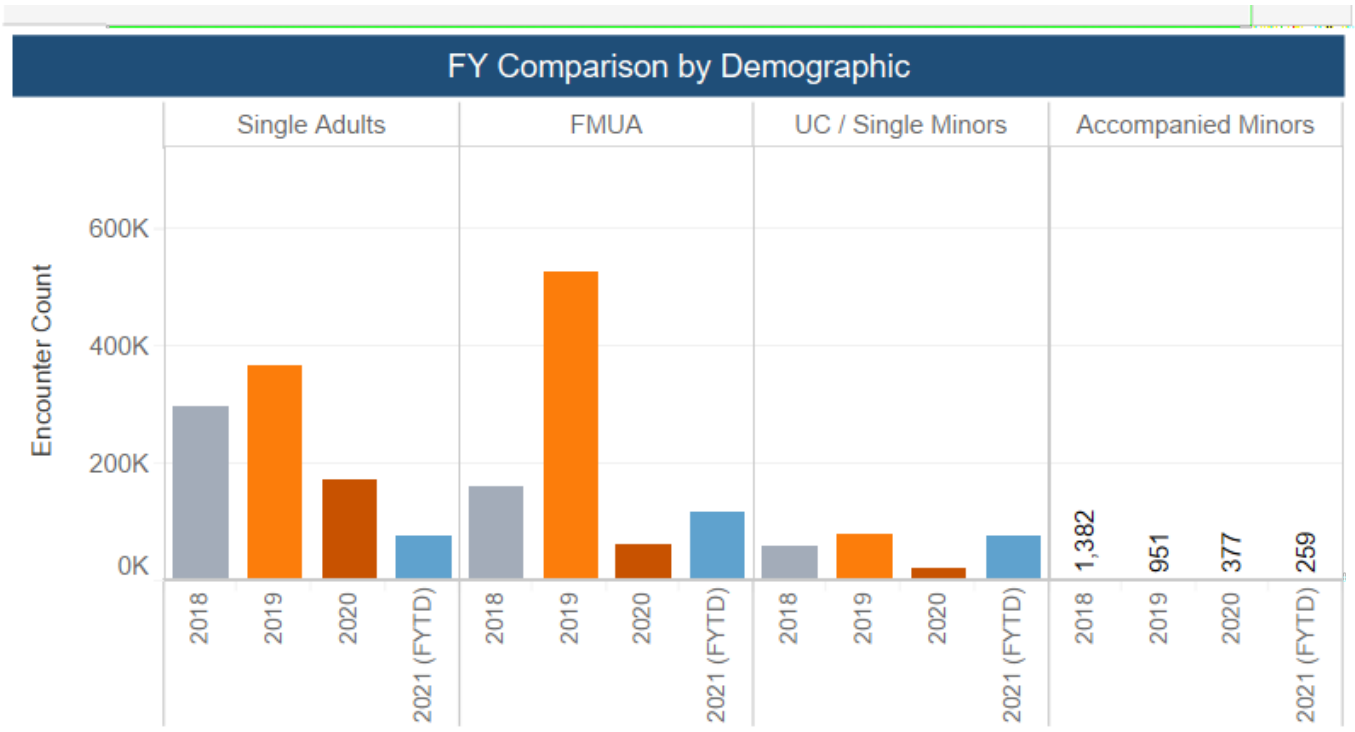
Citizenship Grouping: All | Title of Authority: Title 8 | Reset Filters

FY 2018 2019 2020 2021 (FYTD)



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2021 (FYTD)	7,045	8,890	11,676	14,136	26,854	64,234	66,415	67,732					266,982
2020	45,139	42,643	40,565	36,585	36,687	27,310	1,584	2,342	3,220	4,058	5,561	7,607	253,301
2019	60,781	62,469	60,794	58,317	76,545	103,731	109,415	144,116	104,311	81,777	62,707	52,546	977,509
2018	34,871	39,051	40,519	35,905	36,751	50,347	51,168	51,862	43,180	40,149	46,719	50,568	521,090

Note: This image removed the Title 42 Public Health Expulsions



Source: USBP and OFO official year end reporting for FY18-FY20; USBP and OFO month end reporting for FY21 to date. Data is current as of 6/3/2021.

*Source CBP data through May 2021, available at https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last visited 6.12.21).

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

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 suspension clause and due process challenges to restrictions on the ability of asylum seekers to challenge the sufficiency of the expedited removal proceedings. This case, which discusses and distinguishes the use of habeas petitions in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and *Boumediene v. Bush*, 553 U.S. 723 (2008), is excerpted below:

Department of Homeland Security v. Thuraissigiam

Supreme Court of the United States

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

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

Opinion

JUSTICE ALITO delivered the opinion of the Court.

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

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

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

Respondent's due process argument fares no better. While aliens who have established connections in this country have due process rights in deportation proceedings, the Court long ago held that Congress is entitled to set the conditions for an alien's lawful entry into this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause. *See Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892). Respondent attempted to enter the country illegally and was apprehended just 25 yards from the border. He therefore has no entitlement to procedural rights other than those afforded by statute.

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

I

A

We begin by briefly outlining the provisions of immigration law that are pertinent to this case. Under those provisions, several classes of aliens are "inadmissible" and therefore "removable."

INA §§ 212, 240; 8 U.S.C. §§1182, 1229a (e)(2)(A). An alien like respondent who is caught trying to enter at some other spot is treated the same way. INA § 235(a)(1), (3); 8 U.S.C. §§1225(a)(1), (3).

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

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

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

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

Over the last five years, nearly 77% of screenings have resulted in a finding of credible fear. And nearly half the remainder (11% of the total number of screenings) were closed for administrative reasons, including the alien's withdrawal of the claim. As a practical matter, then, the great majority of asylum seekers who fall within the category subject to expedited removal do not receive expedited removal and are instead afforded the same procedural rights as other aliens.

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

Applicants can avoid expedited removal by claiming asylum. If an applicant "indicates either an intention to apply for asylum" or "a fear of persecution," the immigration officer "shall refer the alien for an interview by an asylum officer." INA § 235(b)(1)(A)(i)-(ii); 8 U.S.C.

§§1225(b)(1)(A)(i)-(ii). The applicant need not show that he or she is in fact eligible for asylum—a "credible fear" equates to only a "significant possibility" that the alien would be eligible. *Ibid*.

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

B

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

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

C

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

[1] [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).

signed the removal order. After hearing further testimony from respondent, an Immigration Judge affirmed on de novo review and returned the case to the Department for removal.

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

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

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

II

A

The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, cl. 2. In *INS v. St. Cyr*, 533 U.S. 289 (2001), we wrote that the Clause, at a minimum, "protects the writ as it existed in 1789," when the Constitution was adopted. Id., at 301 (internal quotation marks omitted). And in this case, respondent agrees that "there is no reason" to consider whether the Clause extends any further. We therefore proceed on that basis.[2] [FN 12]

---

[2] [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).

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.[3][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 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

[3] [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.

admitted into the country pursuant to law," "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Nishimura Ekiu*, 142 U.S., at 660. Since then, the Court has often reiterated this important rule. *See*, *e.g.*, *Knauff*, 338 U.S., at 544("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"); *Mezei*, 345 U.S., at 212(same); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative").

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

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

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

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

For these reasons, an alien in respondent's position has only those rights regarding admission that Congress has provided by statute. In respondent's case, Congress provided the right to a "determin[ation]" whether he had "a significant possibility" of "establish[ing] eligibility for asylum," and he was given that right. 8 U.S.C. §§1225(b)(1)(B)(ii), (v). Because the Due Process Clause provides nothing more, it does not require review of that determination or how it was made. As applied here, therefore, INA § 242(e)(2); 8 U.S.C. §1252(e)(2) does not violate due process.[4] [FN 28]

[4] [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 §§

***

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

It is so ordered.

[Concurrence of Justice Thomas omitted.]

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

The statute at issue here, INA § 242(e)(2); 8 U. S. C. §1252(e)(2), sets forth strict limits on what claims a noncitizen subject to expedited removal may present in federal habeas corpus proceedings. I agree that enforcing those limits in this particular case does not violate the Suspension Clause's constitutional command: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, § 9, cl. 2. But we need not, and should not, go further.

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

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

Could Congress, for that matter, deny habeas review to someone ordered removed despite claiming to be a natural-born U. S. citizen? The petitioner in *Chin Yow v. United States*, 208 U. S. 8(1908), and others have faced that predicament. *See also* INA § 242(e)(2)(A); §1252(e)(2)(A) (permitting, at present, habeas review of citizenship claims). What about foreclosing habeas review of a claim that rogue immigration officials forged the record of a credible-fear interview that, in truth, never happened? Or that such officials denied a refugee asylum based on the dead-wrong legal interpretation that Judaism does not qualify as a "religion" under governing law? *Cf. Tod v. Waldman*, 266 U. S. 113, 119-120 (1924) (observing that immigration officials ignored a Jewish family's claim that they were "refugees" fleeing "religious persecution").

The answers to these and other "difficult questions about the scope of [Suspension Clause] protections" lurk behind the scenes here. *Lozman v. Riviera Beach*, 585 U. S. ___, ___, 138 S. Ct. 1945, 1953 (2018). I would therefore avoid making statements about the Suspension Clause that

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.

sweep beyond the principles needed to decide this case—let alone come to conclusions about the Due Process Clause, a distinct constitutional provision that is not directly at issue here.

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

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

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

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

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

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

Respondent, to be sure, casts the brunt of his challenge to this adverse credible-fear determination as two claims of legal error. But it is the factual findings underlying that determination that respondent, armed with strong new factual evidence, now disputes. Brief for Professors of Sri

Lankan Politics as Amici Curiae 7-11; n. 28 (noting that immigration officials may revisit their findings in light of this additional evidence).

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

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

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

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

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

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

procedural, they may constitutionally be treated as unreviewable—at least under the border-entry circumstances present in this case.

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

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

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

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

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

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

***

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.[5] [FN 11in dissent]

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

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

[5] [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.

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 is still being litigated. See page 180 in Text discussion expansion to the entire U.S. territory for those who cannot prove two years 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 Litigation. If you were working in Congress to ensure proper consideration of asylum and withholding of removal claims, would you recommend a program such as the "Migrant Protection Protocols" that was used to force people to wait in Mexico even if they present themselves at a port of entry seeking protection? Could advocates organize assistance to these individuals to help them present their claims in a more organized fashion than trying to reach people at the border or in brief periods of detention as they prepare for the critical credible fear interview? The Migrant Protection Protocols, a misnamed program, is discussed in Problem 2-3-2 in the text at page 158. DHS ended this program on June 1, 2021.

4. Credible Fear Review and Standards May Become Much More Difficult. In the summer of 2020, the Trump administration proposed joint regulations guiding and binding both the Asylum officers and the Immigration Judges within the Executive Office for Immigration Review. These proposed rules would have required individuals to demonstrate more than a significant possibility of persecution to establish a credible fear of persecution. The rules would have raised the standard to a "reasonable fear" standard. The proposed rules were over 160 pages long and proposed many procedural and substantive alterations to expedited removal and the asylum, withholding and Convention Against Torture standards. This change was revoked in Executive Order No. 14, 010, 86 Fed. Reg. 8267 (Feb. 2, 2021). The agencies were instructed to review rescinding the regulations. Litigation also sought to prevent this change. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020).

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.

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? Why might joint rulemakings for these agencies be permitted as a lawful delegation from Congress to the Executive branch?

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

Editors' Note: The transcript misspells the name Thuraissigiam.

JUDGE TO MR. THURASSIGIAM [sic]

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

INTERPRETER TO JUDGE

The interpreter --

JUDGE TO MR. THURASSIGIAM

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

MR. THURASSIGIAM TO JUDGE

(Untranslated.)

JUDGE TO MR. THURASSIGIAM

Sir, just listen. And awoke one day later in the hospital. You do not know who these individuals are or why they beat you. You testified that you were working on your farm when these men came in a van , blindfolded you, and took you away and beat you . You do not know if the police or other government entities are willing or able to protect you because you did not report this incident to the authorities. Although you do not know who beat you or why you were beaten , you are fearful of returning to Sri Lanka. So, sir, is that a fair summary of what you told the officer?

MR. THURASSIGIAM TO JUDGE

Yes, Your Honor. It's truth.

JUDGE TO MR. THURASSIGIAM

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

MR. THURASSIGIAM TO JUDGE

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

JUDGE TO MR. THURASSIGIAM

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

MR. THURASSIGIAM TO JUDGE

Yes.

JUDGE TO MR. THURASSIGIAM

Go ahead, sir.

MR. THURASSIGIAM TO JUDGE

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

JUDGE TO MR. THURASSIGIAM

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

INTERPRETER TO JUDGE

Interpreter needs repetition, Your Honor.

JUDGE TO MR. THURASSIGIAM

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

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

MR. THURASSIGIAM TO JUDGE

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

JUDGE TO MR. THURASSIGIAM

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

MR. THURASSIGIAM TO JUDGE

In, in which one?

JUDGE TO MR. THURASSIGIAM

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

MR. THURASSIGIAM TO JUDGE

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

JUDGE TO MR. THURASSIGIAM

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

MR. THURASSIGIAM TO JUDGE

Yes, sir.

JUDGE TO MR. THURASSIGIAM

And you never reported to the police, correct?

MR. THURASSIGIAM TO JUDGE

Yes, Your Honor. I did not.

JUDGE TO MR. THURASSIGIAM

Again, sir, I have no reason to doubt your subjective fear of return. But upon de novo review of the Asylum Officer's determination, I must find as follows. First, the Asylum Officer appears to have done a diligent job of attempting to obtain and record the relevant information. Second, the officer reached the proper conclusion in the context of controlling law for the reasons articulated. In other words, anyone could understand how difficult a situation this must have been for you and how you can still have fear. But considering all the circumstances, it does not qualify for a reasonable fear of persecution as defined under the law or of torture as defined under the law. So the decision of the Asylum Officer, finding no credible fear of persecution or torture, must be affirmed. And the record is returned to the Department of Homeland Security.

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

. . . .

MR. THURASSIGIAM TO JUDGE

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

JUDGE TO MR. THURASSIGIAM

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

***

Notes and Questions:

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

2. Does the Supreme Court Understand the Scope of a Credible Fear Review Hearing? The credible fear hearing transcript was added to the Supreme Court docket after oral argument. Go back a few pages and read the transcript excerpt provided. You can find the full transcript at: https://www.supremecourt.gov/DocketPDF/19/19-161/137250/20200306095524611_Thurassigiam%20CF%20IJ%20transcript%20-%20Redacted%20transcript.pdf (last accessed June 22, 2021).

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* https://hir.harvard.edu/sri-lankan-civil-war/ Many people assume that residents of Sri Lanka are fully protected by the government. Why is there no reference to country conditions in the Immigration Judge review? Do you assume Mr. Thuraissigiam would have access to the Internet during his DHS detention?

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

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

Source: 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:

On April 1, 2019, the Ninth Circuit granted the plaintiff's motion to dismiss the case. *Flores v. Sessions*, 2019 U.S. App. LEXIS 9580. The settlement about detained children remains in effect.

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

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

In the fiscal year 2019 report on enforcement actions, DHS said that 164,296 people, or 46% of all removals, were subjected to the expedited removal process. Another 39% were reinstatements of removal. Added together, that means that 85% of all removals occur with little or no involvement of the immigration courts.

See DHS Enforcement Action 2019, https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf

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

Air: 53,237
Land: 157,153
Sea: 77,575
Total: 287,977

If a person reenters without permission after an expedited removal order, he or she can be criminally prosecuted for illegal reentry. Technically an individual is barred for five years from seeking admission after an expedited removal order. If the individual reenters unlawfully within this period, is not detected, and 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?

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

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

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.

7. The Power of Prior Orders of Removal. The border apprehensions and administration process continues 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 chose 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 in a case involving reinstatement of removal that people 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*, __ U.S. __, 2021 U.S. LEXIS 3562 (June 29, 2021).

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

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 January 2021, President Joe Biden submitted the U.S. Citizenship Act of 2021 to Congress. If enacted into law, the bill would reclassify 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. The bill would allow 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 give employment authorization to children and spouses of H-1B visa holders. Furthermore, the bill would expand and raise the annual cap on U visas from 10,000 to 30,000. All of these nonimmigrant visas are explained in detail below. 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/; *U.S. Citizenship Act Of 2021 Impact On Legal Immigration*, Carl Shusterman, https://www.shusterman.com/us-citizenship-act-of-2021/#2.

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:

In October 2020, 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 White House issued a memorandum calling for the withdrawal of all rules that were pending at the Federal Register and not yet published. As the modified version of the rule was pending at the Federal Register, it was withdrawn. 86 Fed. Reg. 7,424 (Jan. 20, 2021); AILA, Featured Issue: DHS and DOL Rules Altering the H-1B Process and Prevailing Wage Levels (May

17, 2021), https://www.aila.org/advo-media/issues/all/dhs-dol-rules-altering-h1b-prevailing-wage-levels.

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

The 2017 memo acknowledged that the tech industry had evolved significantly since 2000. The memo also clearly stated the standard that was to be applied to qualify for H-1B: the employer must show that the position requires the theoretical and practical application of a body of highly specialized knowledge, which requires the attainment of a bachelor's degree or higher in a related field. The memo also stated that a position could not be identified as entry level on the industry salary range, yet require a skill set and consist of job duties that are more senior, complex, or specialized in nature. Further, the memo reversed a long-standing policy which presumed a computer programmer to be a specialty occupation. In February 2021, the USCIS rescinded the 2017 policy memo and reinstated the 2000 policy memo. In rescinding the 2017 memo, the USCIS cited a Ninth Circuit decision that found the USCIS' refusal to issue a H-1B visa to a computer programmer to be arbitrary and capricious. USCIS, Policy Memorandum, PM-602-0142.1, Rescission of 2017 Policy Memorandum PM-602-0142 (Feb. 3, 2021), https://www.uscis.gov/sites/default/files/document/memos/PM-602-0142.1_RescissionOfPM-602-0142.pdf (citing *Innova Solutions v. Baran*, 983 F. Supp. 3d 428 (9th Cir. 2020)).

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

4. Executive Order 13788 of April 18, 2017: Buy American and Hire American. In Executive Order 13788, President Trump proposed to create higher wages and employment rates for American workers by requiring the executive branch "to rigorously enforce and administer the laws governing entry to the United States of workers from abroad." 82 Fed. Reg. 18,837 (Apr. 21, 2017). His executive order required the Departments of State, Justice, Labor, and Homeland Security to propose new rules and issue new guidelines to supersede or revise previous rules and guidance if appropriate, to protect the interests of U.S. workers in the administration of our immigration system "as soon as practicable, and consistent with [current] laws." *Id.* at § 5(a). In particular, the President's Executive Order sought to reform the H-1B program to "ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries." *Id.* at § 5(b). President Biden revoked the Executive Order in January 2021. 86 Fed. Reg. 7,475 (Jan. 25, 2021).

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

5. Suspension of Nonimmigrant Visas: In April 2020, President Trump issued a proclamation suspending immigrant visas from outside of the United States due to COVID-19. In June 2020, Trump issued a proclamation also suspending the entry of H-1B, H-2B, L-1, and certain J-1 visa holders from outside of the United States until December 31, 2020. He later extended the restrictions through March 31, 2021. The ban harmed H-1B holders who were abroad and expected to begin work in the United States. Danilo Zak, *President Trump's Proclamation Suspending Immigration*, National Immigration Forum (June 23, 2020), https://immigrationforum.org/article/president-trumps-proclamation-suspending-immigration/. In August 2020, the DOS announced that it would allow H-1B and L visa holders to either return to

the United States to resume previously approved employment or apply for a national interest exception if their employer was fulfilling a critical infrastructure need in a designated industry. *State Department Broadens National Interest Exceptions to Nonimmigrant Entry Ban for H-1B and L-1 Employees*, Fragomen (Aug. 12, 2020), https://www.fragomen.com/insights/alerts/state-department-broadens-national-interest-exceptions-nonimmigrant-entry-ban-h-1b-and-l-1-employees. While President Biden revoked the April proclamation suspending immigrant visas in February 2021, the June proclamation suspending nonimmigrant visas remains in effect. Presidential Proclamation No. 10149, 86 Fed. Reg. 11,847 (Feb. 24, 2021); see also US. Dep't of State, *Presidential Proclamation on the Suspension of Entry as Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019* (updated May 12, 2021), https://travel.state.gov/content/travel/en/News/visas-news/presidential-proclamation-on-the-suspension-of-entry-as-nonimmigrants-of-certain-additional-persons-who-pose-a-risk-of-transmitting-coronavirus-disease-2019.html.

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.

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

In 2018, USCIS issued a policy memo clarifying existing requirements relating to H-1B petitions filed for foreign nationals who will be employed at one or more third-party worksites. This policy

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

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.

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

In response to President Trump's Buy American and Hire American Executive Order, the DHS proposed a rule to rescind work authorization for H-4 spouses in February 2019. The change would have hurt an estimated 90,000 foreign nationals, mostly women from India. Laura D. Francis, *White House Poised to End Work Permits for H-1B Spouses,* Bloomberg Law, Feb. 21, 2019, https://news.bloomberglaw.com/daily-labor-report/white-house-poised-to-end-work-permits-for-h-1b-spouses-2. The DHS withdrew the proposed rule in January 2021. President Biden has introduced a bill to Congress, the U.S. Citizenship Act of 2021, which would expressly grant work authorization to H-4 visa holders. U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. (2021); AILA, Practice Alert: Proposed H-4 EAD Rescission Rule Withdrawn from Review at OMB (Jan. 28, 2021), https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/practice-alert-proposed-h-4-ead-rescission.

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 new policy memo on the L-1 visa classification was issued on November 8, 2017. USCIS, Policy Memorandum, *Matter of G-Inc.*, PM-602-0148 (Nov. 8, 2017), https://www.uscis.gov/sites/default/files/document/memos/APPROVED_PM-602-0148_Matter_of_G-_Inc._Adopted_AAO_Decision.pdf (designating *Matter of G-Inc*. as an Adopted Decision, 2017-05 (A.A.O. Nov. 8, 2017). *Matter of G-Inc.* clarifies that to establish that a beneficiary will be employed in a managerial capacity as a "function manager," the petitioner must demonstrate that: (1) the function is a clearly defined activity; (2) the function is "essential," i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations. *Matter of G-Inc.*, Adopted Decision 2017-05, at 4 (A.A.O. Nov. 8, 2017).

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

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

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.

Chapter 4: Immigrants and Paths to Permanent Resident Status

Page 428 (§ 4.01[C]): Add the following paragraph at the end of section 4.01[C]:

In January 2021, President Joe Biden submitted the U.S. Citizenship Act of 2021 to Congress. If enacted, the bill would create a new lawful prospective immigrant (LPI) status for undocumented immigrants. LPI status would allow undocumented immigrants to adjust to legal permanent resident status after five years and eventually apply for citizenship. Those eligible for LPI status would include those in DACA, Temporary Protected Status, and Deferred Enforced Departure status, as well as certain agricultural workers and essential workers. The bill would also increase the number of visas available each year, including annual per-country caps. The bill would recognize same-sex partnerships as "permanent partners" and grant permanent partners and their adopted and biological children the same protections available to heterosexual couples and their children. The bill would also limit executive authority to prevent bans such as the Muslim and Africa bans from being implemented in the future. 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/; Siskind Summary – The US Citizenship Act (the "Biden Immigration Bill"), Siskind Summer PC (Feb. 20, 2021), https://www.visalaw.com/siskind-summary-us-citizenship-act-biden-immigration-bill/.

Page 434-35 (§ 4.01[G][1]): Replace the last paragraph at the end of page 434 and add the following two charts to page 435:

During FY2014, there was a "surge" in applications for the EB-4 category. The number of I-360 petitions filed increased from 3,994 to 5,766. In FY2015, the USCIS received 11,500 petitions. In FY2017, this number increased to 20,914. What factors do you think contributed to this rapid increase in numbers? How do you think the increase in filings affected the availability of visa numbers for this category? In FY2020, USCIS began processing EB-4 applications much more quickly. What could have prompted this change?

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

Page 437 (§ 4.01[G][3]): Add the following problem 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?

Page 477 (§ 4.02[D][3]): Add the following section and shift down the current sections 3 to 5:

[3] Public Charge

The DHS implemented a public charge rule in 2019. Under the rule, applicants seeking to adjust status were inadmissible if an adjudicating officer found that they were a public charge, or that they were likely to become a public charge "at any time." Applicants were a public charge if they received one or more public benefits, not limited to cash benefits, for more than twelve months total within any thirty-six-month period. An adjudicating officer considered the totality of circumstances to determine whether an applicant was likely to become a public charge, including age, health, family status, education, and financial status. Applicants had to Form I-944, Declaration of Self-Sufficiency, and some also had to submit Form I-864, Affidavit of Support (explained below). USCIS, Public Charge Fact Sheet (Sept. 22, 2020), https://www.uscis.gov/news/public-charge-fact-sheet. Certain U and T visa applicants, VAWA self-petitioners, and special immigrant juveniles were exempt from the public charge rule. USCIS Policy Manual, Chapter 3 – Applicability (Feb. 22, 2021), https://www.uscis.gov/policy-manual/volume-8-part-g-chapter-3. Many organizations challenged the rule in litigation. *See, e.g.*, CLINIC, Challenges to the Final Rule on Public Charge (Aug. 28, 2019), https://cliniclegal.org/resources/ground-inadmissibility-and-deportability/public-charge/challenges-final-rule-public. On March 2021, the DOJ announced that it will no longer pursue appellate review of decisions that invalidated or enjoined the public charge and will revert to the 1999 interim field guidance on the public charge instead of the 2019 public charge rule. DHS, DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility (Mar.

9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility.

Page 491 (§ 4.03[C][1]): Add the following to the last paragraph on National Interest Waivers, before Problem 4-5:

The Ninth Circuit held that it does not have jurisdiction to review a USCIS denial of a national interest waiver. *Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019).

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. 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. 2020 U.S. Dist. LEXIS 181333 (D.D.C. Sept. 30, 2020). Subsequently, 181 citizens and lawful permanent residents who had immediate family members with an approved visa petition sued. In December 2020, the district court enjoined the DOS from enforcing the proclamation against the named plaintiffs. *Young v. Trump*, 2020 U.S. Dist. LEXIS 233614 (N.D. Cal. Dec. 11, 2020). President Biden revoked the proclamations in February 2021. Proclamation No. 10149, 86 Fed. Reg. 11,847 (Feb. 24, 2021). However, many consulates have been slow to reopen visa services during COVID-19. U.S. Dep't of State, Phased Resumption of Routine Visa Services (Feb. 24, 2021), https://travel.state.gov/content/travel/en/News/visas-news/phased-resumption-routine-visa-services.html; U.S. Dep't of State, Visa Services Operating Status Update (Apr. 6, 2021), https://travel.state.gov/content/travel/en/News/visas-news/visa-services-operating-status-update.html.

Page 524 (§ 4.05[C][10]): Delete this paragraph just before section 11:

Due to these two federal court orders, USCIS has resumed accepting requests to renew a grant of deferred action under DACA for the time being while the courts and Congress continue to debate the outcome and fate of the DACA recipients. USCIS, *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, https://www.uscis.gov/humanitarian/deferred - action-childhood-arrivals-response-january-2018-preliminary-injunction (last visited Jan. 31, 2019).

Page 524 (§ 4.05[C][10]): Instead, replace with the following:

Eventually, the Supreme Court granted certiorari. In *DHS v. Regents*, the Supreme Court declared that the process DHS used to rescind DACA was arbitrary and capricious but declined to decide whether DACA itself was lawful. 140 S. Ct. 1891 (2020) (*see* Chapter 1). In response, DHS announced that it would reject DACA applications from individuals who had never previously received DACA. DHS would continue to grant DACA renewal applications, but only for one year instead of two. USCIS Policy Memorandum, Reconsideration of the June 15, 2012 Memorandum 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children' (July 28, 2020), https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf. In December 2020, a federal court ordered DHS to immediately reinstate DACA. *Vidal v. Wolf*, 2020 U.S. Dist. LEXIS 228328 (E.D.N.Y. Dec. 4, 2020). Pursuant to the court order, DHS allowed new applications and extended the period to two years. USCIS, Update: Deferred Action for Childhood Arrivals (Dec. 9, 2020), https://www.uscis.gov/news/alerts/deferred-action-for-childhood-arrivals-response-to-december-4-2020-order-in-batalla-vidal-et-al-v. In January 2021, the Biden administration issued a memorandum calling to preserve DACA. Memorandum on Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA) (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/.

Chapter 5: Inadmissibility: In Every Context

Page 527 (§ 5.01) Inadmissibility: An Introduction: Add near the bottom of this page:

The State Department has not released data for fiscal year 2020 on the number of people found to be inadmissible. The 2019 data is similar to that of 2017:

	Immigrants	Non Immigrants
Total Grounds of Ineligibility:	433,137	3,804,717
Grounds overcome:	203,132	834,910
Number of Applications:[6]	298,017	3,742,047

The data is available at:
https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2019AnnualReport/FY19AnnualReport-TableXX.pdf.

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.

On April 24, 2021, the House of Representatives passed legislation that would reform both of these provisions to limit executive authority and to explicit prohibit religious discrimination. The National Origin-Based Antidiscrimination for Nonimmigrants Act. As of June 30, 2021, the bill is pending in the Senate. The status and text of the bill can be found at https://www.congress.gov/bill/117th-congress/house-bill/1333?q=%7B%22search%22%3A%5B%22National+Origin-Based+Antidiscrimination+for+Nonimmigrants%22%5D%7D&s=1&r=1.

Page 554 ((§ 5.03[C]]): Add the following to Note 8:

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. 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.

[6] The number of applications reflects that one person many have multiple grounds of inadmissibility applied to them.

The night before President Biden's inauguration, President Trump announced that he wanted to rescind the 14-day bans on non-U.S. citizens entering the United States from China, Iran, the Schengen Zone, the United Kingdom, Ireland, or Brazil, effective January 26, 2021. On January 25, 2021, however, President Biden announced a Proclamation on the Suspension of Entry as Immigrants and Non-Immigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease, continuing the suspension of entry of certain travelers from these areas and expanding the restrictions to include travelers from South Africa and on April 30, 2021, the President issued a proclamation for nonimmigrants from India.

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. This ban expanded travel restrictions to apply to certain nationals from six new countries: Kyrgyzstan, Nigeria, Myanmar, Sudan, Eritrea, and Tanzania. 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/.

The State Department report noted that only twenty-three people were granted exceptions or overcame the inadmissibility finding under the § 212(f) Presidential ban in 2019. *See* Table XX FY 2019 Annual Report. The Table also reports that findings of inadmissibility were also made pursuant to the 2017 Executive Order: Immigrants banned 12,645; ban overcome 6,785; Nonimmigrants banned 7,091; ban overcome 1,296.

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. See https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/#content. For more information, see Shoba Sivaprasad Wadhia, *Biden Ends the 'Muslim ban' on day one of his presidency but its legacy will linger,* Philadelphia Inquirer (Jan. 20, 2021), https://www.inquirer.com/opinion/commentary/biden-immigration-day-one-muslim-ban-repeal-20210120.html.

Page 572 (§ 5.03 [H]): Add the following case before *Notes and Questions*:

Larios v. Attorney General
978 F.3d 62 (3d Cir. 2020)

KRAUSE, *Circuit Judge.*

To determine if a noncitizen convicted of a state offense is subject to immigration consequences prescribed in federal law, the Supreme Court has instructed courts to compare whether the elements of the state offense define a crime that is the same as or narrower than the generic federal offense. *See Descamps v. United States*, 570 U.S. 254, 257 (2013). This analysis, which has come to be known as the "categorical approach," sounds simple in theory but has proven difficult (and often vexing) in practice, necessitating a "modified categorical approach" and generating an evolving jurisprudence around when the categorical or modified categorical approach applies. That difficulty is borne out in the convoluted history of this case. Here, in what is now Lazaro Javier Larios's third petition for review from prior reversals, the Board of Immigration Appeals (BIA) applied the categorical approach and held Larios ineligible for cancellation of removal under [INA § 240A(b)(b)(1);] 8 U.S.C. § 1229b(b)(1) for having been convicted of "a crime involving moral turpitude." [INA § 212(a)(2)(A)(k)(I);] 8 U.S.C. § 1182(a)(2)(A)(i)(I). Because we conclude the crime at issue—New Jersey's terroristic-threats statute, N.J. Stat. Ann. § 2C:12-3(a)—should have been analyzed under the modified categorical approach, and, under that approach, the particular offense of which Larios was convicted is not a crime involving moral turpitude, we will grant the petition for review.

I. Factual and Procedural History

For nonpermanent residents who meet the eligibility criteria outlined in 8 U.S.C. § 1229b(b)(1), cancellation of removal is a discretionary form of relief that "allows [them] to remain in the United States despite being found removable." *Barton v. Barr*, __ U.S. __,140 S. Ct. 1442, 1445 (2020). But those who have "been convicted of an offense under section 1182(a)(2)," 8 U.S.C. § 1229b(b)(1)(C)—which includes "a crime involving moral turpitude" (CIMT), id. § 1182(a)(2)(A)(i)(I)— are ineligible for cancellation of removal.

Larios, an El Salvadoran national, entered the country without inspection in 1986. In 1998, Larios was approached by someone outside of a bar and, allegedly because he believed he would be robbed, pulled out a knife and caused the person to flee. Larios pleaded guilty to "threaten[ing] to commit any crime of violence with the purpose to terrorize another . . . or in reckless disregard of the risk of causing such terror" in violation of N.J. Stat. Ann. § 2C:12-3(a). Some years later in 2006, he was served a Notice to Appear and entered removal proceedings. Since then, Larios has been seeking cancellation of removal.

The IJ and the BIA in 2008 determined that Larios's crime of conviction was a categorical match for a CIMT, rendering him ineligible for cancellation of removal.

In 2008, Larios filed his first of three petitions for review to this Court and argued that his crime could not qualify as a CIMT because, under the categorical approach, the elements of a state statute must define an offense not broader than the federal statute, whereas here, "the least culpable conduct necessary to sustain a conviction under the [New Jersey] statute," *Partyka v. Att'y Gen.*, 417 F.3d 408, 411 (3d Cir. 2005)—a threat to commit "simple assault"—did not meet the criteria to qualify as "turpitudinous" under § 1182(a)(2)(A)(i)(I) and the relevant case law, *Larios v. Att'y Gen.*, 402 F. App'x 705, 708–09 (3d Cir. 2010). We agreed that, because it swept in simple assault, the statute encompassed both turpitudinous and non-turpitudinous conduct, and based on our understanding of the categorical approach at the time, we held the statute was divisible. See id. at 709. That understanding changed a few years later with Descamps v. United States, 570 U.S. 254 (2013), but our divisibility analysis then focused on whether a statute comprised both turpitudinous and non-turpitudinous conduct, rather than whether it comprised different, alternative elements (one or more of which may be turpitudinous). Regardless, the purpose of the modified categorical approach has always been to determine which portion of the statute formed the basis for the petitioner's conviction. Thus, we remanded for the agency to apply the modified categorical approach to determine whether Larios had been convicted of the turpitudinous or the non-turpitudinous part of the statute. *See id.*

On remand, however, the IJ declined to apply the modified categorical approach and instead concluded that the categorical approach applied after all. The IJ reasoned that simple assault, under New Jersey law, N.J. Stat. Ann. § 2C:1-4(b), was not a "crime" at all, only "a disorderly persons offense [or] . . . a petty disorderly persons offense," id. § 2C:12-1(a). See A.R. 675–76 (citing *State v. MacIlwraith*, 782 A.2d 964, 966 (N.J. App. Div. 2001)). And because New Jersey's terroristic-threats statute covers only threats to "commit a[] crime of violence," N.J. Stat. Ann. § 2C:12-3(a) (emphasis added), the IJ explained, a threat to commit simple assault was not covered by that statute, excluding the only non-turpitudinous application and, hence, the need for the modified categorical approach.

Applying the categorical approach yet again, the IJ relied on BIA precedent that statutes criminalizing "the intentional transmission of threats of violence are categorically CIMTs," A.R. 676 (citing *Matter of Ajami*, 22 I. & N. Dec. 949, 952 (BIA 1999)), and the New Jersey Model Jury Charge's description of a terroristic threat as one "convey[ing] menace or fear," id. (citing New Jersey Model Criminal Jury 6 Charge, § 2C:12-3(a), at 2), to conclude that the statute covered only turpitudinous offenses and was therefore a categorical match with § 1182(a)(2)(A)(i)(I).

The BIA affirmed, summarizing the IJ's analysis but, for its own part, stating only that it agreed that the actus reus, simple assault, was not a "crime of violence" under New Jersey law. That explanation left unclear whether the BIA had compared the mens rea of the state offense—"purpose" or "reckless disregard," N.J. Stat. Ann. § 2C:12-3(a)—to the generic offense, and under that analysis, whether the New Jersey statute was still a categorical match for § 1182(a)(2)(A)(i)(I)'s generic offense. So after Larios filed his second petition for review, we granted the Government's motion to remand "to allow the Board to clarify whether its analysis was properly limited to the 'crime of violence' element of the statute, or, alternatively, to allow the Board to consider the mental state element." A.R. 54. This time on remand, the BIA held the mens rea element, too, was a categorical match, treating both purpose and reckless disregard as "an intentional or vicious state of mind," A.R. 5, and treating a threat with that mens rea as an "act

committed with an appreciable level of consciousness or deliberation," id. at 4 (quoting *Partyka*, 417 F.3d at 414). So it again rejected Larios's cancellation-of-removal application. We now consider Larios's third, timely filed petition for review.

II. [Jurisdiction and Standard of Review]

III. Discussion

For Larios, the sticking point in terms of his eligibility for cancellation of removal is whether his conviction for making a terroristic threat under N.J. Stat. Ann. § 2C:12-3(a) is a CIMT. First, we explain why § 2C:12-3(a) should be analyzed under the modified categorical approach rather than the categorical approach, and, second, we apply the modified categorical approach to the particular alternative under which Larios was convicted: "threaten[ing] to commit any crime of violence with the purpose to terrorize another . . . or in reckless disregard of the risk of causing such terror." N.J. Stat. Ann. § 2C:12-3(a).

A. The Modified Categorical Approach Applies Here

When a state conviction is subject to federal criminal or immigration consequences, we use the now-familiar categorical approach or modified categorial approach to determine whether a petitioner's crime of conviction matches the generic federal offense—here, whether N.J. Stat. Ann. § 2C:12-3(a) is a categorical match for § 1182(a)(2)(A)(i)(I) and thus qualifies as a CIMT.

In the ordinary case, we analyze state statutes under the categorical approach. Under that framework, we consider whether the "least culpable conduct hypothetically necessary to sustain a conviction under the statute" would also be covered by the federal statute. *Moreno*, 887 F.3d at 163 (quoting *Jean Louis v. Att'y Gen.*, 582 F.3d 462, 471 (3d Cir. 2009)). A categorical match occurs if a state statute's elements define a crime identical to or narrower than the generic crime because "anyone convicted under that law is necessarily . . . guilty of all the [generic crime's] elements." *Descamps*, 570 U.S. at 261 (alterations in original) (internal quotation marks and citation omitted). But if the state offense covers more conduct, then it is overbroad and does not match the generic offense. The approach is "categorical" because we look only to the elements of the state offense, "not to the particular facts underlying th[at] conviction[]." Id. at 161 (internal quotation marks and citation omitted).

This analysis is straightforward enough for an indivisible state offense with a single set of elements. But where the statute is divisible—that is, "(1) the statute of conviction has alternative elements, and (2) at least one of the alternative divisible categories would, by its elements, be a 9 match with [the] generic federal crime," a CIMT—then, the so-called "modified categorical approach" applies instead. *Hillocks v. Att'y Gen.*, 934 F.3d 332, 339 (3d Cir. 2019) (internal quotation marks and citation omitted). The modification is a small one, allowing the court to review "a limited set of documents" for the sole purpose of identifying whether the petitioner was convicted of a CIMT or non-CIMT alternative. Id. at 338. This modification serves "not as an exception, but instead as a tool . . . [for] preserv[ing] the categorical approach's basic method: comparing [statutory] elements with the generic offense's," while disregarding the particular facts of the crime the petitioner committed. *Descamps*, 570 U.S. at 263.

When the modified categorical approach is "[a]pplied in [this] way—which is the only way [the Supreme Court has] ever allowed," id., it retains its proper focus on the elements of the crime: the actus reus, mens rea, and causation. These are what "the State must prove . . . beyond a reasonable doubt" to sustain a conviction, *State v. Tindell*, 10 A.3d 1203, 1217 (N.J. Super. Ct. App. Div. 2011), or, "at a plea hearing, . . . what the defendant necessarily admits when he pleads guilty," *Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243, 2248 (2016) (citation omitted). Disjunctives in statutes often provide "textual clue[s]" of divisibility, *Hillocks*, 934 F.3d at 343, but they are not dispositive because statutes that merely "enumerate[] various factual means of committing a single element" are not in fact divisible, *Mathis*, __ U.S. at __, 136 S. Ct. at 2249.

Here, the parties dispute whether N.J. Stat. Ann. § 2C:12-3(a) is divisible and requires application of the modified categorical approach. On de novo review, *see Moreno*, 887 F.3d at 163, we agree with Larios that the BIA erred in treating the statute as indivisible and applying the categorical approach.

In relevant part, New Jersey's terroristic-threats statute provides:

> A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience. N.J. Stat. Ann. § 2C:12-3(a) (1981)

In view of the numerous disjunctives, we look to state law to see whether these are alternative elements delineating separate offenses, or merely alternative means to commit one offense. *See*, *e.g.*, *Hillocks*, 934 F.3d at 339. "Whe[re] a ruling from an 'authoritative source[] of state law' resolving this means-or-elements question 'exists, a . . . judge need only follow what it says,'" *Singh v. Att'y Gen.*, 839 F.3d 273, 283 (3d Cir. 2016) (second and third alterations in original) (*quoting Mathis*, 136 S. Ct. at 2256), and here, fortunately, we have that authoritative source in a New Jersey Superior Court decision. In *State v. Tindell*, 10 A.3d 1203 (N.J. Super Ct. App. Div. 2011), the court made clear that § 2C:12-3(a) incorporates three alternatives, each of which has the same actus reus, i.e., "threatens to commit any crime of violence," N.J. Stat. Ann. § 2C:12-3(a), and a mens rea incorporating either "purpose . . . or . . . reckless disregard of the risk," id., but a different, alternative causation element: (1) "to terrorize another," (2) "to cause evacuation," or (3) "to cause serious public inconvenience[.]"

In sum, N.J. Stat. Ann. § 2C:12-3(a) requires the modified categorical approach because it has "alternative elements," and the Government does not dispute that "at least one of the alternative divisible categories would, by its elements, be a match with a generic federal crime." Hillocks, 934 F.3d at 339 (internal quotation marks and citation omitted). We turn now to applying this approach to Larios's crime of conviction.

B. Larios's Crime of Conviction is Not a CIMT

Under the modified categorical approach, we must first consider "what crime, with what elements, a defendant was convicted of" and then "compare that crime, as the categorical approach commands, with the [CIMT] generic offense." *Mathis,* 136 S. Ct. at 2249.

1. *Larios's Crime of Conviction*

[T]he transcript of Larios's plea colloquy reveals that he was convicted "under subsection (a), [of a] threat to commit . . . a crime of violence." A.R. 384. During the colloquy, the judge also confirmed that Larios was pleading guilty to "threatening to commit an assault upon a person . . . by—causing [him] to be in fear." A.R. 391. Thus, in full, the alternative offense that formed the basis for Larios's conviction is "threaten[ing] to commit any crime of violence with the purpose to terrorize another . . . or in reckless disregard of the risk of causing such terror." N.J. Stat. Ann. § 2C:12-3(a). The remaining question before us is whether that alternative is a CIMT.

2. *CIMT Analysis*

To determine whether Larios's alternative is a categorical match, we must first ascertain the elements of the generic offense. There is no statutory definition of a crime involving moral turpitude, so we draw on "long-established BIA principles and decisions of our Court," *Knapik v. Ashcroft*, 384 F.3d 84, 89 (3d Cir. 2004) (internal citation omitted), for its elements: (1) an actus reus of "a reprehensible act . . . . that is inherently base, vile, or depraved contrary to the accepted rules of morality and the duties owed to other persons, either individually or to society in general"; and (2) a mens rea of "an appreciable level of consciousness or deliberation," signifying "a vicious motive or a corrupt mind," *Javier v. Att'y Gen.*, 826 F.3d 127, 130–31 (3d Cir. 2016) (citations omitted); *see Francisco-Lopez v. Att'y Gen.*, 970 F.3d 431, 435 (3d Cir. 2020).

With this generic construction in mind, we home in on the elements of Larios's crime of conviction: an actus reus of "threaten[ing] to commit any crime of violence," a mens rea of "purpose . . . or [] reckless disregard," and a causation element of "terroriz[ing] another." N.J. Stat. Ann. § 2C:12-3(a). We have already settled that "a threat to: [] commit any crime of violence with intent to terrorize another" is a CIMT. Javier, 826 F.3d at 131 (alteration in original); *see also Ajami*, 22 I. & N. Dec. at 952 (stating that "the intentional transmission of threats is evidence of a vicious motive or a corrupt mind"). The particular alternative offense of which Larios was convicted is the same in all respects, except it requires a mens rea of only recklessness. Our focus, then, is whether the "least culpable conduct hypothetically necessary to sustain a conviction," *Moreno*, 887 F.3d at 163, for that alternative offense is turpitudinous.

Our precedent provides guidance on when recklessness constitutes a turpitudinous mental state and, conversely, when it does not. We deemed a mens rea of recklessness turpitudinous for both New Jersey's second-degree aggravated assault offense, *Baptiste v. Att'y Gen.*, 841 F.3d 601, 623 (3d Cir. 2016), and New York's reckless endangerment offense, *Knapik*, 384 F.3d at 93, explaining that there were two "aggravating factors" in the each statute: "serious bodily injury" to another, N.J. Stat. Ann. § 2C:12-1b(1), or "grave risk of death to another person," N.Y. Penal Law

§ 120.25, and "extreme indifference to the value of human life," N.J. Stat. Ann. § 2C:12-1b(1), or "a depraved indifference to human life," N.Y. Penal Law § 120.25. *See Baptiste*, 841 F.3d at 622; *Knapik*, 384 F.3d at 90. Although these statutes required a mens rea of only recklessness, the two aggravating factors ensured the least culpable conduct encompassed by these statutes was still "inherently base, vile, or depraved." *Baptiste*, 841 F.3d at 621; *see Knapik*, 384 F.3d at 89.

In contrast, we concluded recklessness was not turpitudinous in Pennsylvania's reckless endangerment statute because there was not even one statutory aggravating factor.

Here, the BIA did not articulate what, if any, aggravating factors it identified in § 2C:12-3(a), and we perceive none. Whereas the statutes at issue in Baptiste and Knapik targeted conduct that risks death or serious injury to another person, New Jersey's terroristic-threats statute criminalizes threats that merely carry the risk of "convey[ing] menace or fear of a crime of violence" to another person, New Jersey Model Criminal Jury Charge, § 2C:12-3(a), at 2; and whereas those statutes required a mental state exhibiting "extreme" and "depraved" indifference to a person's life, New Jersey defines recklessness to include "heedless[ness]," "foolhardi[ness]," or "scorn for the consequences" of causing fear in another, id. at 3. New Jersey's terroristic-threats statute, therefore, lacks the type of aggravating factors that we have previously recognized would make an offense inherently vile and depraved.

The Government contends otherwise, pointing us to two purported statutory aggravating factors. In addition to the required mental state of "purpose" or "reckless disregard," the Government argues, there must both be a "threat" and "a crime of violence" that is the subject of that threat. Resp't Br. 25 (internal quotation marks omitted). The argument comes up short.

As to the first factor, the Government reads into the lone word "threat" an "additional, intentional 'layer' to the mens rea requirement" because it "suggests that the perpetrator must initially commit a purposeful act." Resp't Br. 32–33. But we already rejected that argument when reviewing Pennsylvania's terroristic-threats statute in *Bovkun v. Ashcroft*, 283 F.3d 166 (3d Cir. 2002). There, we held a "threat[] to commit a crime of violence" was simply the actus reus, id. at 170 (alteration in original) (quoting 18 Pa. Cons. Stat. § 2706), and did not carry its own implicit mens rea, independent of that specified in the statute. We reaffirm that holding here: Where a statute specifies the mens rea, courts ordinarily interpret it as applying throughout the statute, *see Rehaif v. United States*, __ U.S. __, 139 S. Ct. 2191, 2196 (2019), and here, nothing in the text, New Jersey law, or our precedent suggests we should stray from that ordinary construction

The Government's second factor fares no better. Although we agree that the term "crime of violence" does not encompass simple assault under New Jersey law, it does encompass other crimes lacking in the vileness and depravity required for a statutory aggravating factor. See *Baptiste*, 841 F.3d at 621. Neither New Jersey law nor the Model Penal Code defines "crime of violence," but we draw on the federal definition of that term, as we did in Bovkun: "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Bovkun*, 283 F.3d at 169 (quoting 18 U.S.C. § 16(a)). So the least culpable conduct under § 2C:12-3(a) would be a threat to commit an offense involving the use of physical force against a person's property in reckless disregard of the risk of terrorizing that person—conduct the Government contends is necessarily vile and depraved.

Yet New Jersey's criminal code demonstrates otherwise: The offense of criminal mischief, for example, involves "tamper[ing] with tangible property of another so as to endanger person or property" and causing "pecuniary loss of $500 or more," N.J. Stat. Ann. § 2C:17-3(a)(2), so a threat to commit that particular "crime of violence" would include a threat to "chip[] away at the patio bricks around the porch of [a neighbor's] property," *State in Interest of A.H.*, 697 A.2d 964, 965 n.1 (N.J. Super. Ct. 1997). No doubt, threats to engage in this type of conduct would be unwelcome and un-neighborly, but they do not rise to the level of depraved or extreme indifference to the risk of causing serious bodily injury or death.

In sum, Larios's crime of conviction has a minimum mens rea of recklessness but lacks any statutory aggravating factors, so the least culpable conduct is a reckless threat to commit a violent property crime, which under *Baptiste*, *Knapik*, and *Mahn*, is not turpitudinous. Larios's offense of conviction therefore does not qualify as a CIMT under the modified categorical approach. *See Javier*, 826 F.3d at 130–31; *Hillocks*, 934 F.3d at 339.

IV. Conclusion

After more than a decade of litigation, Larios has finally established he was not convicted of a crime involving moral turpitude, and the BIA erred in finding him ineligible for cancellation of removal on that basis. Accordingly, we will grant the petition for review and remand to the agency for proceedings consistent with this opinion.

Notes and Questions

1. Why Are the Grounds of Inadmissibility Relevant in a Cancellation of Removal Case? As this chapter has tried to make clear, the grounds of inadmissibility are cross referenced in many areas of immigration law. In *Larios*, above, the individual is seeking a form of relief from deportation called cancellation of removal, discussed in more detail in Chapter 7. However, to be eligible for this relief, he cannot be barred by a conviction meeting the definition for inadmissibility found in INA § 212. Attorneys must constantly be aware of how the grounds of inadmissibility may arise in every aspect of an immigration case.

2. Is it Time to Revise the Crime Involving Moral Turpitude Standard? What are the pros and cons of using this type of vague reference in the INA? If you wanted to make it easier for the DHS to manage the statutory application, would you make the INA language more specific or would you make the terms more general? For example, any conviction resulting in a punishment of greater than six months incarceration could be a ground of inadmissibility. What approach would you suggest for ease of administration? What approach for ensuring greater equity in the consideration of inadmissibility?

Page 572 (§ 5.03[I]): Change the numbering on Notes 1 and 2 to 3 and 4 to reflect the new Notes added above.

Page 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.*, 2017 U.S. App. LEXIS 25123 (11th Cir. Dec. 13, 2017).

Page 597 (§ 5.04[D]): Replace the last sentence ("As of July 2019…") with:

As of February 2021, the provisional waiver procedures remain the same.

Chapter 6: Deportability and the Removal Process

Page 602 (§ 6.01[A]): Introduction to Deportation: Add the following to the end of § 6.01[A], just before [B]:

The last available data reporting DHS removals is for FY 2019. This data can update the material reported in this section. Note that removal without extended procedures currently make up over 86% of all removals. Attorneys will see clients who have a final order of removal that has never been executed and also those who were subject to one of the administrative forms such as expedited removal or reinstatement of removal.

Here is a brief excerpt from the DHS "Annual Flow Report: Immigration Enforcement Actions: 2019" issued September 2020 by the DHS Office of Immigration Statistics. The full yearbook is published at https://www.dhs.gov/immigration-statistics/yearbook/2019:

> *Notices to Appear*
> DHS issued 790,000 NTAs to initiate removal proceedings before an IJ in 2019, a 110 percent increase over 2018 and a 180 percent increase over the 5-year average from 2014 to 2018 (Table 4). USBP issued 520,000 NTAs in 2019, a 350 percent increase over 2018 and a 440 percent increase over the 5-year average from 2014 to 2018. OFO issued 62,000 NTAs in 2019, a 29 percent increase over 2018, an 85 percent increase over the 2014 –2018 average, and the highest number of OFO NTAs since at least 2005 when data began being collected. ERO issued 70,000 in 2019, down 14 percent from 2018 but up 7.1 percent from the 2014 – 2018 average. And USCIS issued 140,000 NTAs in 2019, a slight increase from 2018.

***

> *Removals*
> DHS performed 360,000 removals of aliens in 2019, a 9.5 percent increase from 2018 (Table 6). ERO completed 69 percent of DHS removals, USBP accounted for 23 percent, and OFO completed the remaining 8 percent. Expedited removals accounted for 46 percent of all removals while 39 percent were based on the reinstatement of prior removal orders. Removals of nationals from Mexico made up 60 percent of removals while removals of aliens from the Northern Triangle countries made up 31 percent.
>
> Over 68 percent of all removals resulted from a USBP apprehension in 2019 (Figure 6). ICE administrative arrests led to the next-largest share of removals (21 percent), and OFO determinations of inadmissibility led to 11 percent.
> Forty-three percent of removals in 2019 were of aliens with prior criminal convictions, similar to the average for the entire 2011–2018 period.16 Thirty-nine percent of the removals of Mexican nationals, 44 percent of the removals of those from the Northern Triangle countries, and 67 percent of removals of nationals from other countries involved those with prior criminal convictions (Table 7). As in previous years, a majority of prior criminal convictions involved immigration violations, traffic offenses, and drug offenses (Table 8).

> *Returns*
> DHS performed 170,000 returns of aliens to their home countries without an order of removal in 2019, a 7.2 percent increase from 2018 (Table 9). USBP returns jumped by 54 percent, OFO returns increased by 1.8 percent, and ERO returns rose by 9.5 percent in 2019. Forty percent of returns involved Mexican or Canadian nationals. Crew member detentions made up 40 percent of returns, while withdrawals of applications for admission voluntary returns and voluntary departure made up 30 percent, 15 percent, and 9.1 percent of total returns, respectively.

In May 2021, John D. Trasvina, head of the ICE Office of the Principal Legal Advisor (OPLA), issued a new priorities memorandum that strongly suggests reducing the number of new removal cases. Moreover, the memorandum reminds ICE attorneys that they can exercise discretion to ensure "opportunities at every stage of the process to ensure the most just, fair, and legally appropriate outcome, whether that outcome is a grant of relief, an order of removal, or an exercise of discretion that allows the noncitizen to pursue immigration benefits outside the context of removal proceedings." The memorandum is at https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf

For an analysis of the potential impact on the exercise of prosecutorial discretion, see Shoba Sivaprasad Wadhia, *Prosecutorial Discretion in the Biden Administration: Part 3* Yale J. Reg. June 5, 2021, available at https://www.yalejreg.com/nc/prosecutorial-discretion-in-the-biden-administration-part-3-by-shoba-sivaprasad-wadhia/.

The pandemic and the large volume of cases filed between 2017 and 2020 created a backlog of over 1.33 million pending cases before the Executive Office of Immigration Review. See data tool at TRAC https://trac.syr.edu/phptools/immigration/court_backlog/ (through May 2021).

For recommendations on reducing the backlog and improving adjudication, see Camille J. Mackler, *To Fix the Immigration System We Need to Start With the Immigration Courts*, Just Security blog, Apr. 6, 2021, available at https://www.justsecurity.org/75675/to-fix-the-immigration-system-we-need-to-start-with-immigration-courts/

Page 630 (§ 6.02[D][1]): Add the following paragraph just before Problem 6-4:
President Trump's Executive Order No. 13768 was revoked by President Biden in the Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities on January 20, 2021. Along with revoking the prior order, the Biden Administration has called for relevant agencies and departments to review any agency actions that developed as a result of Executive Order 13768 and issue revised guidance as appropriate.

Page 642 (§ 6.02[D][1]): Add this update to Note 1 following *Lopez-Mendoza* concerning the availability of suppression motions in removal proceedings:
The Third Circuit has also reversed an immigration court's refusal to consider a suppression challenge to traffic stop arrests that may have been motivated by racial profiling. *Yoc-Us v. Att'y*

Gen., 932 F.3d 98 (3d Cir. 2019). In this case the Third Circuit noted that in removal proceedings, the noncitizen bears the burden of proving a prima facie case that the evidence should be suppressed. *Matter of Tang*, 13 I. & N. Dec. 691, 692 (BIA 1971). When the person satisfies his or her burden, the burden then shifts to the government to justify the manner in which it obtained its evidence. An evidentiary hearing is warranted where an individual alleges facts that state a violation of his or her Fourth Amendment rights and shows, through an affidavit, that the violation could be deemed to be egregious or widespread.

Page 667 (§ 6.03[A]) What is a conviction?
New Problem 6-5.1 to supplement exploring the impact of convictions.
Add on p. 667 after [1], before [2]

Problem 6-5.1

In problem 6-5, page 650 and 6-5 revisited, page 666, we met Henry, who was charged with several offenses, including smuggling aliens across the U.S. border and possession of stolen property while driving a truck for a Michigan trucking company. In that problem, Henry was driving from Ontario, Canada to Oxford, Ohio. For problem 6-5.1, alter the facts and assume that Henry was driving to Buffalo, New York, and the following facts have been added.

While driving to Buffalo, Henry had to stop at another weigh station just a few miles from his destination. Upon inspection of the vehicle, state police discovered that Henry had 30 grams of concentrated cannabis. At the time of his trip, possession of marijuana was an offense for which a person could be charged and convicted. Henry is charged with and convicted for possession of marijuana. Shortly thereafter, Henry has his record expunged by the state of New York for the drug possession charge as a result of a new New York act, the Marijuana Registration and Taxation Act ("MRTA"). Under MRTA, adults over the age of 21 are permitted to possess three ounces of cannabis and 24 ounces of concentrated cannabis. MRTA also removes cannabis from the list of controlled substances.

If Henry's record is expunged under MRTA, what impact will the expungement have on Henry's immigration options? Could Henry be removed even if the conviction is expunged?

Problem 6-5-1: Essential Materials
INA § 101(a)(48)(A); 8 U.S.C. § 1101(a)(48)(A)
INA § 237(a)(2)(A)(i); 8 U.S.C. § 1227(a)(2)(A)(i)

Notes and Questions:

1. Convictions for Drug Related Offenses for Immigration Purposes. In *Matter of A-F-*, 8 I. & N. Dec. 429 (BIA, Att'y Gen. 1959), the BIA held that a conviction for a narcotics or marijuana violation is final, regardless of the possibility of expungement, and that noncitizen drug offenders will continue to be considered as having been conviction for immigration purposes. Subsequently, the BIA carved out an exception for first-time offenders in for individuals whose offense was for simple possession of a controlled substance and was a beneficiary of a state rehabilitative statute. *Matter of Manrique*, 21 I. & N. Dec. 58 (BIA 1995). In 1996, Congress

passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which codified a broad definition of conviction at INA § 101(a)(48)(A); 8 U.S.C. § 1101(a)(48)(A). This definition was in line with IIRIRA's aim of adding penalties for noncitizens who have committed crimes while in the United States. It includes formal judgments of guilt entered by courts, and, in cases where guilt has been withheld, where a judge or jury has found the noncitizen guilty or the individual entered a plea of guilty or *nolo contendere*, and the judge ordered some form of punishment. This broadening led many circuits to interpret the provision in various ways and caused disagreement as to whether a conviction had to be final for immigration purposes, which is of particular importance for criminal cases that have been suspended or deferred under the second prong of the definition.

For recent guidance about the consequences of seeking diversionary pleas and drug treatment programs, see Immigration Law Resource Center Practice Advisory on Immigration and Diversion Programs, available at https://www.ilrc.org/diversion-and-immigration-law.

2. Does the Conviction Need to be Final? In 2018, the BIA clarified the ambiguities of INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). In *Matter of J.M. Acosta*, 27 I. & N. Dec. 420 (BIA 2018), the BIA held that the finality of convictions was not intended to be abandoned by the passing of IIRIRA and a conviction is not final until it possesses a "sufficient degree of finality," which occurs after the defendant's right to review on the merits has been exhausted or waived. The case also sets forth a rebuttable presumption that a conviction is final such that if DHS can prove the time for a direct appeal of the conviction has passed, the conviction is presumed to be final for immigration purposes. *Id*. at 432. The noncitizen may rebut this presumption by showing either that an appeal was filed within the deadline, and the appeal relates to guilt or innocence in the criminal proceeding.

3. Guidance on Marijuana and Other Drug Offenses? Many people are unaware that the legalization of many drugs or the decriminalization of some controlled substances can still be the basis of a removal order. While this chapter is focused on removability grounds under INA § 237(a)(2), drug use, possession, and/or conviction can also create a ground of inadmissibility under INA § 212 (a)(2) and other grounds.

4. Consequences Beyond Removal? Admission of controlled substance possession or use can also create bars to establishing eligibility for relief discussed in Chapter 7. In 2019, the USCIS amended its Policy Manual to make clear that even if marijuana use was permitted under state law, the admission of this behavior could be a bar to establishing "good moral character" for naturalization purposes. USCIS Policy Manual, Chapter 5, Conditional Bars for Acts During the Statutory Period, available at https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5 (last visited June 21, 2021).

5. Beware of Assumptions. It is essential to obtain the exact conviction and to analyze the law at the time of the conviction and in the specific jurisdiction. Also, evaluate how the state or municipal conviction might be characterized under federal law. A helpful guide can be found at Immigration Law Resource Center 2019 memorandum, available at https://www.ilrc.org/sites/default/files/resources/chart-note_08-controlled_substances.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, just before [b]:

As of May 2021, the Third Circuit has become the latest court to rule that immigration judges have the authority to indefinitely close deportation cases while awaiting rulings in related proceedings. *Sanchez v. Attorney General*, 997 F.3d 113 (3d Cir. 2021). The Third Circuit held that immigration judges have the power to control their dockets by granted administrative closures or long stays of the proceedings. The Third Circuit joined the Seventh Circuit in rejecting *Matter of Castro Tum*, 27 I. & N. Dec. 271 (Att'y Gen. 2018), which had held that immigration courts and the BIA lack this authority. *See Morales v.* Barr, 973 F.3d 976 (7th Cir. 2020). The Fourth Circuit had also ruled that immigration judges could use administrative closure in *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019). In early June the Sixth Circuit also affirmed authority of immigration judges to control their dockets. *Garcia-DeLeon v. Garland*, __ F.3d __, 2021 U.S. App. LEXIS 16845 (6th Cir. June 4, 2021).

Yet, in many parts of the United States, immigration judges may be unable to administrative close cases. In December 2020, the Department of Justice adopted a rule codifying the end of administrative closure pursuant to *Castro-Tum.* 8585 Fed. Reg. 81,588 (Dec. 16, 2020) (amending 8 C.F.R. § 1003 in several subsections "to make clear" that immigration judges lack authority to grant administrative closure. The courts' rejection of *Castro-Tum* suggests the rule is vulnerable to legal challenges.

On June 11, 2021, Jean King, the Acting Director of the Executive Office for Immigration Review, issued a memorandum implementing new case priorities of the Biden administration. The memo instructs immigration judges to use all docketing tools "available to them." However, the memo also includes this footnote:

> Administrative closure is currently permitted in the Third, Fourth, and Seventh Circuits. *See Arcos Sanchez v. Att'y Gen. U.S.A.*, 997 F.3d 113 (3d Cir. 2021); *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020); *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019). Administrative closure is currently permitted in the Sixth Circuit, but only to allow respondents to apply with U.S. Citizenship and Immigration Services for provisional unlawful presence waivers. *See Garcia-DeLeon v. Garland*, __ F.3d __, 2021 WL 2310055 (6th Cir., June 4, 2021). Administrative closure is not currently permitted in the other circuits. *See Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018).

The full memorandum can be found at https://www.justice.gov/eoir/book/file/1403401/download (last visited June 21, 2021).

Page 682 (6.04[B][1][c]): In Absentia Orders and Challenges to Notice: Include the following paragraph after the discussion of *Pereira v. Sessions*, __ U.S. __, 138 S. Ct. 2105 (2018), in the second paragraph on Page 682:

On May 2, 2021, the Supreme Court issued a 6-3 decision in *Niz Chavez v. Garland*, __ U.S. __, 141 S. Ct. 1474 (2021), opting for a strict interpretation of INA § 239; 8 U.S.C. § 129b, that addresses whether the government has provided proper notice to a noncitizen to appear for removal proceedings. The Supreme Court held the government to the plain language of the statute and refused to accommodate the immigration agencies' desire for flexibility in determining when an individual is served with a notice to appear in a removal proceeding sufficient to trigger the stop-time rule. INA § 239b(d)(1); 8 U.S.C. § 1229b(d)(1).

The litigation in *Niz-Chavez* built upon *Pereira v. Sessions*, __ U.S. __, 138 S. Ct. 735 (2018), and continued examining the precise form that a Notice to Appear (NTA) must take to trigger the stop-time rule for cancellation of removal purposes. The INA specifies ten different pieces of information that constitute notice of removal proceedings. INA § 239(a)(1); 8 U.S.C. § 1229(a)(1). *Niz-Chavez* addressed whether the stop-time rule is triggered if the government provides notice via multiple documents. Petitioner Agusto Niz-Chavez had received an NTA lacking time and place information, followed by a subsequent hearing notice, before accruing ten years of physical presence in the United States. The BIA and Sixth Circuit held that Niz-Chavez was ineligible to apply for cancellation of removal because the two notices, taken together, had triggered the stop-time rule. The Supreme Court reversed, holding that all of the required notice information must be transmitted via a single document to trigger the stop-time rule.

Attorneys have begun to file motions to terminate proceedings for lack of adequate notice using *Niz-Chavez* and *Pereira.*

Page 697 (§ 6.05[B][Note 1]): 1. The Attorney General Ends the Ability of the IJ to Order Bond: Include the following case update to *Padilla v. Immigration & Customs Enf't*, 2019 U.S. App. LEXIS 21846 (9th Cir. 2019):

The Ninth Circuit eventually ruled that the IJ had the authority to issue bond for people who had passed a credible fear of persecution determination and moved from expedited removal to regular removal. The court also upheld some aspects of the national injunction that the lower court had granted. *Padilla v. Immigration& Customs* Enf't, 953 F.3d 1134 (9th Cir. 2020). However, on January 11, 2021, the U.S. Supreme Court vacated the Ninth Circuit's judgment and remanded the case to the Ninth Circuit for further consideration in light of *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020). The implication is that the Supreme Court questioned both the scope of due process protections and perhaps the subject matter jurisdiction of the federal courts to consider the bond eligibility of those original placed in removal under INA § 235(b). *Immigration & Customs Enf't v. Padilla*, __ U.S. __, 141 S. Ct. 1041 (2021). The Supreme Court did not clarify its ruling. You can read an excerpt of *Thuraissigiam* in the supplement update to Chapter 2 discussing expedited removal.

At least one federal district court used this ruling to find that the lack of a bond provision for a person pending removal even after passing a credible fear determination met the requirements of

due process. *See Petgrave v. Aleman,* 2021 U.S. Dist. LEXIS 65954 (S.D. Tex. Mar. 29, 2021) (citing the vacation of the injunction in *Padilla* and the Supreme Court ruling in *Thuraissigiam).*

Page 698 (6.05[B])[Note 3]:
3. Special Settlement for Children: Include the following paragraph after the last paragraph in Section [B] discussing the elimination of the *Flores* settlement and regulations issued by DHS and HHS:

Shortly after the final rule was published, the district court enjoined enforcement of the regulations issued by the Department of Homeland Security and the Department of Health and Human Services, which would have allowed the U.S. government to hold migrant parents and children in detention indefinitely.

In December 2020, the Ninth Circuit affirmed in part and reversed in part. *Flores v. Rosen*, 984 F.3d 720 (9th Cir. 2020). The Ninth Circuit rejected the government's argument that the Flores Settlement Agreement was terminated simply because the regulations were published. Additionally, the Ninth Circuit rejected the government's argument that changed circumstances, namely an increase in unlawful migration by unaccompanied minors and families warranted termination of the Flores Settlement Agreement. Accordingly, the Ninth Circuit upheld the injunction prohibiting certain aspects of the Trump administration's regulations from taking effect and rejected the Department of Justice's attempt to terminate the Flores Settlement Agreement. See also *Flores v. Garland*, __ F.3d __, 2021 U.S. App. LEXIS 19446 (9th Cir. June 30, 2021) (upholding injunction preventing the federal government from keeping minors in hotels for more than three days).

Page 728: Insert the following at the end of § 6.05 [C] Detention and the Constitution, just before § 6.06:

For a primer on immigration detention and recent statistics about the use of ICE detention, visit https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html. This website uses FOIA information to track the location of detention, the allegations of criminal convictions resulting in immigration detention, and the length of detention. Here is a snapshot comparing the people detained at the end of the month of May in 2019, 2020 and 2021 using this data.

	May 2019	May 2020	May 2021
All detained people	52,465	25,421	24,519
Criminal convictions or pending convictions	17,225 + 5,573	12,279 + 3,373	4,382 + 971
Immigration violations alone	29,667	9,769	16,166

For the vast majority of detained people, detention may also result in an immigration hearing using video technology. TRAC at Syracuse University reports that in fiscal year 2020, 77% of all master

calendar hearings that resulted in a final decision took place using video technology while the individual was in detention. https://trac.syr.edu/immigration/reports/593/

In the fall of 2019, the Congressional Research Service published a report describing the legal authority and statutory limits on the use of immigration detention. *See* Hillel R. Smith, Immigration Detention: An Overview (Sept. 16, 2019), https://fas.org/sgp/crs/homesec/R45915.pdf.

In *Nielsen v. Preap*, __ U.S. __, 139 S. Ct. 954, 962 (2019), the Supreme Court rejected recent statutory challenges seeking to limit the power of the DHS to detain noncitizens who are arrested long after a state or federal criminal conviction. Mr. Preap, a permanent resident of the United States, was convicted of two counts of possession of marijuana. More than seven years later, he was detained by ICE and put into removal proceedings. Mr. Preap had originally immigrated to the United States as a refugee from Cambodia.

A recent student law review Note considers the impact on mandatory detention on many people of Asian descent. Currently, over 16,000 Southeast Asians in the United States await deportation, with a large percentage of those deportees being refugees who had obtained legal residency. Many failed to become citizens due to poor English skills, financial resources, and a lack of awareness of the benefits of citizenship. More than 13,000 cases are based on old criminal convictions. While criminal convictions account for only 29% of deportation orders among other immigrant groups, about 80% of all Southeast Asian deportation orders are based on old criminal records. Alexandra Tran, Note, *Ignoring the Asian Elephant in the Room: How* Nielsen v. Preap *Denies the International Rights of Southeast Asian Refugees*," 22 Rutgers Race & L. Rev. 157, 171 (2020).

The racial impact of immigration detention needs further study. In 2020, the NYU Immigrant Rights Clinic and the Black Alliance for Just Immigration issued a report titled The State of Black Immigrants. According to the report, "[t]he data further reveals that Black immigrants are more likely than the overall immigrant population to be detained for criminal convictions than immigration violations…. While within the immigrant population, individuals are 3.5 times more likely to be detained for an immigration violation than a criminal conviction, the reverse is true for Caribbean immigrants in particular, who are almost twice as likely to be detained for a criminal conviction than an immigration violation." The full report is available at https://www.immigrationresearch.org/system/files/sobi-fullreport-jan22.pdf.

In June 2021, the Supreme Court held in *Johnson v. Guzman Chavez*, 2021 U.S. LEXIS 3562 (U.S. June 29, 2021), that individuals who were removed from the United States and later reentered without authorization and who are subject to reinstated orders of removal do not have a right to a bond hearing. The majority held that such individuals are subject to the mandatory detention provisions in INA § 241; 8 U.S.C. § 1231, not the detention provisions set forth in INA § 236; 8 U.S.C. § 1226.

Chapter 7: Relief from Removal

Page 767: add a new section **§ 7.01[F] entitled "Cancellation of Removal Part A"** and the following:

Cancellation of Removal Part 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. 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.

Page 767: change § 7.01[F] to § 7.01[G]

Page 783: add the following after Note 2:

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 case is excerpted below:

Matter of J-J-G-
27 I. & N. Dec. 808 (BIA 2020)

MALPHRUS, Acting Chairman:

In a decision dated April 5, 2019, an Immigration Judge denied the respondent's applications for asylum, cancellation of removal, and withholding of removal pursuant to sections 208(b)(1)(A), 240A(b)(1), and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1229b(b)(1), and 1231(b)(3)(A) (2018), and for protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) ("Convention Against Torture"). The respondent has appealed from this decision. The appeal will be dismissed.

Factual and Procedural History

The respondent is a native and citizen of Guatemala who is present in the United States without being admitted or paroled. After he was placed in proceedings and found to be removable, he applied for relief from removal.

The sole issue regarding the respondent's statutory eligibility for cancellation of removal at his hearing was whether his removal would result in exceptional and extremely unusual hardship to his qualifying relatives. The respondent presented evidence that he has six qualifying relatives—his five United States citizen children and his lawful permanent resident mother.

At the time of the hearing, his four oldest children were 12, 11, 8, and 5 years of age, and his youngest was 2 months old. The respondent testified that his children would remain in the United States if he is removed. However, his partner, the mother of his children, testified that the children would relocate to Guatemala and indicated that she would also accompany the respondent. She previously worked and helped to pay the family's rent.

The respondent's 8-year-old daughter has been diagnosed with hypothyroidism, a condition she has had since birth. She requires regular medication to treat this condition, and if she does not have it, she has problems regulating metabolic functions, like the temperature of her body. The medical costs of the respondent's children are covered by State benefits, and they receive food stamps.

The respondent claims that he would be unable to afford medication to treat his daughter's hypothyroidism in Guatemala. His partner stated that the medication costs $1,100 there, indicating that she obtained this information from the internet. However, the respondent's mother testified that she had received medical care in Guatemala free of charge and believes that it is still provided for free in that country.

The respondent's oldest child went to counseling for about 3 months in 2016 for "aggressive and defiant behavior," but there is no indication that he was diagnosed with any mental health or behavioral issues. The respondent's 11-year-old son attended the same counseling service for about 5 months in 2018 and was diagnosed with "Anxiety Disorder, unspecified" and "Attention-deficit hyperactivity disorder, unspecified." After the counselors provided this child with coping strategies to alleviate his anxiety, including watching fewer "scary movies" with his older brother, they concluded that the relevant treatment goals had been met and that he had "[s]uccessful[ly] complet[ed] therapy."

With regard to the hardship of his lawful permanent resident mother, the respondent testified that he provides support to her and that he, his partner, and his children all live with, and pay rent to, his mother. The respondent presented evidence that his mother has been diagnosed with hypertension, but the evidence also indicates that State benefits cover all of her medical expenses and that she is able to take the bus to medical appointments and pick up her own prescriptions. She receives Social Security benefits and has rented a room in her home for income in the past. The respondent's sister indicated that she could live with and take care of their mother, who would remain in the United States in the event that her son is removed.

The respondent claimed that if his children accompany him to Guatemala, they will face limited educational and economic opportunities in that country, especially in light of his son's attention deficit disorder. He also argued that his mother and children will face emotional hardship in the event they are separated from him.

Discussion

To establish eligibility for cancellation of removal, the respondent must demonstrate, among other things, that his "removal would result in exceptional and extremely unusual hardship

to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." Section 240A(b)(1)(D) of the Act. For the following reasons, we will affirm the Immigration Judge's determination that the respondent has not established that his removal would result in the requisite level of hardship to his qualifying relatives.

1. Hardship Based on a Qualifying Relative's Health

The respondent argues that his qualifying relatives would experience the requisite level of hardship for cancellation of removal, at least in part based on their medical conditions. He also asserts that medical care for these conditions is unavailable in Guatemala. It is well settled that for purposes of cancellation, we consider the "ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives." *Matter of Monreal*, 23 I&N Dec. 56, 63 (BIA 2001). The exceptional and extremely unusual hardship for cancellation of removal is based on a cumulative consideration of all hardship factors, but to the extent that a claim is based on the health of a qualifying relative, an applicant needs to establish that the relative has a serious medical condition and, if he or she is accompanying the applicant to the country of removal, that adequate medical care for the claimed condition is not reasonably available in that country.

Whether a qualifying relative suffers from a serious medical condition and whether adequate medical care for this condition is reasonably available in the country of removal are findings of fact that are made by an Immigration Judge and reviewed on appeal under a clearly erroneous standard. 8 C.F.R. § 1003.1(d)(3)(i) (2019). The applicant has the burden of establishing these facts. Section 240(c)(4)(B) of the Act, 8 U.S.C. § 1229a(c)(4)(B) (2018).

The hypothyroidism the respondent's daughter suffers may constitute a serious medical condition, particularly given the consequences if it is left untreated, but the record reflects that his daughter receives regular treatment for this condition in the United States, and there is no indication that she will be unable to continue treatment if the respondent is removed. Although the respondent's partner testified that she learned from the internet that treatment for hypothyroidism costs $1,100 in Guatemala, the Immigration Judge found that the respondent presented no evidence to corroborate her testimony. See section 240(c)(4)(B) of the Act (providing that an Immigration Judge may require the submission of corroborating evidence, even where the testimony of an applicant or witness is credible). The Immigration Judge also reasonably determined that the basis for her testimony was inadequate to establish her assertion.

Moreover, as the respondent concedes on appeal, his mother testified that she received free medical care in Guatemala and believes that it continues to be free there. In light of this testimony, the Immigration Judge was not required to accept the assertions made by the respondent and his partner regarding the cost and availability of treatment for hypothyroidism in Guatemala. See *Matter of D-A-C-*, 27 I&N Dec. 575, 579 (BIA 2019).

The respondent has submitted evidence reflecting that medical facilities in Guatemala provide a lower standard of medical care than facilities in the United States. However, this evidence does not show that treatment for hypothyroidism is not reasonably available in Guatemala. Moreover, it is well settled that evidence that a qualifying relative will experience a "lower standard of living" in the country of removal, including a lower standard of medical care,

"will be insufficient in [itself] to support a finding of exceptional and extremely unusual hardship." *Matter of Monreal*, 23 I&N Dec. at 63–64; cf. *Matter of Correa*, 19 I&N Dec. 130, 134 (BIA 1984).

Further, although the Immigration Judge acknowledged that two of the respondent's children have received counseling for behavioral and emotional problems, and one of them has been diagnosed with anxiety and attention deficit disorders, there is no clear error in the Immigration Judge's findings that these are not serious ongoing medical conditions. Moreover, the record reflects that the younger child successfully completed counseling and was given coping strategies for his anxiety, and there is no indication that he has received further counseling or treatment for either his anxiety or attention deficit disorders.

There is also no clear error in the Immigration Judge's finding that if the children remain in the United States and need treatment for their conditions, they will be able to obtain it. The respondent does not argue that treatment for these conditions is unavailable in Guatemala. Nor does he meaningfully contest the Immigration Judge's finding that the son who suffers from anxiety will feel less anxious if he accompanies the respondent to Guatemala.

Finally, the Immigration Judge did not clearly err when she found that the hypertension of the respondent's mother was not serious and that she could continue to obtain treatment for this condition in the United States. The respondent's mother testified that the medical expenses stemming from her hypertension are covered by State benefits, she takes the bus to the doctor, and she is able to pick up her own prescriptions. There is also no indication that her hypertension prevents her from performing necessary tasks.

2. Other Hardship Concerns

With regard to the financial hardship that would allegedly result from his removal, the respondent does not contest the Immigration Judge's finding that he could financially support his family if his children and partner accompany him to Guatemala. Nor does he meaningfully challenge the Immigration Judge's finding that, in the event his children and partner remain in the United States, his partner could return to work and help support the children. The respondent's mother testified that she receives Social Security benefits and has rented one of the rooms in her home for income in the past. She is currently renting space to the respondent and his family. The respondent's sister also stated that she could live with and care for the respondent's mother in the event the respondent is removed.

While the respondent's children may face fewer economic and educational opportunities in Guatemala than they would if they remained in this country, both in the short and long term, economic detriment is generally insufficient to support a finding of the required hardship. See *Matter of Andazola*, 23 I&N Dec. 319, 323 (BIA 2002). Difficulties of this nature are an unfortunate consequence of removal in many cases. The respondent has not shown that his children "would be deprived of all schooling or of an opportunity to obtain any education" in Guatemala. *Id*. Furthermore, since his children are citizens of the United States, they may return to this country later to pursue economic and educational opportunities.

Finally, we acknowledge the emotional hardship the respondent's relatives may experience as a result of their separation from him if they remain in the United States. However, we agree with the Immigration Judge that it does not rise to the level of exceptional and extremely unusual hardship.

Considering all of the hardship factors in this case cumulatively, including the hardships that may result from the medical, economic, and emotional factors, the respondent's qualifying relatives will not experience hardship that rises to the level of extremely and exceptionally unusual. The hardship must be "substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here." *Matter of Monreal*, 23 I&N Dec. at 65. In fact, the application of the exceptional and extremely unusual hardship standard must be "limited to 'truly exceptional' situations." *Matter of Monreal*, 23 I&N Dec. at 62 (quoting H.R. Conf. Rep. No. 104-828 (1996))[.]

Page 783: Add a new Note 3 that reads as follows:

3. *Pereida v. Wilkinson*. In 2021, the Supreme Court held in *Pereida v. Wilkinson* that a nonpermanent resident seeking to cancel a lawful removal order fails to meet their burden of showing they were not convicted of a disqualifying offense when the statutory conviction on his record is inconclusive as to whether the disqualifying offense formed the basis of his conviction. 2021 U.S. LEXIS 1278 (Mar. 4, 2021).

Page 789 ((§ 7.01[G]): Add the following after Note 3.

The Third Circuit decided *Da Silva v. Attorney General* in January 2020.

Ramos Da Silva v. Attorney General
948 F.3d 629 (3d Cir. 2020)

Appellant Ludimilla Da Silva petitions for review of her final order of removal. She contends that the Board of Immigration Appeals erred when it concluded that her convictions for assaulting her husband's mistress were not "connected to" the extreme cruelty she suffered, rendering her ineligible for cancellation of removal. We agree. For the reasons that follow, we will grant Da Silva's petition for review and vacate the BIA's removal order.

I.

Da Silva, a native of Brazil, was admitted to the United States in 1994 with a B-2 visa; she was then about two years old. She overstayed her visa and has never left the United States. Da Silva married a United States citizen, Aziim Leach, on April 30, 2012. Leach, a member of the armed services, subjected Da Silva to emotional, psychological, and physical abuse throughout their marriage. For instance, he refused to file immigration paperwork that would provide her with documented status and used her undocumented status as a method to control her. Leach also hit Da Silva's daughter and pushed Da Silva against a wall multiple times.

Most importantly to this appeal, Leach engaged in numerous extramarital affairs, including one particularly intense relationship with his coworker, L.N. On September 1, 2014, Da Silva discovered sexually explicit text messages between Leach and L.N. Da Silva questioned Leach about the messages and called L.N. to arrange a meeting at L.N.'s house so they could talk. When Da Silva arrived, L.N. got into Da Silva's car, and Da Silva confronted L.N. with the text messages. Da Silva claimed she feared that L.N. was about to hit her so she punched L.N. in the nose.

Next, L.N. proposed that they go to Da Silva's house, so they could talk with Leach. When they arrived, L.N. and Leach claimed the affair was over. Da Silva and L.N. then left to return to L.N.'s house but stopped at Da Silva's friend's house on the way, where there was a second confrontation regarding the affair. Da Silva testified that L.N. said Leach was still her "daddy," indicating that L.N. would continue the extramarital affair. In response, Da Silva "exploded" and, in "a blind rage," struck L.N. in the nose again. The IJ recognized that Da Silva had "been provoked by a woman who was [having] an affair with her husband," and the BIA noted her violent outburst was "an aberration." Da Silva was arrested the following morning.

On January 19, 2016, Da Silva pleaded guilty to two counts of assault in violation of 18 U.S.C. § 113(a)(4) and was sentenced to eighteen months' imprisonment.5 On July 31, 2017, the government served Da Silva with a Notice to Appear, charging her with removability for overstaying her visa pursuant to 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 8 U.S.C. § 1229b(b)(2)(A) if (1) they have been "battered or subjected to extreme cruelty" by a spouse who is a United States citizen, (2) they have been "physically present in the United States for a continuous period of not less than [three] years immediately preceding the date of such application," (3) they have been "a person of good moral character" during the past three years, and (4) "the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent."7 Da Silva concedes that she cannot satisfy the "good moral character" requirement because, as a result of her assault conviction, she was "confined . . . to a penal institution for an aggregate period of one hundred and eighty days or more." 8 However, she argues that she qualifies for the exception to the good moral character requirement, which provides that a petitioner is still eligible for VAWA cancellation if the "act or conviction was connected to the alien's having been battered or subjected to extreme cruelty" and cancellation is otherwise warranted.

***

III.

Our analysis proceeds in two parts. First, we address the government's motion to remand to the BIA and conclude that remand is not appropriate here. Next, we apply our principles of statutory interpretation to the term "connected to." We hold that the term has a clear and unambiguous meaning and that the BIA's construction of "connected to" was overly narrow and contrary to the plain language of the statute.

A. The Motion to Remand to the BIA is denied.

The government urges us to remand to the BIA so that it may re-interpret the term "connected to." The government does not concede that the BIA's construction of the term was improper but rather argues that remand is warranted to permit the BIA an opportunity to fully consider the "ambiguous" phrase "connected to." We decline the government's invitation to remand because the factors supporting remand are not present here. Indeed, we conclude that the phrase "connected to" is unambiguous, leaving no statutory gaps for the BIA to fill.

Remand is appropriate where an agency has yet to consider the issue presented to the court. For instance, in *I.N.S. v. Orlando Ventura*, the Supreme Court held that the Ninth Circuit "committed clear error" when it decided a question itself in the first instance rather than remanding to the BIA. Remand is also called for where there has been a change in law or an intervening event. Neither factor is present in this case.

The BIA has already interpreted and applied the term "connected to," and thus, we would not be conducting a de novo inquiry as in Ventura and its progeny. Moreover, there has been no change in law or intervening event that would affect the BIA's analysis. The government asked the BIA to summarily affirm the IJ's decision. If it wanted the BIA to conduct a re-analysis of "connected to," it should have asked the BIA to do so the first time around.

Accordingly, we will deny the government's motion to remand to the BIA to re-interpret "connected to."

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

We employ well-established principles of statutory interpretation to determine the meaning of "connected to," first asking whether the term has a plain and unambiguous meaning.27 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."

The government argues that the plain meaning of "connected to" is too broad to be unambiguous; however, "a term in a statute is not ambiguous merely because it is broad in scope." Application of the plain, expansive meaning of "connected to" is called for as long as it is supported by the "broader context of the statute as a whole," and, indeed, the statutory context does support such application. Two other VAWA-based provisions in the INA are instructive because Congress expressly limited the broad scope of "connection" in those provisions. Under the first statute, battered spouses are exempt from a certain ground of inadmissibility if they can show, inter alia, that "there was a substantial connection between the battery or cruelty . . . and the alien's unlawful entry into the United States." A second statute, which applies to VAWA self-petitioners who are divorced from their abusive spouses, requires petitioners to demonstrate "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty." Both of these provisions reveal that Congress knew how to narrow the otherwise

expansive term "connection"—either by including a modifier like "substantial" or a temporal requirement—but chose not to for VAWA cancellation of removal.

The government also cites the interpretive principle that statutory exceptions should be read narrowly so as not to "swallow" the general rule. Retaining the plain meaning of "connected to" in the exception to the good moral character requirement does not swallow the cancellation of removal statute; rather, it aligns with its purpose. VAWA cancellation of removal is "intended to ameliorate the impact of harsh provisions of immigration law on abused women." A narrow construction, like the one the BIA adopted here, would frustrate this statute's larger goal by limiting the exception to those who committed crimes at the direction of their abuser.

As the government notes, there are Supreme Court cases stating that the phrase "in connection with" is so broad that it is indeterminate; however, these cases do not compel the same holding here. In those cases, the application of "in connection with" conflicted with the purpose of the statutes at issue. Da Silva's case is distinguishable because, as discussed, a plain meaning application of "connected to" furthers, not undercuts, the objectives of the VAWA cancellation statute.

Lastly, the government cites a U.S. Citizenship and Immigration Services interoffice memorandum that addresses the meaning of "connected to." This memo does not affect our analysis. The memo first defines "connected to" as compulsion or coercion, but then conflates "connected to" with but-for causation. As an initial matter, this memo's interpretation is not binding on this Court or the BIA, and it is entitled to respect only to the extent it has the power to persuade. It is not persuasive.

Its interpretation is at odds with the plain meaning of "connected to" to the extent that it requires compulsion and coercion rather than a causal or logical relationship. It is also internally inconsistent because compulsion/coercion and but-for causation are very different standards.

Thus, we hold that "connected to" is unambiguous and means "having a causal or logical relationship." Applying the plain meaning of "connected to" to this case, Da Silva has established that her convictions are connected to the extreme cruelty she suffered. The IJ and the BIA held that Leach's adultery was part of the extreme cruelty, and Da Silva assaulted L.N. while confronting Leach and L.N. about the affair. This meets the causal or logical relationship standard.

IV.

For these reasons, we will deny the government's motion to remand to the BIA to reconsider the term "connected to," grant the petition for review, vacate the BIA's order of removal, and remand for further proceedings consistent with this opinion.

P. 804 (§ 7.02[A]): Add the following before Section [B]:

On January 20, 2021, President Biden revoked a Trump administration executive order that listed anyone with a removal order as an actual priority for removal, which was a sharp departure from how prosecutorial discretion had been applied in the past. Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities (Jan. 20, 2021),

https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-the-revision-of-civil-immigration-enforcement-policies-and-priorities/.

Also on January 20, 2021, DHS under the Biden administration issued a memorandum titled "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities." The memo directs DHS to review the policies and practices concerning immigration enforcement and to use the memo as a guide for prioritization and prosecutorial discretion. The memo also defined and identified multiple different stages and forms of prosecutorial discretion. Memorandum for Troy Miller, et al., Senior Official Performing the Duties of the Commissioner, U.S. Customs and Border Protection, *Review of Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf. For more information, see Shoba Sivaprasad Wadhia, *Prosecutorial Discretion in a Biden Administration*, Yale Journal on Regulation (Jan. 20, 2021), https://www.yalejreg.com/nc/prosecutorial-discretion-in-a-biden-administration-by-shoba-sivaprasad-wadhia/

The January 20, 2021 DHS Memo also implemented an immediate 100-day pause on removals based on prioritizing DHS's limited resources to enhancing border security, conducting immigration and asylum processing at the southwest border, and complying with COVID-19 protocols. On January 26, a federal judge in Texas issued a nationwide temporary restraining order to block the 100-day pause on deportations, and on February 9, this order was granted a 14-day extension. See Memorandum for Troy Miller, et al., Senior Official Performing the Duties of the Commissioner, U.S. Customs and Border Protection, *Review of Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities,* (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf; *Texas v. United States*, __ F. Supp. 3d __, 2021 U.S. Dist. LEXIS 14116 (S.D. Tex. Jan. 26, 2021).

On February 18, 2021, U.S Immigration and Customs Enforcement issued interim civil enforcement priorities. 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#.

In May 2021, ICE issued a separate memo to its attorneys concerning removal priorities. Memorandum from John D. Trasviña, Principal Legal Advisor, to all OPLA attorneys, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf.

P. 806 (§ 7.02[B]): Remove Note 8 (No DACA Program for Parents), see next change. Instead, add the following:

8. 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 court 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 January 20, 2021, President Biden issued a Memorandum titled *Preserving and Fortifying Deferred Action for Childhood Arrivals.* See https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/. On March 26, 2021, 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. https://www.dhs.gov/news/2021/03/26/statement-homeland-security-secretary-mayorkas-daca.

P. 807 (§ 7.02[C]): Add new subsection C, "Deferred Action for Parents" before § 7.03:

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, (last accessed: Mar. 10, 2021), https://www.uscis.gov/archive/2014-executive-actions-on-immigration#2.

On January 25, 2017, then-President Trump issued Executive Order 13768, which canceled DAPA. *See* Executive Order 13768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 (Jan. 30, 2017).

Chapter 8: Asylum and Relief for People Seeking Refuge

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. 24,475 (May 7, 2021).

P. 852 (§ 8.02[D][2]): Add the following before [3]:

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, the Attorney General withdrew both prior decisions in *Matter of A-B-*, holding that immigration judges and the Board should no longer follow *A-B- I* or *A-B- II* when adjudicating pending or future cases. Instead, pending forthcoming rulemaking, immigration judges and the Board should follow pre-*A-B- I* precedent, including *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014). *Matter of A-B-*, 28 I. & N. Dec. 307 (Att'y Gen. 2021). The same day, the Attorney General vacated *Matter of L-E-A-*, 27 I. & N. Dec. 581 (Att'y Gen. 2019), returning the immigration system to the preexisting state of affairs pending issuance of a final rule addressing the definition of "particular social group." Matter of L-E-A-, 28 I. & N. Dec. 304 (Att'y Gen. 2021).

The Attorney General's decisions should reopen the door for asylum for many applicants.

P. 856 (**§ 8.02[D]):** Add the following as new Note Three:

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." 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." Executive Order 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.

P. 883 (§ 8.03): Before § 8.04, add a new § 8.03[F] titled "Asylum Restrictions by Executive Action" and add the following

1. *Migrant Protection Protocols (MPP), or "Remain in Mexico".* On December 28, 2018, the Trump Administration announced the "Migrant Protection Protocols," under which individuals who arrived at the southern border and asked for asylum were given notices to appear in immigration court and then sent back to Mexico, prompting a large number of those subject to the MPP to be unable to make their immigration court dates and subsequently being ordered removed or deported. The MPP was challenged in federal court, and briefly enjoined by the Ninth Circuit, but the Supreme Court stayed the injunction, resulting in the MPP remaining in effect. *See* U.S. Dep't of Homeland Security, Archived Content: Migrant Protection Protocols (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols. On January 20, 2021, the Department of Homeland Security issued a statement suspending new enrollments in the MPP. U.S. Dep't of Homeland Security, *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program*, (Jan. 20, 2021), https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program. On June 1, 2021, DHS terminated the MPP. https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

2. *Title 42 Expulsions and Restrictions Based on COVID-19.* On March 20, 2020, the Centers for Disease Control and Prevention (CDC) issued an order titled Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists. This order was issued pursuant to the CDC's public health authority under Title 42 and allowed DHS to expel anyone, even those fleeing persecution and seeking asylum, if there was a "serious danger of the introduction of [a communicable] disease into the United States." On May 19, 2020, the order was extended indefinitely. Public health experts have called for an end to the order based on the "fundamental problem [that Title 42] expulsions are targeted primarily at a small number of people seeking asylum at a time when restrictions placed at ports of entry still allow large numbers of people to cross the border daily." *See* American Immigration Council, Fact Sheet, A Guide to Title 42 Expulsions at the Border (Mar. 29, 2021), https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border. In January 2021, President Biden announced he would not lift the Title 42 Order, and has continued to expel foreign nationals based on the order. For more information, see https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border On May 12, 2021, DHS announced that it would explore a humanitarian exception to the Title 42 order. https://www.dhs.gov/news/2021/05/12/dhs-improves-process-humanitarian-exceptions-title-42.

For further examination and analysis on executive branch changes to asylum during the Trump Administration, see Lindsay Harris, *Asylum Under Attack*, 67 Loy. L. Rev. __ (forthcoming 2021).

P. 889 (§ 8.05[D]): Insert after text on p. 889:

The Board's decision in *Matter of L-A-B-R* has been followed by the Sixth Circuit and distinguished by the First Circuit.

Chapter 9: U.S. Citizenship and Naturalization

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), https://thehill.com/homenews/administration/479540-trump-administration-releases-rule-to-restrict-birth-tourism. While Trump raised the idea of issuing an executive order ending birthright citizenship, lawmakers argued that this would violate the 14th Amendment, which grants citizenship to "all person born or naturalized in the United States." The former President was never able to draft the order. Brett Samuels, *Trump Administration Revives Talk of Action on Birthright Citizenship*, THE HILL (Nov. 20, 2020), https://thehill.com/homenews/administration/526950-trump-administration-revives-talk-of-action-on-birthright-citizenship.

Page 903 (§ 9.02): Add the following to the end of Note 3 after Problem 9-5:

Naturalization applications have significant backlogs. The average wait time for naturalization applicants has changed from 5.6 months in 2016 to 10.3 months in 2018, 9.9 months in 2019, and 8.8 months in 2020. Some organizations have called the backlogs a "novel form of voter suppression" that prevented many applicants from voting in the 2020 elections. ILRC & Boundless, *Denying the Right to Vote: Politicization of the Naturalization Process as a Novel Form of Voter Suppression* (Oct. 15, 2020), https://www.ilrc.org/denying-right-vote-politicization-naturalization-process-novel-form-voter-suppression.

Page 903 (§ 9.02): Add the following after the first paragraph in Note 4 after Problem 9-5:

Before December 2020, the civics test had 100 potential questions, and applicants had to answer six questions correctly out of ten. In December 2020, USCIS made the civics test more difficult by adding 128 potential questions and requiring applicants to answer twelve questions correctly out of twenty. Maeve Higgins, *128 Tricky Questions That Could Stand Between You and U.S. Citizenship*, N.Y. TIMES (Nov. 30, 2020), https://www.nytimes.com/2020/11/30/opinion/us-citizenship-test.html. Many commentators said the test created barriers to English language learners and pushed certain political beliefs. For example, the new questions asked for the biographical details of Alexander Hamilton and the purpose of the Tenth Amendment. Another question asked why the United States entered the Vietnam War, for which the only correct answer was "to stop the spread of Communism." Simon Romero & Miriam Jordan, *New U.S. Citizenship Test is Longer and More Difficult*, N.Y. TIMES (Dec. 3, 2020), https://www.nytimes.com/2020/12/03/us/citizenship-test.html. In February 2021, USCIS announced that it would revert to the old test. Specifically, USCIS will administer the 2008 civics test to applicants who filed for naturalization before December 1, 2020, or who will file on or after March 1, 2021. For applicants who filed between December 2020 and March 2021, USCIS will give applicants the option to take either the 2008 civics test or the 2020 civics test. USCIS Policy Alert, PA-2021-02, Revising Guidance on Naturalization Civics Educational Requirement (Feb.

2, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210222-CivicsTest.pdf.

Page 904 (§ 9.02): Add a new Note 7 after Problem 9-5:

7. U.S. Citizenship Act of 2021. President Joe Biden submitted the U.S. Citizenship Act of 2021 to Congress in January 2021. If enacted, the bill would waive 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 also waive 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); *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/; Siskind Summary – The US Citizenship Act (the "Biden Immigration Bill"), Siskind Summer PC (Feb. 20, 2021), https://www.visalaw.com/siskind-summary-us-citizenship-act-biden-immigration-bill/.

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 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.

Page 931 (§ 9.05[A][2]): Add a new Note 3 after *Kungys v. United States*:

3. Denaturalization under the Trump administration. 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. 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. 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.

Page 931 (§ 9.05[A][2]): Add a new Note 4 after *Kungys v. United States*:

4. The DOJ's New Denaturalization Section. The DOJ previously litigated denaturalization cases in the Office of Civil Litigation. While the Office won denaturalization cases "ninety-five percent of the time," the DOJ created a new Denaturalization Section in 2020 solely focused on denaturalization to meet the growing numbers of referrals from law enforcement agencies. Press Release, U.S. Dep't of Justice, The Department of Justice Creates Section Dedicated to Denaturalization Cases (Feb. 26, 2020), https://www.justice.gov/opa/pr/department-justice-creates-section-dedicated-denaturalization-cases.