IMMIGRATION AND NATIONALITY LAW: PROBLEMS AND STRATEGIES

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Summer 2022 Update

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2022 Summary of Updates

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The summer 2022 update to Immigration and Nationality Law: Problems and Strategies by Lenni Benson, Shoba Wadhia, and Stephen Yale-Loehr incorporates prior annual supplements and also contains many new developments, including:

Chapter 1:

- Updated statistics on the number of foreign-born people living in the United States and the size of the undocumented migrant population
- Statistics outlining the shift away from family-based migration and status adjustments during the global pandemic
- Additional statistics on the numbers and countries of origin of migrant children and adults through FY 2022
- Information regarding the total expenditures of foreign direct investment in 2022
- Updated data on refugee admissions as of April 30, 2022
- The impact that the global pandemic had on the numbers of foreign students, both documented and undocumented, attending universities in the United States
- Statistics on the high volume of immigration cases being appealed to the federal circuit courts
- A new note discussing the Supreme Court's holding in *Kansas v. Garcia*
- An in-depth discussion of the increasing involvement of state governments in immigration enforcement through sanctuary policies, information sharing, and state legislation to prevent courthouse arrests

Chapter 2:

- A narrative overview of the chapter including (1) the key inquiries to deepening understanding of the topic; (2) important changes to removal and expulsion policies the main updates to asylum policy; (3) the exceptional use of parole authority to admit tens of thousands of Ukrainians and Afghans since 2021; and (4) an outline of the litigation around the scope of parole authority
- Statistical summary of the scope of U.S. CBP and DHS activity through the COVID-19 pandemic
- The DHS's use of facial recognition, big data, and other surveillance mechanisms and its disproportionate impact on people of color
- An excerpt from the CBP Inspector's Field Manual on Arriving Aliens
- More information about the procedural aspects of Expedited Removal and a chart highlighting the differences between the various removal processes.
- The DHS's annual performance report highlighting the number of removals in FY 2021
- A memorandum from Secretary Alejandro Mayorkas explaining the decision to suspend the Migrant Protection Protocols along with a summary of the Supreme Court's opinion in *Biden v. Texas*
- An outline of the new Interim Final rule that went into effect on May 31, 2022, that modifies rules around expedited removal
- An excerpt from Biden Administration actions repealing the Trump-era executive orders around expedited removal
- A new section § 2.01(A) covering expulsions of individuals under the authority of Title 42 and the litigation surrounding its implementation

- Recent Transactional Records Access Clearinghouse data on ICE's detention of immigrants as of May 2022

Chapter 3:

- The DHS's addition of new fields of study to the STEM OPT program for STEM workers and students
- USCIS guidance on how the agency determines eligibility for O-1A nonimmigrant status for noncitizens of extraordinary ability
- Updates on the FY 2023 H-1B lottery season
- Recent DHS and DOL actions to address the domestic labor shortage
- The status of U visa processing times and the USCIS's new bona fide determination process to address the mounting backlog
- Current employment authorization document (EAD) backlogs and processing times for EAD applications
- USCIS actions to provide to automatic extensions for EADs
- Information on Temporary Protected Status (TPS) such as history, individual eligibility requirements, and recent applications of TPS to address humanitarian crises

Chapter 4:

- Recent Supreme Court decision limiting eligibility for lawful permanent resident status on the basis of TPS status
- USCIS expansion of premium processing

- A recent Supreme Court ruling clarifying that federal courts lack jurisdiction to review facts found as part of discretionary-relief proceedings
- A new law reforming the EB-5 immigrant investor program
- Pending lawsuits against USCIS regarding its interpretation of the EB-5 Reform and Integrity Act of 2022
- USCIS actions to relieve mounting backlogs and establish internal cycle time goals
- General information about humanitarian parole, including the statutory authority and recent uses of humanitarian parole to help citizens of Afghanistan and Ukraine

Chapter 5:

- State Department data on the number of inadmissible people and the grounds of inadmissibility under the INA
- An Editor's Note discussing *Trump v. Hawaii* and a pending bill that would limit executive authority and explicitly prohibit religious discrimination
- Reviewing presidential proclamations issued by the Trump administration to ban travel during the beginning of the pandemic response and the Biden administration's subsequent modification of those policies
- A list of crimes considered to involve moral turpitude within the State Department's Foreign Affairs Manual.
- Addition of *Larios v. Attorney General*, 978 F.3d 62 (3d Cir. 2020), discussing whether an assault is a crime involving moral turpitude
- Pending legislation that would prohibit denying immigration benefits and protections for marijuana-related convictions or conduct

- A new federal district court decision explicitly defining *Arrabally*

Chapter 6:

- Recent statistics demonstrating the growing backlogs in the immigration court system
- Update on Trump administration efforts to increase the number of 287(g) agreements with local law enforcement agencies
- Additional information about the Alien Terrorist Removal Court
- A 2021 DHS Memorandum halting immigration raids on workplaces and the agency's shift to focusing their efforts on protecting employees from exploitation
- Executive branch actions regarding civil immigration enforcement policies and priorities and subsequent litigation
- A note on the holding of the 2009 BIA decision in *In re Barcenas-Barrera*
- A Third Circuit case where a panel of judges applied a two-part test to measure ineffective assistance of counsel
- Review of a new set of regulations for persons entering § 240 removal from expedited removal proceedings
- The Biden administration's instruction to create a dedicated Ddcket for family immigration cases where the family has been admitted pending removal proceedings
- The EOIR's new priorities, processing rules, and the office's movement toward increased electronic submissions and greater transparency
- The current status of *Padilla v. Immigration & Customs Enf't*
- A new note on a bill to create a new independent immigration court system

Chapter 7:

- A new section on cancellation of removal
- A March 2020 BIA case excerpt demonstrating that exceptional and extremely unusual hardship for cancellation of removal is based on a cumulative consideration of all factors
- Case excerpt of the Third Circuit decision in *Ramos Da Silva v. Attorney General*
- New USCIS policies to address the backlog of SIJS petitions
- Recent executive actions revoking Trump administration executive orders and granting prosecutorial discretion when prioritizing removal
- New USCIS, ICE, and DHS civil enforcement priorities for apprehension and removal of noncitizens.
- The current status of the Deferred Action for Childhood Arrivals (DACA) program

Chapter 8:

- Updated refugee admissions for fiscal years 2021 and 2022
- Discussion of the new interim final rule to streamline asylum applications and a fact sheet from the USCIS about implementation of the rule
- Updates on the Attorney General's withdrawal of both prior Matter of A-B- decisions and reversion to the preexisting definition of "particular social group"
- A new section titled "Asylum Restrictions by Executive Action" that covers the Migrant Protection Protocols and Title 42 expulsions
- A new hypothetical example in Section 8.03
- A section highlighting the key differences between Temporary Protected Status and asylum

Chapter 9:

- Former President Trump's comments on his intent to end birthright citizenship for U.S.-born children of undocumented immigrants
- Backlogs and the recent increase in wait times for naturalization applications
- Recent changes to the USCIS's civics test and comments describing how the changes create barriers English language learners and pushed certain political beliefs
- A story of several U.S.-born newborns and their mothers who were expelled by the Trump administration before they could obtain a U.S. birth certificates.
- An overview of the increase in denaturalization under the Trump admission when compared to prior administrations and the Department of Justice's response to the increase in referrals from law enforcement agencies.
- A 2022 lawsuit filed against the USCIS by multiple naturalization applicants claiming that they were harmed by the agency's delay in processing their applications

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

Page 3, ¶ 2

- The current population estimate (February 2022) is that there are 46.7 million foreign-born people in the United States, representing 14% of the population.

Page 3, ¶ 4

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

Page 4, ¶ 1

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

Here are some key findings from their data:
Based on the 2019 Data of the American Community Survey conducted by the U.S. Census Bureau there are an estimated 10.3 million unauthorized migrants present in the United States. Of the 10.3 million unauthorized migrants, 6% are Black and more than 50% of this population lives in five states: Florida, New York, Texas, New Jersey and Maryland.

Most of the 10.3 million migrants live in mixed-status households meaning that they have a spouse, parent, and/or child who has status or is a citizen. Since 2010, two-thirds of the undocumented population consists of people who overstayed a lawful admission with a visa and one-third are people who entered without inspection.

Years in the United States

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

Arrived Before Age 16

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

Source: www.cmsny.org

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

Part of the challenge of counting is that the United States does not have a required national identification card. Several decades ago, the Census Bureau stopped asking about citizenship status to avoid frightening immigrants from participating in the national census. However, in March 2018, then-Commerce Secretary Wilbur Ross sought to include a citizenship question on the 2020 census, supposedly to improve enforcement of the Voters Rights Act. In *Department of Commerce v. New York*, 588 U.S. ___, 139 S. Ct. 2551 (2019), the U.S. Supreme Court struck down the inclusion of the question on the 2020 census, holding the Commerce Department's stated reasoning for adding the question to be merely pretextual. However, Chief Justice Roberts left open the possibility of the inclusion of such a question if the administration could produce an acceptable rationale. The Trump Administration made further attempts to include the question on the census. Before the printing of the 2020 census, three federal courts – in New York, California, and Maryland – found the Commerce Department violated federal procedural law and called the Commerce Department's rationale, to improve enforcement of the voting rights act, a cover for another motive.

Page 4, ¶ 4

Updating the information about Global Families

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

- 53% of Lawful Permanent Residents in FY 2022 Q1 obtained status as immediate relatives of U.S. Citizens
- 19% of Lawful Permanent Residents in FY 2022 Q1 obtained status as family-sponsored preferences

- https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration

Page 5, ¶ 4

- Statistic Correction: The text estimates 18 but the estimate is 17.8 million children with at least one immigrant parent in 2019.
- https://www.migrationpolicy.org/programs/data-hub/charts/children-immigrant-families

Update to the discussion on Migrant Children

Page 7 (§ 1.01[A][1]) Family Law: Replace the chart reported by the Customs and Border Protection (CBP) discussing the apprehensions of unaccompanied children with the following:

Country	FY 16	FY 17	FY 18	FY 19	FY 20	FY 21	FY 22
El Salvador	17,512	9,143	4,949	12,021	2,189	15530	9,603
Guatemala	18,913	14,827	22,327	30,329	8,390	58,783	34,546
Honduras	10,468	7,784	10,913	20,398	4,454	39,906	19,884
Mexico	11,926	8,877	10,136	10,487	14,359	25,745	17,027
Total:	58,819	40,631	48,325	73,235	15,033	139,964	81,060

*FY 22 YTD APRIL 2022

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

Children from other countries are also arriving in greater numbers at the Southwest border. In FY 2021:

320 from Venezuela

117 from Haiti

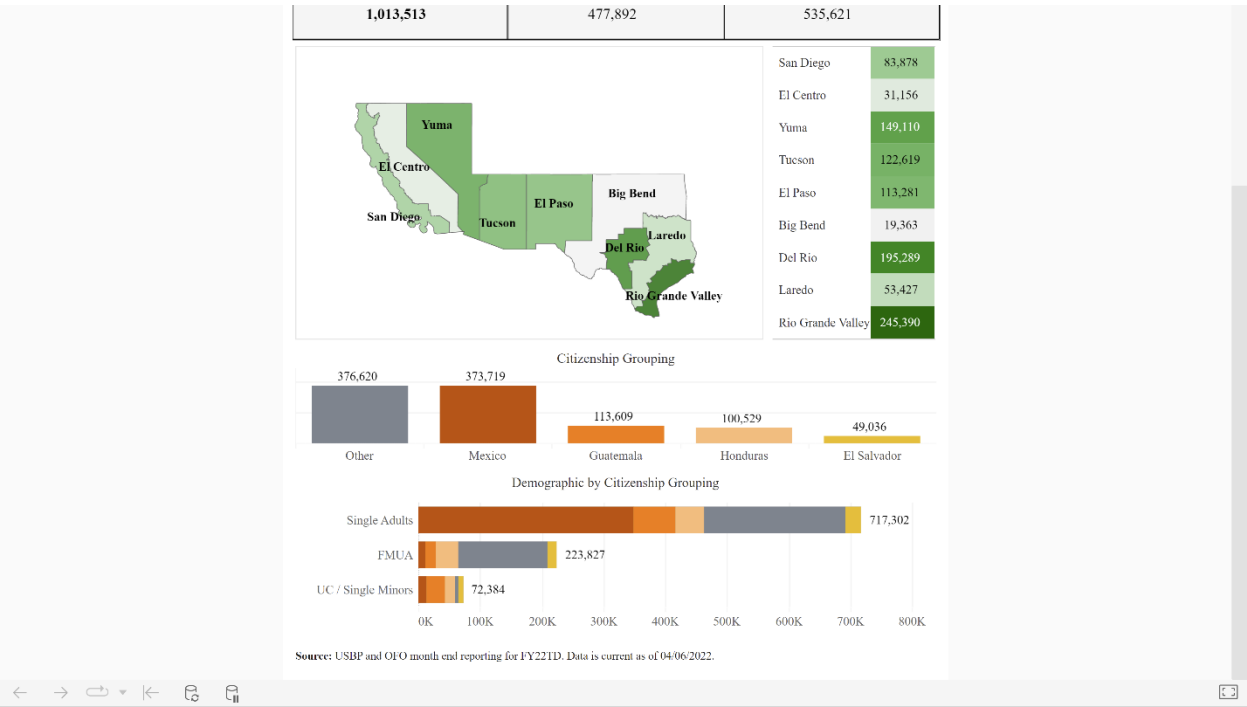
135 from Canada

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

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

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

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



Page 8 (§ 1.01[A][2]) Business and Trade Attorneys: Replace the 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." Bureau of Economic Analysis, New Foreign Direct Investment in the United States (July 1, 2021), https://www.bea.gov/data/intl-trade-investment/new-foreign-direct-investment-united-states. Immigration attorneys work with corporate and trade attorneys to structure such investments and to advise about the ability of an investor to live and work in the United States.

Page 8, ¶ 5 Updates for 2022

- New Investment by Foreign Direct Investors in 2020: $120.7 billion
- "Expenditures by foreign direct investors to acquire, establish, or expand U.S. businesses totaled $120.7 billion (preliminary) in 2020. Expenditures were down 45.4 percent from $221.2 billion (revised) in 2019 and below the annual average of $314.4 billion for 2014-2019. As in previous years, acquisitions of existing businesses accounted for a large majority of total expenditures."
- News Release, Bureau of Economic Analysis, New Foreign Direct Investment in the United States, 2020 (July 1, 2021), https://www.bea.gov/sites/default/files/2021-06/fdi0721.pdf

- Bureau of Economic Analysis, New Foreign Direct Investment in the United States (July 1, 2021), https://www.bea.gov/data/intl-trade-investment/new-foreign-direct-investment-united-states

Page 10, ¶ 2 Update to Data about Refugee Admissions

U.S. Refugee Admissions

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

- U.S. refugee admissions as of April 30, 2022: 10,742
- http://www.wrapsnet.org/admissions-and-arrivals/

Page 10, ¶ 7 Update to Data about Educational Institutions

- https://www.nafsa.org/sites/default/files/media/document/isev_EconValue2020_2021.pdf
- 2019-2020: Students from China (34.6%), India (18%), and South Korea (4.6%) account for about 57% of international students
- Decrease in economic contributions to $28.4 billion in the 2020-2021 school year
    - Decrease to 306,308 jobs held by international students in the 2020-2021 school year

Page 11, ¶ 1 Continued update about foreign students

- ~1.1 million international students enrolled in the U.S. in the 2019-2020 School Year
    - ~20,000 decrease from 2018-2019 School Year
- https://www.migrationpolicy.org/article/international-students-united-states-2020#enrollment_numbers_trends

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

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

For a detailed map and tool that estimates the contribution of foreign students by state, see https://www.nafsa.org/policy-and-advocacy/policy-resources/nafsa-international-student-economic-value-tool-v2.

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

- Currently, seventeen states and D.C. offer in-state tuition for undocumented students
    - Seven state university systems offer in-state tuition for undocumented students where the state legislature has not adopted any action to that affect:
        - University of Hawaii Board of Regents
        - Kentucky Council on Postsecondary Education
        - University of Maine Board of Trustees
        - University of Michigan Board of Regents
        - Ohio Board of Regents
        - Oklahoma State Regents for Higher Education
        - Rhode Island's Board of Governors for Higher Education
- https://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx

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

2017	2018	2019	2020	2021
20,438	27,916	31,495	23,618	19,266

- https://www.uscourts.gov/sites/default/files/data_tables/jb_d2_0930.2021.pdf

Page 12 (§ 1.01[A][5]) Criminal Prosecution and Defense: Add the following to the end of subsection [5], just before [6]:
Recently, many states have passed laws decriminalizing or even legalizing possession and use of marijuana. Although marijuana is still illegal under federal law, New York's Marihuana Regulation and Taxation Act ("MRTA") includes a provision to expunge prior convictions related to marijuana. 2021 N.Y. Ch. 92, 2021 N.Y. SB 854. Unfortunately, under current immigration law, drug crimes cannot be forgiven through a waiver of inadmissibility. This concept is explored and developed further in chapter 6. For more information about how the changing law on immigration may impact a noncitizen, see the Immigrant Defense Project's Guidance and FAQ section: https://www.immigrantdefenseproject.org/wp-content/uploads/2020/10/Community-FAQ_-Marijuana-Legalization-English.pdf.
To review the MRTA, visit https://www.nysenate.gov/legislation/bills/2021/S854.

Page 12, ¶ 5

- Broken link to DHS website; New link: https://www.dhs.gov/office-general-counsel
- The number of employees in the DHS General Counsel office has increased to over 3,000

Page 16, Table 1

- **Immigration Cases in the Federal Docket by Year**

YEAR	2016	2017	2018	2019	2020
Total Appeals	60,357	50,506	49,276	48,486	48,190
BIA Appeals	5,215	5,210	5,158	5,112	6,067
% of Total	8.6%	10.3%	10.5%	10.5%	12.6%

- https://www.uscourts.gov/sites/default/files/data_tables/jb_b3_0930.2020.pdf

Page 16, Table 2

- **2020 Federal Circuits with High Immigration Case Loads**

CIRCUITS	TOTAL CASE WORKLOAD OF CIRCUIT	BIA APPEALS OF CIRCUIT	PERCENTAGE OF TOTAL WORKLOAD
ALL CIRCUITS	48,190	6,067	12.6%
2nd Circuit	4,698	753	16%
3rd Circuit	2,877	342	11.9%
5th Circuit	6,401	708	11.1%
9th Circuit	10,400	3,048	29.3%

- https://www.uscourts.gov/sites/default/files/data_tables/jb_b3_0930.2020.pdf

Page 31 – Last Paragraph

DHS removed the PDF versions of the DS-160 form at the linked website. DHS now uses an online version of the form and has posted an example of the online version here: https://travel.state.gov/content/dam/visas/PDF-other/DS-160-Example_11-19-2020.pdf. For guidance on the questions asked and how to fill out this form, see Thirumal Motati, *How to fill DS-160 form online for US visa – A step-by-step guide* (July 9, 2021), https://www.visatraveler.com/blog/fill-ds-160-form-online-for-us-visa/.

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

13. State Regulation of Federal and State Tax Withholding Forms for Noncitizens. In *Kansas v. Garcia*, 589 U.S. __, 140 S. Ct. 791 (2020), the Supreme Court ruled on one aspect of the intersection between federal and state law. In the case, the respondents, three noncitizens, used false social security numbers to complete federal and state tax withholding forms. They used the same social security numbers when completing the I-9 forms for employment. The Immigration Reform and Control Act of 1986 makes it unlawful to knowing hire a noncitizen who is unauthorized to work in the United States. INA §§ 274A(a)(1), (h)(3); 8 U.S.C. §§ 1324a(a)(1), (h)(3). Through the I-9 process, employers are required to attest that each employee is "verified" that 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 making it a criminal offense to use false social security numbers on tax exemption forms are not expressly preempted by Congress's power to regulate immigration and an individual's right to work.

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New Note11: More on State Involvement in Immigration

August 12, 2021 CRS Report on 287(g) Program: INA § 287(g); 8 U.S.C. § 1367(g) permits the delegation of certain immigration enforcement procedures to state law enforcement agencies. Cong. Rsch. Serv., IF11898, The 287(g) Program: State and Local Immigration Enforcement at 1 (Aug. 12, 2021). Agreements between state and federal agencies entered under 287(g) allow specially trained state or local officers to perform certain functions relating to an investigation, apprehension, or detention of noncitizens. *Id.* All duties performed by state officials must be performed under federal oversight by DHS and ICE during only a predetermined time frame. *Id.*

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

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

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

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

March 10, 2020 CRS Report on Litigation Surrounding State Information Sharing Restrictions: A Jan 25, 2017 Executive Order by President Trump instructed the Attorney General and Secretary of DHS to withhold federal grant funds from states and localities that fail to comply with INA § 642; 8 U.S.C. § 1373. Exec. Order No 13768, 82 Fed. Reg. 8799 (Jan 30, 2017) (revoked by Exec. Order No. 13993 on Jan. 20, 2021). President Trump sought to strengthen immigration enforcement by encouraging state compliance with federal immigration information-sharing protocols by withholding grant money requested by states. *Id*. INA § 642; 8 U.S.C. § 1373 provides that State and Local government entities may not prohibit or restrict information exchanges regarding the immigration or citizenship status of any individual. *Id*. The grant money to be withheld was from the Edward Byrne Memorial Justice Assistance Grant Program which provided money to states and localities for non-federal criminal justice

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

Page 107 New Note 12: State Immigration Protections and Sanctuary Jurisdictions

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

In addition to becoming a Sanctuary Jurisdiction, many states have issued guidance to law enforcement and posted resources for state residents to ensure immigrants in that state are protected and know their rights. For example, the Attorney General's office of Illinois published guidance for their law enforcement in 2019 reminding them that "Illinois law largely prohibits law enforcement from participating in actions to enforce immigration law." Office of The Attorney General, State of Illinois, Guidance: Illinois Laws Governing Law Enforcement interactions with Immigrant Communities at 1 (2019), https://www.illinoisattorneygeneral.gov/rights/ImmigrationLawGuidancetoLawEnforcement.pdf. The state of New Jersey did something similar when the Attorney General issued a Law Enforcement Directive stating "New Jersey's law enforcement officers protect the public by investigating state criminal offenses and enforcing state criminal laws. They are not responsible for enforcing civil immigration violations except in narrowly defined circumstances." Office of the Attorney General, State of New Jersey, Attorney General Law Enforcement Directive No. 2018-6 v.20 at 1 (2019), https://www.nj.gov/oag/dcj/agguide/directives/ag-directive-2018-6_v2.pdf.

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

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

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New Note 13: State Legislation Preventing Courthouse Arrests

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

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

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

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

For a more detailed look at the changes to state policy regarding courthouse arrests of undocumented immigrants see James D. Gingerich, "Recent Changes In Federal Policy Will Decrease Immigration Arrests At State And Local Courthouses," 57 COURT REVIEW 192, 195 (2021).

Page 110 (§ 1.02[D]): ***City and County of San Francisco v. Sessions:***
The text excerpts the District Court opinion for its breadth and quality of discussion. The holding of this case was followed in most appeals courts, with the exception of the Second Circuit, which agreed with the federal government that federal funds could be withheld. *New York v. Dep't of Justice*, 951 F.3d 84 (2d Cir. 2020). As noted below, the election of President Biden ultimately resulted in several of the sanctuary cases being withdrawn. One news source reported that the change in policy netted New York over $30 million in funds that would have been withheld. Adam Klasfeld, *Biden's Reversal of Trump's DOJ Funding Denial for Sanctuary Cities Nets More Than $30 Million for New York*, Newstex Law and Crime Blog (May 4, 2021), https://lawandcrime.com/immigration/bidens-reversal-of-trumps-doj-funding-denial-for-sanctuary-cities-nets-more-than-30-million-for-new-york/.
Attorney General Garland rescinded the barriers to funding in April 2021, mooting the issue of penalizing 'sanctuary" state and city governments by depriving them of these funds. The rescission was reported in the press. *See, e.g.,* Sarah N. Lynch, "U.S. Justice Department Ends Trump-Era Limits on Grants to 'Sanctuary Cities,'" Reuters (April 28, 2021).

Page 122 (§ 1.02[D]): Under Notes and Questions, replace Note 1 with the following:
1. Sanctuary Cities Litigation in the Biden Era. In early 2021, there were three cases pending before the Supreme Court, one filed by the Department of Justice, one by the State of New York, and one by the City of New York. These cases were submitted to the Supreme Court to resolve the legality of the Trump Administration's efforts to restrict or withhold federal funds from sanctuary cities and states that do not cooperate with ICE. In January 2021, the cases were rescheduled to account for the Biden administration to come into office and determine their stance on the issue. After two more rescheduling dates for the proceedings, the Department of Justice, the City of New York, the State of New York, and the City and County of San Francisco agreed to dismiss the cases. The Biden administration effectively repealed the Trump Administration's attack on sanctuary cities and the dismissal of the cases before the Supreme Court rendered moot many cases about the ability to withhold funds from sanctuary cities. *See*, *e.g.*, *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 *Sanctuary Jurisdiction Policies by State*, Ballotpedia, https://ballotpedia.org/Sanctuary_jurisdiction_policies_by_state. The conservative nonprofit Center for Immigration Studies maintains an interactive map to current sanctuary states, cities, and counties. *See* Jessica M. Vaughan & Brian Griffith, *Map: Sanctuary Cities, Counties, and States*, Center for Immigration Studies (Mar. 22, 2021), https://cis.org/Map-Sanctuary-Cities-Counties-and-States. The National Council of State Legislatures has a robust

database with legislation and statutory proposals that includes a wide range of immigration topics. *Immigration Laws and Current State Immigration Legislation*, National Council of State Legislatures, https://www.ncsl.org/research/immigration/immigration-laws-database.aspx.

Page 123: New Note 4:
4. Positive Developments in State Laws:
Not every state or local law is targeting immigration enforcement. Many pieces of legislation are explicitly seeking greater immigrant integration. For example, several states liberalized access to State I.D. or driver's licenses. Others reduced license requirements for many professions opening areas of self-employment to authorized migrants as well as those with documents.

For a 2020 report on the variety of state legislation, see Ann Morse, *Report on State Immigration Laws | 2020*, National Council of State Legislatures (Mar. 8, 2021) : https://www.ncsl.org/research/immigration/report-on-state-immigration-laws-2020.aspx. For a summary of state laws addressing occupational restrictions see *Professional and Occupational Licenses for Immigrants*, Clinic Legal (last updated Aug. 22, 2019), https://cliniclegal.org/resources/state-and-local/professional-and-occupational-licenses-immigrants.

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

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

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

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

The updates are numerous. Here is a short summary of what you will find in this chapter.

PANDEMIC EXPULSIONS:

First, the Trump administration took many steps to expand the power of the DHS to refuse admission at airports and all ports of entry. One of the most significant steps was to use the agency's Quarantine authority found in Title 42 of the U.S. Code to exclude all travelers unless they fall under an administratively created exception. As of June 2022, there is ongoing litigation about the ability of the DHS to withdraw these wholesale expulsions as recommended by the Centers for Disease Control. This litigation is discussed below.

REMAIN IN MEXICO:

The second major change concerned the authority of DHS to push people who appeared at ports of entry seeking asylum back into Mexico. On June 30, 2022, in the last opinion issued for the term, the Supreme Court ruled 5-4 that the Biden administration had the statutory authority to terminate the remain in Mexico program. Below, connected to text page 164, you will find a summary of that case. This remain in Mexico program, also known as the Migration Protection Protocols, is not identical to the INA statutory authority to conduct expedited removal under Section 235(b); 8 U.S.C. § 1225(b).

EXPANDING AND CONTRACTING THE STATUTORY REACH OF EXPEDITED REMOVAL:

The third major change by the Trump administration was to expand expedited removal into the entire territory of the United States – in effect making everywhere the border area. This is discussed in the text at pages 167 to 181. Subsequent litigation had limited success in stopping the implementation of the policy, which potentially subjected everyone to requests for proof of citizenship, inspection, and evidence of physical presence of more than two years. However, the Biden administration repealed this extension of the expedited removal authority in the winter of 2021.

LIMITING ACCESS TO THE COURTS

Also included in the textbook update is a major Supreme Court decision limiting federal judicial review of challenges to expedited removal cases, even where the individual is alleging constitutional violations. See the discussion of Department of Homeland Security v. Thuraissigiam *in this supplement for more information.*

REVISING THE ASYLUM PROCESS:

While there are other smaller policy and litigation issues, one of the most significant developments in 2022 is the adoption of new regulations that allow people seeking asylum who are in the expedited removal process to have a credible fear interview before an asylum officer. If they are successful in their credible fear interview, they can complete the adjudication of their entire asylum claim before an asylum officer rather than the case being referred to the immigration courts. We have included new materials about these significant regulatory changes and charts and graphs to help expand your study.

BREAKING THE BARRIERS THROUGH THE GRANT OF PAROLE:

Finally, as you study the rights of people at the border, we must note the truly exceptional use of parole authority to admit nearly 100,000 Afghan nationals as the United States worked to evacuate many people who were employed by the U.S. government or affiliated institutions. The DHS used its authority to parole admission pursuant to INA § 212(d)(5); 8 U.S.C. § 1182(d)(5). Afghans were admitted as "parolees" and given two years to remain in the United States. The DHS also issued Employment Authorization Documents that allow Afghans permission to work and the ability to obtain social security numbers. However, parole is not a formal "status" under the INA and as such, Afghans must find additional paths should they wish to remain in the United States beyond the term of their parole. Parole does not automatically convert to any status that allows reunification with separated family members.

The term parole is used in a variety of contexts:

i. *Parole admission into the United States for a specific period*

ii. *Parole entry to allow continuation of removal proceedings*

iii. *Advance Parole – Parole after a grant of permission to travel and return to the United States. Advance parole is also discussed in Chapter 4 in evaluating eligibility for permanent residence using in country procedures called "adjustment of status."*

iv. *Parole in Place – a grant of admission currently in very rare use, but historically a power given to the district directors to correct errors or problems with irregular admission and entry*

v. *Humanitarian Parole – used primarily for urgent medical treatment and exceptional situations.*

In this chapter our main focus is on parole as the way people are allowed physically into the territory but remain without a formal admission usually as part of the administrative exclusion or removal process.

In March 2022, the DHS designated Afghans already present in the United States as eligible for Temporary Protected Status (TPS) under INA § 244; 8 U.S.C. § 1254a. TPS is also not a path to

permanent resident status. Nor does it allow for family reunification. TPS is covered in Chapter 7 on relief from removal.

To read more about the DHS Operation Allies Welcome, see Dep't of Homeland Sec., Fact Sheet on operation Allies Welcome (Nov. 10, 2021), https://www.dhs.gov/publication/fact-sheet-operation-allies-welcome.

To read more information on the use of humanitarian parole for Afghans, see U.S. Citizenship and Immigr. Enforcement Servs., Information for Afghan Nationals, https://www.uscis.gov/humanitarian/information-for-afghan-nationals

In February of 2022, as Russian invaded the Ukraine, another extraordinary movement of people began. While the press and government officials use the term refugee to describe the people fleeing the conflict, technically, the U.S. legal definition of refugee is more complex. You can find the statutory definition in INA § 101(a)(42); 8 U.S.C. § 1101(a)(42). Under this definition, an individual must establish why he or she is facing persecution, not just instability or risk of harm during a war. European nations responded with an unprecedented grant of a temporary protected status that allow Ukraine nationals to live and work within the EU countries for up to two years.

The DHS created a new parole program under its INA authority found in § 212(d)(5); 8 U.S.C. § 1182(d)(5). The new "Uniting for Ukraine" program allows U.S. citizens, residents, and even visitors maintaining any lawful status to sponsor Ukraine citizens to enter the United States with parole permission. More than 30,000 people have applied and the USCIS has granted almost all applications in a matter of days. Moreover, the government streamlined the process to allow boarding a commercial flight without an official U.S. parole boarding foil – a document put into a passport that is similar to a visa. Paroled Ukraine nationals are eligible to seek an Employment Authorization Document and can remain in the United States for up to two years. To read more about this program, see U.S. Citizenship and Immigr. Servs., Ukraine, https://www.uscis.gov/ukraine.

While advocates and members of Congress largely support the Uniting for Ukraine program, the contrast with the parole process for the ongoing exodus of Afghan nationals is very stark. In the late summer and fall of 2021, U.S. citizens and permanent residents filed more than 70,000 requests for humanitarian parole to help Afghans come to the United States. The USCIS issued policy guidance and held webinars that generally stated that parole can only be granted on a case by case basis, and required a U.S. consulate to issue a boarding foil. As the U.S. government has pulled out of Afghanistan, USCIS has not issued parole approval for those who are still inside the country. But even for individuals who have fled to other countries, the USCIS has denied almost all the requests and issues "boilerplate" refusals stating that parole is not a substitute for the overseas refugee process.

Questions:

What policy reasons explain the different practice between Ukraine and Afghanistan?

Could race or religion be a significant factor in the differences?

Several members of the U.S. Senate wrote to inquire about these disparities. Here is a copy of the letter sent to the Secretary of DHS on May 26, 2022.

United States Senate

May 26, 2022

The Honorable Joseph R. Biden, Jr.
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
U.S. Department of Homeland Security
301 7th Street, SW
Washington, DC 20528

The Honorable Ur Jaddou
Director
U.S. Citizenship and Immigration Services
111 Massachusetts Avenue, NW
Washington, DC 20001

Dear President Biden, Secretary Mayorkas, and Director Jaddou:

We write concerning the inconsistency between the treatment of Afghans seeking humanitarian parole into the United States and the treatment of Ukrainians requesting that relief. We applaud the Administration's efforts to welcome to our shores *all* those displaced by war and its aftermath. But the disparate policies and requirements for those seeking refuge in the United States depending on their country of origin causes us concern. We urge the Administration to find a consistent and equitable approach to the processing of humanitarian parole applications in response to humanitarian crises, wherever they occur.

On December 20, 2021, many of us wrote to you expressing our alarm over the restrictive approach that U.S. Citizenship and Immigration Services (USCIS) was taking toward the more than 40,000 Afghans who had applied for humanitarian parole into the United States in the aftermath of the U.S. military withdrawal from Afghanistan.[1] In that letter, to which we have not yet received a response, we asked why the Administration had changed longstanding parameters for humanitarian parole, why numerous parole applications were being denied without a Request for Evidence, and sought a better understanding of the staffing issues preventing USCIS from adjudicating applications in a timely manner.[2]

[1] Letter from Members of Congress to President Biden, Secretary Mayorkas, and Director Jaddou (Dec. 20, 2021,
[2] *See id*.

On April 21, 2022, the Administration announced *Uniting for Ukraine* (U4U), a new humanitarian parole program to expedite the arrival of Ukrainians seeking refuge in the wake of Russia's unprovoked invasion of their country.[3] U4U is an innovative approach to processing a high volume of humanitarian parole applications, relying heavily on the remote processing and expedited screening of applicants in Ukraine and host countries, despite limited U.S. government operations in Ukraine. While we welcome this new and flexible approach for handling the large influx of Ukrainian parole applications, it stands in stark contrast to the manner in which the high volume of Afghan applications —43,000 since July 2021, most still unadjudicated[4] — are being handled, subjecting Afghans to a longer and more costly process, with a higher burden of proof. The United States has approved only 270 Afghans for humanitarian parole, denying more than 2,000 applications.[5] On the other hand, as of May 2022, nearly 6,000 Ukrainians who had applied through U4U had been granted humanitarian parole.[6]

The disparate treatment of Afghan and Ukrainian humanitarian parole applicants is stark. First, we understand that, unlike Ukrainians, Afghans must have an in-person consular interview with a U.S. consular officer. Without an operating U.S. Embassy in Afghanistan or the option to apply for parole remotely, Afghans seeking to safely exit their country face significant financial, logistical, and safety challenges.[7] Second, unlike U4U petitioners who, according to the USCIS announcement pay no fee to apply for parole (or will have any fee they paid refunded), Afghan parole petitioners are charged a $575 fee[8] — an immense sum of money for nationals of a country with a median per-capita income of $378.[9] Third, under U4U, beneficiaries must prove they resided in Ukraine as of February 11, 2022 and were displaced as a result of the Russian invasion, but there is no requirement that they prove they were specifically targeted with violence.[10] Yet, Afghan citizens applying for humanitarian parole must provide proof of individualized, targeted violence by the Taliban — a requirement that seems especially

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[3] Press Release, U.S. Dep't of Homeland Security, *President Biden to Announce Uniting for Ukraine, a New Streamlined Process to Welcome Ukrainians Fleeing Russia's Invasion of Ukraine* (Apr. 21, 2022), https://www.dhs.gov/news/2022/04/21/president-biden-announce-uniting-ukraine-new-streamlined-process-welcome-ukrainians

[4] Miriam Jordan, *Afghans Who Bet on Fast Path to the U.S. Are Facing a Closed Door*, N.Y. Times (Feb. 16, 2022), https://www.nytimes.com/2022/02/16/us/afghan-refugees-humanitarian-parole.html.

[5] Julia Ainsley, *Nearly 6,000 Ukrainians approved to enter the U.S. through Biden admin's website*, NBC News (May 9, 2022), https://www.nbcnews.com/politics/immigration/nearly-6000-ukrainians-approved-enter-us-biden-admins-uniting-ukraine-rcna28002.

[6] *See id.*

[7] Information for Afghan nationals on requests to USCIS for humanitarian parole, USCIS, https://www.uscis.gov/humanitarian/humanitarian-parole/information-for-afghan-nationals-on-requests-to-uscis-for-humanitarian-parole.

[8] I-131, Application for Travel Document. USCIS, https://www.uscis.gov/i-131.

[9] *Afghanistan's Median Household Income Exceeds Pakistan's*, Wadsam, Afghan Busniiness News Portal (Feb. 17, 2020), https://wadsam.com/afghan-business-news/afghanistans-median-income-exceeds-pakistan-38-other-countries-income/.

[10] Uniting for Ukraine, USCIS (Apr. 21, 2022), https://www.uscis.gov/humanitarian/uniting-for-ukraine.

unnecessary given the well-documented and widespread life-threatening conditions in Afghanistan since the Taliban takeover.[11]

The inconsistent treatment of Afghan and Ukrainian humanitarian parole applications is troubling. Afghans and Ukrainians have turned to humanitarian parole because other pathways out of their respective countries and to the United States, such as family reunification, are inaccessible or backlogged, and therefore inadequate in the face of immediate danger. We urge USCIS to adopt an approach to Afghan parole applications that mirrors the new treatment of Ukrainian applications, including accelerating the processing of Afghan parole applications, waiving (or refunding) application fees, and not requiring a showing of targeted violence. A pragmatic, efficient, and equitable approach strongly favors standing up an Afghan parole program similar to U4U.

While the U.S response to the Ukrainian refugee crisis has been admirable, it is unfortunate that this welcoming and accommodating model is not the standard for all humanitarian crises, wherever they occur, whether in Haiti, throughout Central America, in Africa, the Pacific, and elsewhere. And while the Administration has moved to restore our capacity to provide humanitarian relief, including raising the refugee admissions ceiling to 125,000, only 3,268 refugees were resettled in the first quarter of fiscal year 2022.[12] We urge you to break this cycle and implement a compassionate, human-rights-centered approach that reaffirms our commitment to inclusivity.

Sincerely,

Edward J. Markey
United States Senator

Jeanne Shaheen
United States Senator

/s/
Patrick Leahy
United States Senator

Cory A. Booker
United States Senator

[11] Guidance on Evidence for Certain Types of Humanitarian or Significant Public Benefit Parole Requests, USCIS, https://www.uscis.gov/humanitarian/humanitarian-parole/guidance-on-evidence-for-certain-types-of-humanitarian-or-significant-public-benefit-parole-requests.

[12] US Refugee Admissions, Q1 Fiscal Year 2022, Refugee Council USA (last accessed May 17, 2022), https://rcusa.org/wp-content/uploads/2022/02/RCUSA-Quarterly-Arrivals-Q1-FY22.pdf.

/s/
Ron Wyden
United States Senator

/s/
Patty Murray
United States Senator

Tina Smith
United States Senator

Elizabeth Warren
United States Senator

LITIGATION OVER THE PAROLE AUTHORITY:

While the size and scope of the Afghan and Ukraine parole programs is extraordinary, there have been other large scale parole programs in the past. For more on this history, see Cong. Rsch. Serv., R46570, Immigration Parole (Oct. 15, 2020), https://crsreports.congress.gov/product/pdf/R/R46570. For example, the U.S. government brought thousands of displaced Cambodians and Vietnamese in the 1980's and paroled hundreds of Cubans and Haitians. Parole is not a formal admission and in chapter 2 you will read about the long-term detention of Cuban nationals who could not obtain permanent lawful status and therefore remained vulnerable to detention due to their parole. See § 2.04[A], Clark v. Suarez Martinez, 543 U.S. 371 (2005) *found at page 248 in the text.*

President Trump issued an Executive Order that ordered the DHS to end parole programs that did not use a "case by case" adjudication process. Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 30, 2017). The statutory language relied upon in this order is:

212(d)(5)(B); 8 U.S.C. § 1182(b)(5)(B):

> The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207.

In February of 2021, President Biden formally revoked the Trump Executive Order and requested that DHS evaluate reinstating parole programs that had been terminated under the Trump Administration. Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 5, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/. In the statement announcing the change, President Biden and his cabinet set out a goal of

establishing a more comprehensive framework for improving the processing of people seeking asylum at the border and to address migration causes. Id.
When the DHS reinstated a parole program allowing family reunification of some children from Central America, the State of Texas and other states filed suit to stop the parole program as exceeding statutory authority. See Texas v. Biden, 2:22-cv-00014 (filed Jan. 28, 2022. N.D. Tex). The complaint is posted on the website of the state attorney general for Texas. Press Release, Ken Paxton, Attorney General of Texas, Paxton Launches 9th Border-Crisis Lawsuit Against Biden, Marking 20th Lawsuit Since Inauguration Day (Jan. 28, 2022), https://www.texasattorneygeneral.gov/news/releases/paxton-launches-9th-border-crisis-lawsuit-against-biden-marking-20th-lawsuit-inauguration-day.
These states have not, as of June of 2022, sued over the reinstatement of parole used for family reunification from Cuba or Haiti reinstated in May of 2022. U.S. Dep't of Homeland Sec., Fact Sheet: DHS Resumes Cuban Family Reunification Parole (CFRP) Program and Haitian Family Reunification Parole (HFRP) Program Operations (June 9, 2022), https://www.dhs.gov/news/2022/06/09/fact-sheet-dhs-resumes-cuban-family-reunification-parole-cfrp-program-and-haitian.

The textbook updates begin in regular format on this page.

Page 129 (§ 2.01[B][1]): The Inspection Process: Supplement the summary of the scope of CBP activity with the following combination of reports for FY 2019-2021:

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

	FY2019	**FY2020**	**FY2021**
PROCESSED PASSENGERS TOTAL	**1,124,075**	**650,178**	**491,688**
Int'l Air Passengers & Crew	371,912	169,842	121,516
Passengers & Crew by Sea	70,414	35,795	8,094
Passengers & Pedestrians by Land	681,750	444,541	362,078
Private Vehicles	273,338	187,049	159,598
Truck, Rail, and Sea Containers	78,703	77,895	89,458
$ Amount of Imported Goods	$7.3 billion	$6.64 billion	$7.6 billion
$ Amount of Duties, Takes and Other Fees	$224 million	$216 million	$256 million
Apprehensions at Ports of Entry	2,354	1,107	1,703
Arrests of Wanted Criminals	23	39	25
Refusals of Inadmissible Persons	790	634	723
Intercepted Fraudulent Documents	18	269	7
Discovered Pests	314	250	264
Discovered Materials for Quarantine (plant, meat, animal product, soil)	4,695	3,091	2,548
Pounds of Narcotics Seized/Disrupted	3,707 pounds	3,677 pounds	4,732 pounds
$ Amount of Undeclared or Illicit Currency Seized	$207,356	$386,195	~$342,000
$ Amount of Products Seized with I.P. Violations	$4.3 million	$3.6 million	$9 million

Page 131 (§ 2.01[B][1]): The Inspection Process: Supplement the snapshot Comparing Apprehensions at the Border and Overstay Rates for Fiscal Year 2018 through 2020 report:

Fiscal Year	Total Lawful Admissions	Est. Overstays	CBP Apprehensions	Percent of Overstays	Percent of CBP Apprehensions	Total Percent of Unlawful stays/enters
2018	54,706,966	666,582	404,201	1.20%	0.74%	1.96%
2019	55,928,990	676,422	859,501	1.21%	1.54%	2.75%
2020	46,195,116	684,499	405,036	1.48%	0.88%	2.36%

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

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

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

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

On June 26, 2020, the Ninth Circuit affirmed the district court's judgment ruling against Trump's re-allocation of $2.5 billion of Defense Department funds towards the construction of a "wall" along the U.S. southern border. The Ninth Circuit specifically held that the transfer of funds was inappropriate under the Appropriations Clause, and an unconstitutional violation of the separation of powers. *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020). The Sierra Club case plaintiffs petitioned the U.S. Supreme Court to consider their prior stay based on the findings of the Ninth Circuit, but the Supreme Court declined to lift the stay in a 5-4 decision issued on July 31, 2020, allowing construction of the border wall to continue. *Trump v. Sierra Club*, __ U.S. __, 140 S. Ct. 2620 (2020). The dispute over funding for former President Donald Trump's border wall was scheduled for oral argument on February 22, 2021, but the case was removed from the February argument session after the Biden administration banned the use of taxpayer funds to build a wall and called an end to its construction. *Biden v. Sierra Club*, __U.S. __, 141 S. Ct. 1289 (2021). In July 2021, the Court granted the Biden administration's request for the Court to vacate the lower court decision and to remand for dismissal based on changed circumstances. *Id.*

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

4. Do Overstay Rates Matter? As the textbook explains, we spend more than $19 billion on border enforcement. Do overstay rates indicate that our system of visa applications and entry

inspections are insufficient? What other controls might DHS seek to ensure greater compliance with temporary lawful admissions?

5. Big Data and Immigration Controls. The DHS has grown more sophisticated in its use of facial recognition software. In airports, temporary entrants to the United States are scanned and fingerprints are taken for most temporary entrants. There have been some news reports of DHS enforcement units trying to use geolocation data sources to track movements of people. For example, in the fall of 2020 Buzzfeed reported: "When DHS buys geolocation data, investigators only know that phones and devices visited certain places — meaning, they don't automatically know the identities of people who visited those locations. Investigators have to match a person's visited locations with, say, property records and other data sets in order to determine who a person is. But this also means that, technically, moment-by-moment location tracking could happen to anyone, not just people under investigation by DHS. In particular, lawyers, activists, nonprofit workers, and other essential workers could get swept up into investigations that start with geolocation data." Hamid Aleaziz & Caroline Haskings, *DHS Authorities Are Buying Moment-By-Moment Geolocation Cellphone Data To Track People*, *Buzzfeed* (Oct. 20, 2020). The DHS Office of Inspector General announced that it would investigate the use of private cell phone data. No report has been issued as of June 2022.

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

Some critics argue that DHS is already gathering too much biometric data and has inadequate protections in place to secure the databases. In a May 14, 2021, congressional oversight hearing, the Electronic Information Privacy Center submitted testimony expressing concerns over the lack of adequate privacy protections for vulnerable populations and others due to DHS data gathering. *See* Electronic Privacy Information Center, Comments of The Electronic Privacy Information Center to the Department of Homeland Security Data Privacy and Integrity Advisory Committee May 14 Meeting on the Information Sharing Environment, Docket No. DHS-2021-0016 (May 14, 2021), https://www.dhs.gov/sites/default/files/publications/epic-dpiac-meeting-may-2021-comments_002.pdf.

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

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

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

> For an alien to be subject to the expedited removal provisions at a POE, the alien must first meet the definition of "arriving alien." The

> term "arriving alien" as defined in *8 CFR 1.1(q)* means an applicant for admission coming or attempting to come into the United States at a POE, or an alien seeking transit through the United States at a POE, or an alien interdicted in international or U.S. waters and brought into the United States by any means, whether or not to a designated POE, and regardless of the means of transportation. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act, except that an alien who was paroled before April 1, 1999, or an alien granted parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) the Act.
>
> Aliens who entered the United States without inspection; aliens apprehended in the United States without legal status; and aliens who have departed the United States, are refused admission into another country and are thereafter returned back to the United States do not fall within the definition of arriving aliens. Alien stowaways on arriving vessels, lawful permanent resident aliens of the United States, or applicants under the Visa Waiver Program may be considered arriving aliens for other purposes under the Act, but are not subject to the expedited removal provisions.
>
> It is the responsibility of the officer to determine whether the alien is an arriving alien subject to being placed in expedited removal proceedings. Also see *Chapter 17*.11 for processing alien applicants for admission who claim asylum at ports-of-entry.
>
> [*This document does not have page numbers – this information is found near the bottom of the third page*]

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

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

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

Here is an excerpt of that CRS report with information about the procedural aspects of Expedited Removal:

> Expedited removal has far fewer procedural protections than formal removal proceedings. The alien has no right to counsel, no right to a hearing, and no right to appeal an adverse ruling to the BIA. Judicial review of an expedited removal order also is limited in

> scope. Further, the INA provides that an alien "shall be detained" pending expedited removal proceedings. Although DHS has discretion to parole an alien undergoing expedited removal, thereby allowing the alien to physically enter and remain in the United States pending a determination as to whether he or she should be admitted, DHS regulations only authorize parole at this stage for a medical emergency or law enforcement reasons.
>
> Despite these restrictions, further administrative review occurs if an alien in expedited removal indicates an intent to seek asylum or otherwise claims a fear of persecution or torture if removed. If, following an interview, the alien demonstrates a credible fear of persecution or torture, the alien may pursue an application for asylum and related protections (if the alien fails to show a credible fear of persecution or torture, he or she may still seek administrative review of the asylum officer's determination before an IJ). Administrative review also occurs if a person placed in expedited removal claims that he or she is a U.S. citizen, a lawful permanent resident (LPR), or has been granted refugee or asylee status. In these circumstances, DHS may not proceed with removal until the alien's claim receives consideration.

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

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

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

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).

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Differences In Rights Afforded Between Regular Removal And Expedited Removal

This chart is a summary of Note 3 in the text. However, there are exceptions and contradictions continuously developing. Consider the chart as a rough summary of the distinctions between Expedited Removal and Regular Removal proceedings. As you expand your understanding of the

procedures used in controlling the border and in removal proceedings, you will understand more of the very stark contrasts between expedited removal and regular removal.

	EXPEDITED REMOVAL § 235	**REGULAR REMOVAL § 240**	**AS OF NEW IFR EFFECTIVE MAY 31, 2022 Hybrid Process**
Interview by DHS Official Determination of Inadmissibility	Only grounds to 212(a)(6) or (a)(7) – Limited geographically and in time	Any Ground of Inadmissibility – Process begun with an issuance of a notice to appear	CBP or ICE can continue to use expedited removal as before. CBP cannot conduct Credible Fear, must refer to Asylum Office
Approximate Time for Processing	As short as a few hours to be removed. Could be a detention of several weeks for a credible fear interview.	If detained, it can be a matter of days. If released, it can be a number of years. Length of regular removal discussed further in Ch. 6	After passing Credible Fear, 21-45 days later there will be an Asylum Merits Interview
Credible Fear Interview	Only if DHS Officers refers to Asylum Officer (AO) If AO finds Credible Fear, Transition to Regular Removal	Not Required prior to commencement of proceedings	Performed by USCIS Asylum Officer. If Credible fear found, sent to AO for "Asylum Merits Interview"
Decision by a Judge	NO Decision made by inspector and their supervisor alone unless credible fear is found; Immigration Judge can review lack of Credible Fear by Asylum Officer	YES; but asylum case is heard in court. Notice to Appear Served and Case heard before an Immigration Judge	Not at first stage. Decision made by the AO in the Asylum Merits Interview (AMI) and then de novo review in "streamlined" § 240 proceeding
Right to Counsel	NO* At the Border/Point of Inspection	YES Pro Se or Hired Counsel	Not officially at border but theoretically at credible fear and AMI.
Recording of Proceedings	NO	YES, in court	Unclear what AMI record will contain.
Review by Board of Immigration Appeals (BIA)	NO	YES	YES

	EXPEDITED REMOVAL § 235	REGULAR REMOVAL § 240	AS OF NEW IFR EFFECTIVE MAY 31, 2022 Hybrid Process
Judicial Review	NO Specifically Precluded (See discussion of limited habeas review in *Thuraissigiam)*	YES Via Petition for Review in Federal Circuit Courts	Yes, see regular removal under Section 240.
Negotiate for Withdrawal of Application for Admission	YES Very few other options other than Asylum or Statutory Exemption	NO Once proceedings have begun, you can seek discretionary termination or voluntary departure	YES Application for Asylum can be withdrawn even after Asylum Merits Interview
Relief Available	Only Asylum or Withholding**	Variety of Forms may be possible	May seek all forms of relief.
Detention During Proceedings	YES	YES	YES Unless granted Parole
Bond	NO Parole may be permitted	Currently in litigation for Arriving Aliens	Unclear as "arriving alien" Parole may be permitted

* In some detention centers, DHS has allowed attorneys to appear, provided it is not at the expense of the government.
** This changes if you pass a credible fear interview and are then in regular removal where addition forms of relief, such as adjustment of status, become available.

Page 158 (§ 2.01[D][1][Note 3]): 3. Does a Statutory Right to Claim Asylum Create Guaranteed Procedural Rights?: 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." Mike Guo, *Immigration Enforcement Actions: 2019*, Dep't of Homeland Sec. Office of Immigr. Stat., (Sept. 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf.
The numbers in fiscal year 2020 are complicated because of the Title 42 health ground expulsions. The DHS has not yet published the 2020 or 2021 yearbooks. However, some tables are available that provide some insights into removal.
In a report to Congress describing the operations between 2020 and 2022, the DHS describes the removals as follows:

> Brief Description: This measure provides a comprehensive picture of all returns and removals accomplished by the program to ensure undocumented noncitizens do not remain in the United States.

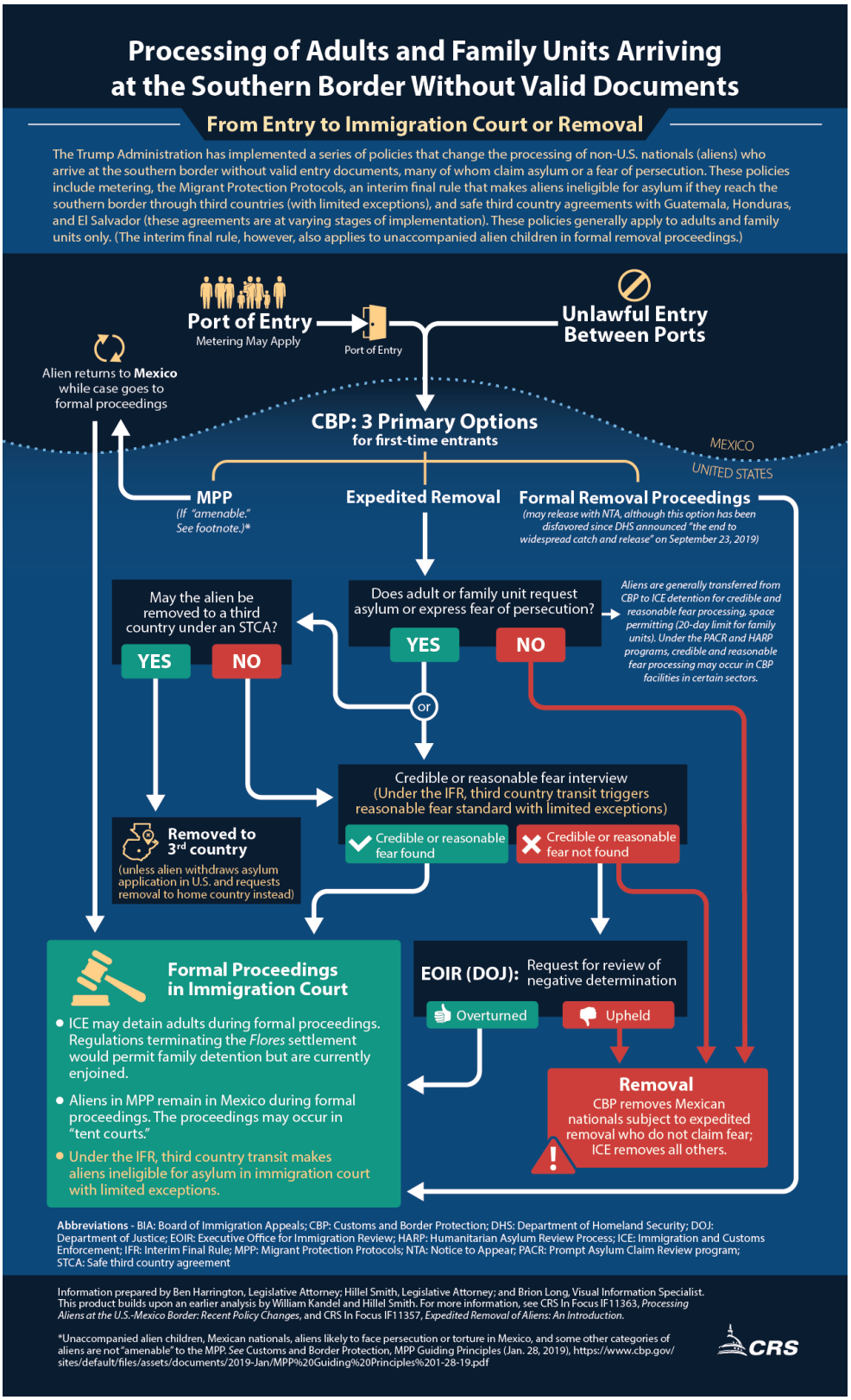
> Explanation and Corrective Action: FY21 Total Removals (excluding Title 42 expulsions) were 59,011, comprised of 27,454 border removals and 31,557 interior removals, a decrease of 126,873 (68%) from FY20's 185,884. While total removals decreased, the quality of removals measurably increased, with the percentage of convicted criminal removals increasing from 56% to 66%. The Interim Civil Immigration Enforcement and Removal Priorities (CIEP) issued 18 Feb 2021 refocused enforcement and removal priorities on national security, border security, and public safety. Like removals, the quality of arrests increased; ERO arrested 12,025 individuals with felony convictions, which is nearly double the 6,815 aggravated felons arrested in the previous fiscal year. This likely will increase the percentage of individuals who pose a public safety threat eligible for removal in the coming fiscal year. To maintain its capacity for removals, ICE is procuring additional COVID-19 testing capabilities, working to obtain increased levels of cooperation from foreign countries, and increasing the frequency of transport for detainees where possible. This measure was replaced by an internal measure aligned to Civil Immigration Enforcement Priorities.

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

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

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 of 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 *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 the 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.
>
> * * * * *

Memorandum from Alejandro Mayorkas, Secretary of Homeland Security, Termination of the Migrant Protection Protocols Program (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf
On June 30, 2022, the U.S. Supreme Court held that the Secretary of Homeland Security has the discretionary authority to end the Migrant Protection Protocols program. See the discussion of a new Note 6 to page 164 below. This new note describes the litigation by Texas and other states to stop the rescission of this program.

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Strike Note 5 – Insert a new Note 5 for an Interim Final rule that went into effect May 31, 2022. The DHS dramatically modified rules proposed by the prior administration and introduced a new hybrid model, altering the ability of people to see asylum or withholding protections via the expedited removal process. Here is the introductory summary:

> On August 20, 2021, the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ") (collectively "the Departments") published a notice of proposed rulemaking ("NPRM" or "proposed rule") that proposed amending regulations governing the procedures for determining certain protection claims and available parole procedures for individuals subject to expedited removal and found to have a credible fear of persecution or torture. After a careful review of the comments received, the Departments are now issuing an interim final rule ("rule" or "IFR") that responds to comments received in response to the NPRM and adopts the proposed rule with changes. Most significantly, the IFR provides that DHS's

> United States Citizenship and Immigration Services ("USCIS") will refer noncitizens whose applications are not granted to DOJ's Executive Office for Immigration Review ("EOIR") for streamlined removal proceedings. The IFR also establishes timelines for the consideration of applications for asylum and related protection by USCIS and, as needed, EOIR. This IFR responds to comments received in response to the NPRM and adopts the NPRM with changes as described in this rule. The Departments solicit further public comment on the IFR's revisions, which will be considered and addressed in a future rule.

87 Fed. Reg. 18,078 (Mar. 29, 2022), https://www.regulations.gov/document/USCIS-2021-0012-5241.

In a prior Interim Final Rule, DHS severely restricted the minimal procedures guaranteed to people at the border. Litigation arose as a result. In an unusual intervention, the Supreme Court stayed an initial injunction preventing this harsh rule from going into effect. However, with the election of President Biden, new Interim Final Rules were released.

New Regulations

On May 31, 2022, the DHS and EOIR implemented new regulations that directly impact the asylum adjudication process related to expedited removal. In essence, these new rules allow the Asylum Office to proceed from a credible fear interview to a full asylum interview. The Asylum Officer is empowered to consider and grant asylum relief in that interview. While this is a welcome outcome, advocates are concerned about the condensed timeframes and how people will find available and qualified legal representation.

If the individual is rejected at the Asylum Office interview stage, the DHS will issue a Notice to Appear and the individual will be put into streamlined and fast-tracked removal proceedings before an immigration judge. *See* 8 C.F.R. § 208.17.

There is a fuller discussion of the new procedures in the update to Chapter 8, which concerns asylum.

On May 27, 2022, the National Immigration Project of the National Lawyers Guild (NIPNLG) released a comment on the Interim Final Rule. Here is an excerpt of that comment:

> NIPNLG commends the agencies for their careful review of the comments submitted to the initial NPRM, and for several substantive changes they made to improve the rule, as discussed below. However, we are very concerned by the ongoing and potentially expanded use of expedited removal for asylum seekers; by the apparent attempt at using newly created "rocket dockets" as part of a deterrence strategy against asylum seekers; by the lack of oversight of asylum offices which will be given a vastly expanded role; by the "streamlined" court procedures; and by the lack of access to employment authorization to those who must work to survive while their cases are pending. We believe that aspects of this rule are rooted in racist laws and practices and will disproportionately affect Black, Indigenous and People of Color (BIPOC) noncitizens. NIPNLG urges the administration to reconsider its approach of designating recently arrived noncitizens as priorities for removal and thereby giving them reduced rights to fair proceedings.

National Immigration Lawyers Project of the National Lawyers Guild, Comment on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal and CAT

Protection Claims by Asylum Officers DHS Docket No. USCIS–2021–0012 (May 27, 2022), https://nipnlg.org/PDFs/practitioners/our_lit/public_comments/2022_27May-comment-asylum-processing-rule.pdf.

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New Note 6: Current Litigation over Migrant Protection Protocols: *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021), reversed and remanded, *Biden v. Texas*, Biden v. Texas, 597 U.S. __, No. 21-954, 2022 U.S. LEXIS 3269 (June 30, 2022).

When President Biden took office in January 2021, the Biden administration announced its intention to suspend a Trump-era policy entitled the "Migrant Protection Protocols" (MPP). The MPP allowed CBP to send immigrants at the southern border who were seeking asylum back to Mexico while they awaited hearings on their immigration proceedings. Consequently, the government of Mexico, non-profit organizations, and the UNHCR began to consider setting up camps. In the interim, people lived in dangerous and unsanitary conditions. *Bollat Vasquez v. Mayorkas*, 520 F. Supp. 3d 94 (Mass. 2021) (detailing the conditions facing plaintiffs who were returned to Mexico in accordance with the MPP).

Pursuant to an agreement to inform Texas of any decisions regarding changes to the MPP policy, DHS sent a letter on Feb 2, 2021, to Texas informing them of the immediate termination of the MPP. Two months later, Texas and Missouri sued to challenge the decision to terminate the MPP, citing violations of the Administrative Procedure Act (APA), the Immigration and Nationality Act (INA), the Constitution, and the agreement between Texas and DHS. The district court, after a one-day hearing, enjoined and vacated the recission of the MPP policy. *Texas v. Biden*, 554 F. Supp. 3d 818 (N.D. Tex. 2021). The Biden administration appealed and while that appeal was pending, issued a new memorandum from Secretary Mayorkas again stopping the MPP program and explaining new additional reasons for the recission. The Fifth Circuit found that the new recission did not meet the requirements of the Administrative Procedure Act and that the provisions of the INA mandated continuing the remain in Mexico option for those foreign nationals deemed by CBP to be inadmissible to either be detained or paroled on an individualized basis. *Biden v. Texas,* 20 F.4th 928, 945 (5th Cir. 2021).

The APA in its relevant part states the following:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
> * * *
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> * * *

5 U.S.C. § 706

In rejecting DHS's decision to terminate the MPP, the Fifth Circuit concluded that DHS failed to consider several relevant factors, thus violating 5 U.S.C. § 706(2)(A). *Texas,* 20 F.4th at 989. According to the court of appeals, the factors DHS failed to consider were "(1) the States' legitimate reliance interests, (2) MPP's benefits, (3) potential alternatives to MPP, and (4) the legal

implications of terminating MPP." *Id.* Reviewing these factors, the Fifth Circuit found the following:

1. The standing agreement between DHS and Texas regarding the MPP outlined the reliance interests of Texas on the policy because (1) Texas, as a border state, is directly affected by the changing of DHS policies regarding immigration; (2) Texas would not have adequate time to adjust budget and resource allocation to comply with sudden changes in DHS policies; and (3) Texas would face irreparable damage from the changing of the MPP.
2. DHS did not properly address the benefits of the MPP that were originally cited in its initial implementation. The original benefit of the MPP was that immigrants seeking asylum with non-meritorious claims would be returned to their countries instead of being allowed to enter the United States where detention space was lacking and parole for mass groups was not statutorily allowed or practical. *See* INA § 212; 8 U.S.C. § 1182.
3. DHS did not address any alternative solutions to the policy in any of the memos regarding the termination of the MPP, but only discussed either keeping or terminating the entire policy.
4. DHS did not properly consider that terminating the MPP was not in legal accord with the 4Immigration and Nationality Act.

Texas, 20 F.4th at 993.

The Fifth Circuit further held that the termination of the MPP violated the INA and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) because of the following four sections:

1. INA § 235(b)(2)(A); 8 U.S.C. § 1225(b)(2)(A):

   > Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

2. INA § 235(b)(2)(C); 8 U.S.C. § 1225(b)(2)(C):

   > In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

3. INA § 236(a); 8 U.S.C. § 1226(a):

   > On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
   >
   > (1) may continue to detain the arrested alien; and
   >
   > (2) may release the alien on—
   >
   > (A) bond of at least $ 1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
   >
   > (B) conditional parole . . . .

4. INA § 212(d)(5); 8 U.S.C. § 1182(d)(5):

   > (A) The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded

> as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.
> (B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

In its determination that DHS violated the INA by terminating the MPP, the court of appeals focused on the need for a "case by case" review of parole for asylum seekers admitted into the United States pending review of their hearings. The Fifth Circuit focused on this because of the perceived impracticality of a "case by case" review of the tens of thousands of immigrants processed monthly by CBP. The court concluded that any termination of the MPP resulting in the mandatory detention or parole of immigrants was also impractical because of the lack of detention space available, meaning that most, if not all, new immigrants with pending hearings would be allowed to enter the United States on parole if they could not be returned to the Mexico or any other country as allowed by INA § 235(b)(2)(C); 8 U.S.C. § 1225(b)(2)(C). *Texas,* 20 F.4th at 996. This would constitute what the court of appeals called "*en masse"* parole for every noncitizen DHS could not detain. *Id.* at 942.

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

The majority quoted the relevant INA restriction:

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

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

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

> In addition to contradicting the statutory text and context, the novelty of respondents' interpretation bears mention. Since IIRIRA's enactment 26 years ago, every Presidential administration has interpreted [INA § 235(b)(2)(C)] section 1225(b)(2)(C) as purely discretionary. Indeed, at the time of IIRIRA's enactment and in the decades since, congressional funding has consistently fallen well short of the amount needed to detain all land-arriving inadmissible aliens at the border, yet no administration has ever used section 1225(b)(2)(C) to return all such aliens that it could not otherwise detain.
>
> And the foreign affairs consequences of mandating the exercise of contiguous-territory return likewise confirm that the Court of Appeals erred. Article II of the Constitution authorizes the Executive to "engag[e] in direct diplomacy with foreign heads of state and their ministers." *Zivotofsky* v. *Kerry*, 576 U. S. 1, 14 (2015). Accordingly, the Court has taken care to avoid "the danger of unwarranted judicial interference in the conduct of foreign policy," and declined to "run interference in [the] delicate field of international relations" without "the affirmative intention of the Congress clearly expressed." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, 115–116 (2013). That is no less true in the context of immigration law, where "[t]he dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy." *Arizona* v. *United States*, 567 U. S. 387, 397 (2012).
>
> By interpreting section 1225(b)(2)(C) as a mandate, the Court of Appeals imposed a significant burden upon the Executive's ability to conduct diplomatic relations with Mexico. MPP applies exclusively to non-Mexican nationals who have arrived at ports of entry that are located "in the United States." §1225(a)(1). The Executive therefore cannot unilaterally return these migrants to Mexico. In attempting to rescind MPP, the Secretary emphasized that "[e]fforts to implement MPP have played a particularly out-sized role in diplomatic engagements with Mexico, diverting attention from more productive efforts to fight transnational criminal and smuggling networks and address the root causes of migration." ... Yet under the Court of Appeals' interpretation,

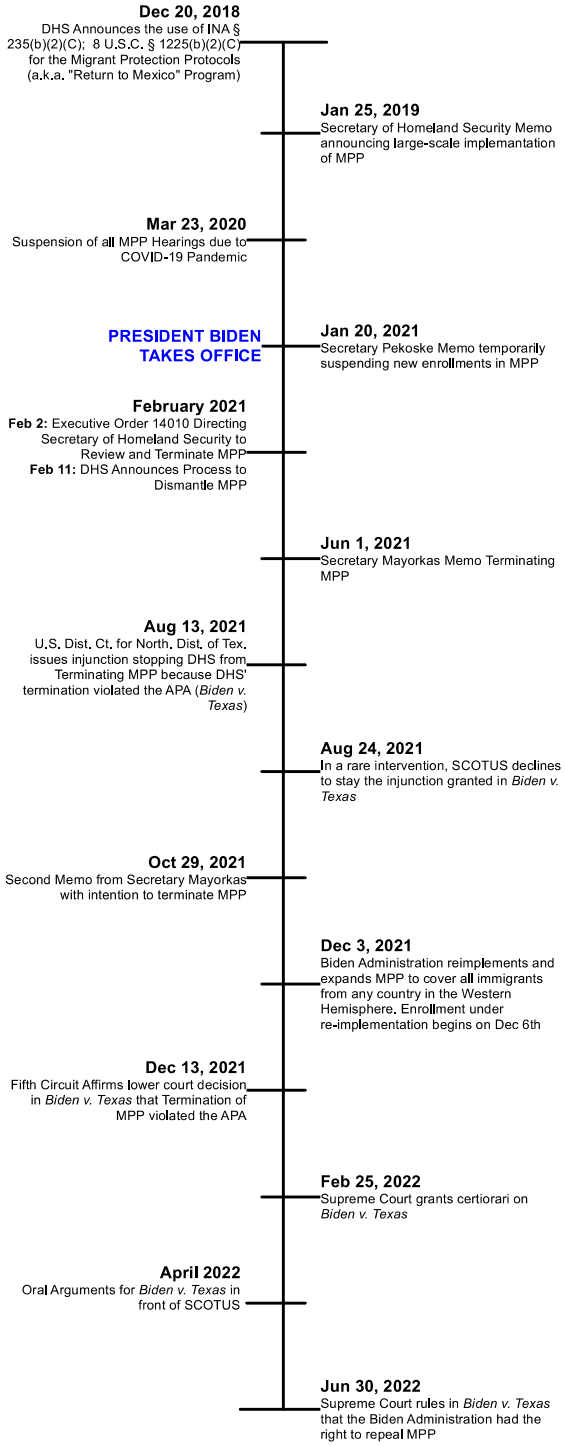
> section 1225(b)(2)(C) authorized the District Court to force the Executive to the bargaining table with Mexico, over a policy that both countries wish to terminate, and to supervise its continuing negotiations with Mexico to ensure that they are conducted "in good faith." 554 F. Supp. 3d, at 857 (emphasis deleted). That stark consequence confirms our conclusion that Congress did not intend section 1225(b)(2)(C) to tie the hands of the Executive in this manner.
>
> Finally, we note that—as DHS explained in its October 29 Memoranda—the INA expressly authorizes DHS to process applicants for admission under a third option: parole. See 8 U.S.C. §1182(d)(5)(A). Every administration, including the Trump and Biden administrations, has utilized this authority to some extent. Importantly, the authority is not unbounded: DHS may exercise its discretion to parole applicants "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Ibid*. And under the APA, DHS's exercise of discretion within that statutory framework must be reasonable and reasonably explained. See *Motor Vehicle Mfrs. Assn. of United States*, *Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983). But the availability of the parole option additionally makes clear that the Court of Appeals erred in holding that the INA required the Government to continue implementing MPP.
>
> In sum, the contiguous-territory return authority in section 1225(b)(2)(C) is discretionary—and remains discretionary notwithstanding any violation of section 1225(b)(2)(A).To reiterate: we need not and do not resolve the parties' arguments regarding whether section 1225(b)(2)(A) must be read in light of traditional principles of law enforcement discretion, and whether the Government is lawfully exercising its parole authorities pursuant to [INA §§ 212(d)(5) and 236(a);] sections 1182(d)(5) and 1226(a). We merely hold that section 1225(b)(2)(C) means what it says: "may" means "may," and the INA itself does not require the Secretary to continue exercising his discretionary authority under these circumstances.

Slip op. at 16-18.

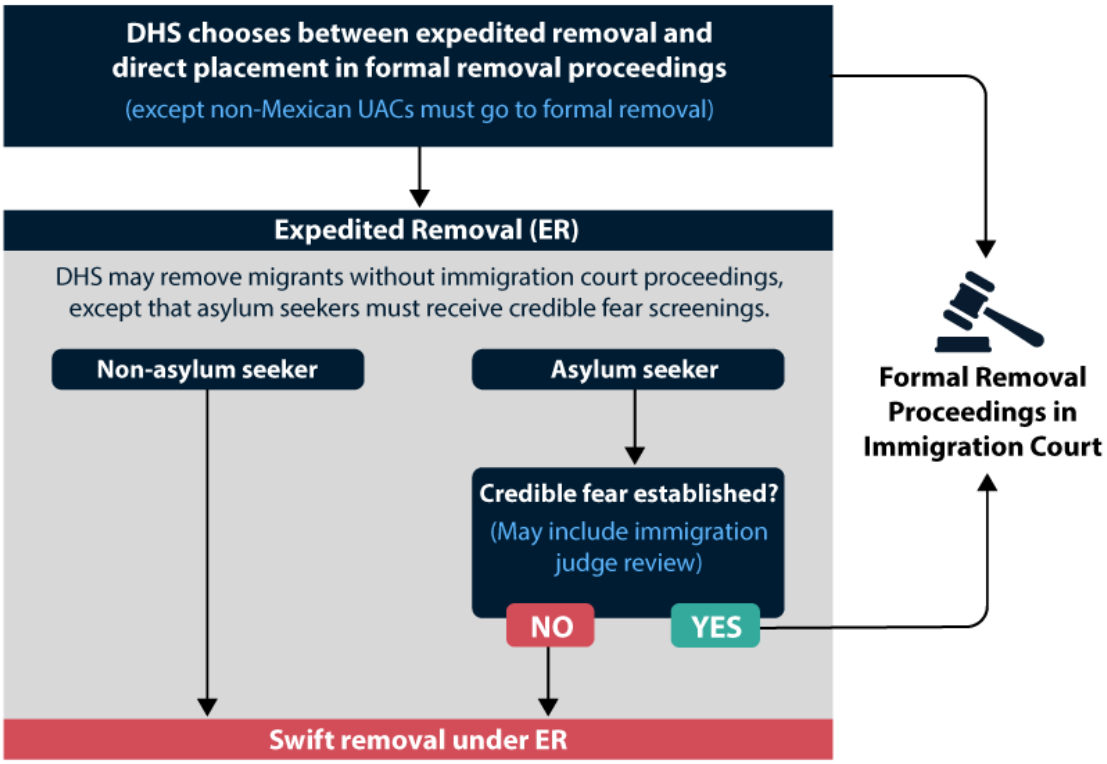
New Note 7: Should Congress consider limiting the discretionary authority of the Executive to implement a wait in a contiguous country program? Many nations around the world rely on push back mechanisms to control refugee flows. Should Congress have to provide funds for adequate shelters for those seeking asylum protection who are forced to wait outside the U.S. territory?

New Note 8: Timeline of MPP Implementation and Attempts to Terminate

POWER OF THE DHS TO REFUSE ADMISSION TO PEOPLE SEEKING ASYLUM FROM MEXICO/U.S. BORDER
("Migrant Protection Protocols" aka "Wait in Mexico")



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



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

New Note Page 167 Before *Fed. Reg. 617 No. 219*: Repeal of 2019 Expansion of Expedited Removal:

On February 2, 2021, President Biden issued an executive order addressing Trump-era immigration and border security policies. Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 5, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/. One of the provisions contained in this order repealed the July 23, 2019, expansion of Expedited Removal. *Id.* As of this writing in May of 2022, persons encountered within 100 miles of any land border who have not been present in the United States for more than 14 days and persons encountered who arrived by sea and have not been present in the United States for more than two years are subject to expedited removal. See below for an excerpt from President Biden's executive order repealing the expansion of Expedited Removal:

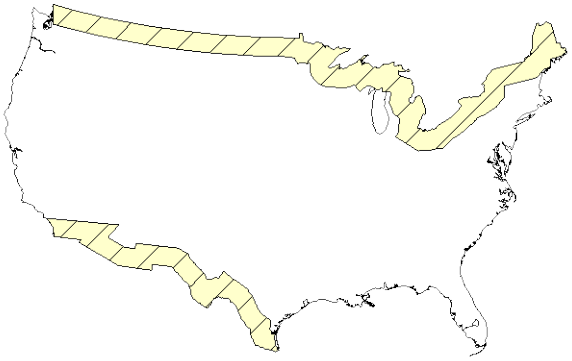
> For generations, immigrants have come to the United States with little more than the clothes on their backs, hope in their hearts, and a desire to claim their own piece of the American Dream. These mothers, fathers, sons, and daughters have made our Nation better and stronger.
>
> The United States is also a country with borders and with laws that must be enforced. Securing our borders does not require us to ignore the humanity of those who seek to cross them. The opposite is true. We cannot solve the humanitarian

> crisis at our border without addressing the violence, instability, and lack of opportunity that compel so many people to flee their homes. Nor is the United States safer when resources that should be invested in policies targeting actual threats, such as drug cartels and human traffickers, are squandered on efforts to stymie legitimate asylum seekers.
>
> Consistent with these principles, my Administration will implement a multi-pronged approach toward managing migration throughout North and Central America that reflects the Nation's highest values. We will work closely with civil society, international organizations, and the governments in the region to: establish a comprehensive strategy for addressing the causes of migration in the region; build, strengthen, and expand Central and North American countries' asylum systems and resettlement capacity; and increase opportunities for vulnerable populations to apply for protection closer to home. At the same time, the United States will enhance lawful pathways for migration to this country and will restore and strengthen our own asylum system, which has been badly damaged by policies enacted over the last 4 years that contravened our values and caused needless human suffering.
>
> * * *
>
> (ii) The Secretary of Homeland Security shall promptly review and consider whether to modify, revoke, or rescind the designation titled "Designating Aliens for Expedited Removal," 84 Fed. Reg. 35,409 (July 23, 2019), regarding the geographic scope of expedited removal pursuant to INA section 235(b)(1), 8 U.S.C. 1225(b)(1), consistent with applicable law. The review shall consider our legal and humanitarian obligations, constitutional principles of due process and other applicable law, enforcement resources, the public interest, and any other factors consistent with this order that the Secretary deems appropriate. If the Secretary determines that modifying, revoking, or rescinding the designation is appropriate, the Secretary shall do so through publication in the Federal Register.

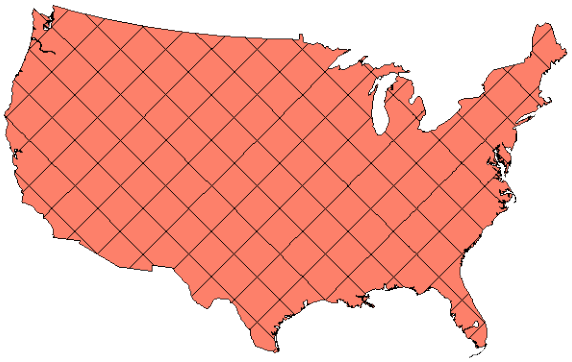
Here is a helpful graphic showing the changes to expedited removal over the years, including the 2002 expansion and the 2019 repealed expansion:

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

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



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



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

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).
As noted above, President Biden repealed the expansion of Expedited Removal into the U.S. interior. For more information, see the update to page 167.

Page 180
Clarification on Linked ACLU article: The Expedited Removal Expansion with the "100-mile" corridor only applies to the 100 air miles from any international land border, not a coastal border. However, the initial expedited removal rules regarding arrival by sea are still in effect. This means that apprehension within two years of entry by sea without inspection could subject an individual to expedited removal. How do you imagine that members of DHS learn that an individual arrived by sea less than two years prior without inspection?

Page 181
Following the discussion of the 2019 expansion of Expedited Removal:
NOTE: This expansion has been repealed. See New Note before *Fed. Reg. Vol. 67, No. 219* on Page 167.

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 used throughout the United States, how can the 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 from 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.

In February 2021, the ACLU of Massachusetts sued 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 183: ADD NEW § 2.01(A)

TITLE 42 EXPULSIONS

1. INTRODUCTION TO TITLE 42

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

The use of Title 42 has been changed and affirmed a number of times since its initial implementation. One of these changes, an October 2020 order excepting Unaccompanied Alien Children from Title 42 expulsions, sparked a lawsuit from the state of Texas detailed below. *Texas v. Biden*, No. 4:21-cv-0579-P, 2022 U.S. Dist. LEXIS 38369 (N.D. Tex. Mar. 4, 2022). In April of 2022, the Biden Administration announced plans to stop the use of Title 42 for COVID-19 expulsions, citing the availability of vaccines and rapid testing making the policy no longer necessary. The intent to stop the use of Title 42 sparked even more litigation from states hoping to continue use of Title 42 to exclude immigrants. This case, *Arizona v. CDC,* is detailed below as

well. *Arizona v. CDC*, No. 6:22-cv-00885-RRS-CBW, 2022 U.S. Dist. LEXIS 80434 (W.D. La. Apr. 27, 2022).

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

2. Another *Texas v. Biden*…

As of April 2022, Texas had filed eleven border-related suits against the Biden administration. *See* Press Release, Ken Paxton, Attorney General of Texas, AG Paxton Again Sues Biden Over Border: New Immigration Rules Drastically Lower Asylum Bar, Forming New Incentives for Next Flood of Aliens (Apr. 28, 2022), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-again-sues-biden-over-border-new-immigration-rules-drastically-lower-asylum-bar-forming.

In an additional case filed by the state of Texas against the Biden Administration, Texas primarily alleged financial harm resulting from an increase in public health costs due to migrants entering and needing to be in detention while positive for COVID-19. The below except is from the Northern District of Texas case in which Texas provided statistics relating to Title 42 encounters with families before and after a February 2021 order excepting unaccompanied children from the October 2020 order allowing the exclusion of illegal immigrants for prevention of the spread of the COVID-19 virus.

Below is an Excerpt from *Texas v. Biden*, No. 4:21-cv-0579-P, 2022 U.S. Dist. LEXIS 38369 (N.D. Tex. Mar. 4, 2022) [Seeking to preserve quarantine expulsions under Title 42].

> There was a dramatic surge of illegal border crossings following the February 2021 Order, with 9,429 UAC encounters at the southwest border in February of 2021. The number of UAC [Unaccompanied Children] encounters increased to 18,890 in March and has remained elevated ever since: more than 17,000 encounters in April; more than 14,000 in May; more than 15,000 in June; more than 18,500 in July; more than 18,000 in August; more than 12,000 in October; more than 13,500 in November; more than 11,500 in December; and more than 8,500 in January 2022. *See* ECF Nos. 68 at 18; 99 at 1.
>
> There was also an increase of family-unit processing because Title 42 was used less frequently, despite an increase of family-unit encounters. ECF Nos. 68 at 19; 99 at 1-2. Texas sets forth the following chart that demonstrates these undisputed numbers regarding family-unit encounters:

Title 42 applications to family units			
Month	**Family-unit encounters**	**Absolute**	**Percentage**
November 2020	4,302	3,641	84.6
December 2020	4,406	3,332	75.6
January 2021	7,296	4,546	62.3
February 2021	19,590	9,478	48.4
March 2021	54,132	21,572	39.9
April 2021	50,094	17,930	35.8
May 2021	44,747	9,320	20.8
June 2021	55,896	8,028	14.4
July 2021	83,499	10,110	12.1
August 2021	86,631	17,070	19.7
September 2021	64,388	17,599	27.3
October 2021	42,799	13,359	31.2
November 2021	45,062	11,566	25.7
December 2021	51,736	11,503	22.2
January 2022	31,795	8,333	26.2

ECF No. 68 at 12. Thus, Texas contends that while the total [*13] number of family unit encounters during this period increased greatly, the percentage of family-unit members rapidly expelled under Title 42 decreased significantly. *Id.*

E. Texas files the instant lawsuit.

Alarmed by these figures, on April 22, 2021, Texas filed the instant lawsuit complaining that the actions and omissions of various federal administrative agencies caused an influx of potentially COVID-19-positive foreign aliens to cross

> the southern border. ECF No. 1. In its Complaint, Texas argued that the February 2021 Order violated the Administrative Procedures Act ("APA"). *Id.* Namely, Texas argued that the February 2021 Order arbitrarily departed from the Title 42 process and the October 2020 Order, both of which were previously used to prevent the entry of potentially-COVID-19-positive illegal aliens and UAC into congregate care settings in Texas. *Id.*
>
> * * *
>
> Here, the President has (arbitrarily) excepted COVID-19 positive unaccompanied alien children from Title 42 procedures—which were purposed with *preventing* the spread of COVID-19. As a result, border states such as Texas now uniquely bear the brunt of the ramifications. Yet, while policy decisions are beyond judicial review, those agency actions that are "arbitrary, capricious, . . . or otherwise not in accordance with law" will be set aside.

Texas v. Biden, No. 4:21-cv-0579-P, 2022 U.S. Dist. LEXIS 38369 (N.D. Tex. Mar. 4, 2022).

3. Limitations on Title 42 Expulsions: *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022)

In January 2022, the D.C. Circuit Court of Appeals upheld a preliminary injunction granted to prevent the expulsion of migrants under Title 42 to countries where they would experience persecution and torture. *Id* at 735. The case has been remanded for further proceedings on the merits of the plaintiffs' case, including a claim that they are entitled to apply for asylum despite the Title 42 public health concerns. *Id*. The case was brought by six families seeking asylum who were put in Title 42 expulsion but argued they should not be expelled to their home countries because they would face "grave danger" there. *Huisha-Huisha v. Mayorkas*, No. 21-100(EGS), 2021 U.S. Dist. LEXIS 175980 (D.D.C. Sept. 16, 2021).

Following the D.C. Circuit's decision, U.S. Customs and Border Protection issued a memorandum to its officers detailing how to continue with Title 42 expulsions while complying with the court of appeals decision. The memorandum explains the court opinion and specifies that "covered noncitizens who are part of a family unit and who have manifested a fear of returning or being sent to the country to which they would be expelled should not be expelled without an appropriate screening by the United States Citizenship and Immigration Services (USCIS) to determine whether they are more likely than not to be persecuted or tortured." The memo lists ways in which CBP officers could recognize the "manifestation of fear" including statements by noncitizens about their fear and non-verbal actions such as hysteria or unusual silence. Pursuant to the memo, CBP officers were instructed to do one of two things if a member of a family unit manifests a fear of expulsion: (1) except the family from expulsion and process them under the INA/Title 8; or (2) refer all family members to USCIS for an exception screening. Memorandum, Processing of Noncitizens Manifesting Fear of Expulsion Under Title, U.S. Customs and Border Protection (May 21, 2022), *available at* https://drive.google.com/file/d/1vSqHop58LAvgwk_afo3tMQ-MrLx0J-he/view.

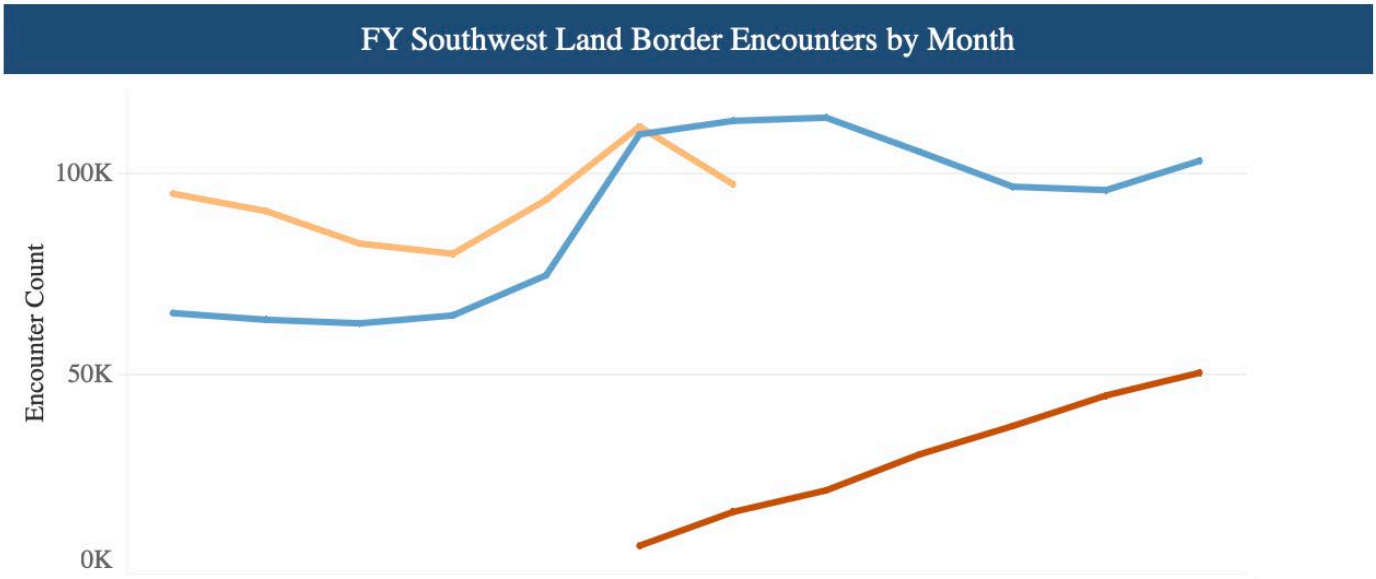
4. Title 42 Expulsion Statistics as of end of April 2022

Southwest Land Border Encounters under Title 42

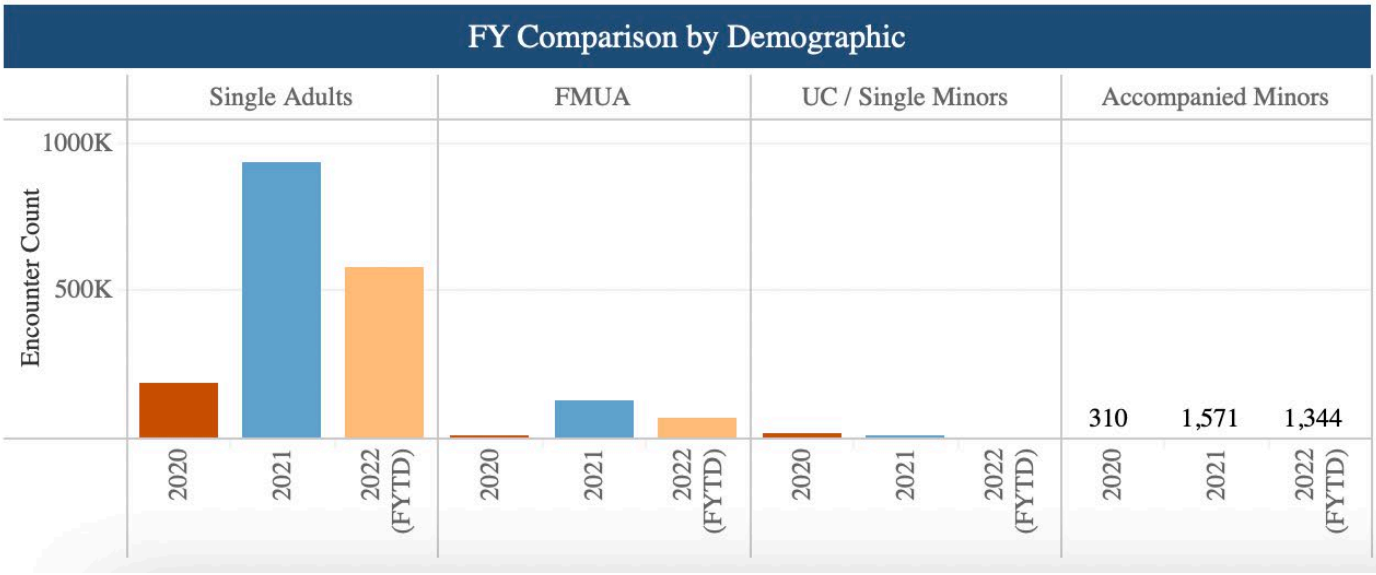
FISCAL YEAR	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep
2020	-	-	-	-	-	7,150	15,522	20,895	29,829	36,871	44,453	50,067
2021	64,894	63,230	62,342	64,304	74,265	109,249	112,590	113,392	104,928	96,407	95,407	102,673
2022	94,527	90,188	82,152	79,602	92,988	111,170	96,908	-	-	-	-	-

FY 2020 Total: 204,787 **FY 2021 Total:** 1,063,526 **FY2022 Total (May 3):** 647,535

Graphic on the following page.



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2022 (FYTD)	94,527	90,188	82,152	79,602	92,988	111,170	96,908						**647,535**
2021	64,894	63,230	62,342	64,304	74,265	109,249	112,590	113,392	104,928	96,252	95,407	102,673	**1,063,526**
2020						7,150	15,522	20,895	29,829	36,871	44,453	50,067	**204,787**



https://www.cbp.gov/newsroom/stats/nationwide-encounters?language_content_entity=en

5. State Challenges to Ending Title 42 Expulsions

Arizona v. CDC, No. 6:22-cv-00885-RRS-CBW, 2022 U.S. Dist. LEXIS 80434 (W.D. La. Apr. 27, 2022)

States Suing to Stop C.D.C. from Ending Title 42 Expulsions:

1. Alabama
2. Alaska
3. Arizona
4. Arkansas
5. Florida
6. Georgia
7. Idaho
8. Kansas
9. Kentucky
10. Louisiana
11. Mississippi
12. Missouri
13. Montana
14. Nebraska
15. Ohio
16. Oklahoma
17. South Carolina
18. Tennessee
19. Utah
20. West Virginia
21. Wyoming

Following the announcement of the Title 42 Termination Order by CDC on April 1, 2022, 21 states sued for a temporary restraining order and a preliminary injunction against the implementation of the order that was set to take effect on May 23, 2022.

Federal district judge Summerhays ruled in favor of the collective states allowing a temporary restraining order on the grounds that the states had met their burden for the following elements: "(1) 'a substantial threat of irreparable injury,' (2) 'a substantial likelihood of success on the merits,' (3) 'that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted,' and (4) 'that the grant of an injunction will not disserve the public interest.'" *Arizona v. CDC*, No. 6:22-cv-00885-RRS-CBW, 2022 U.S. Dist. LEXIS 80434, at *22 (W.D. La. Apr. 27, 2022).

The court concluded that the plaintiff states had shown a substantial threat of immediate and irreparable harm due to the early implementation of the termination of Title 42 in the form of costs for "healthcare, law enforcement, detention, education, and other services for migrants, and further that the balance of harms and the public interest both favor issuance of a temporary restraining order." *Id.* at *23. The court barred DHS, the CDC, and all subagencies from implementing the termination order.

6. Disproportionate Impact of Title 42 Expulsions on Haitian Immigrants

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

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

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

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

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

See Elazar Kosman, *Current Development: 15,000 Haitian Migrants Beneath A Bridge: A Tale of Abusive Title 42 Policy Implementation*, 36 GEO. IMMIGR. L.J. 491 (2021). *See also* Sarah Sherman-Stokes, *Public Health and The Power to Exclude: Immigrant Expulsions At The Border*, 36 GEO. IMMIGR. L.J. 261 (2021).

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

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

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 processes governing recent arrivals of people seeking asylum. Marta is at an airport, Maritza is at the U.S.-Mexico border and CBP has been told her that she has to wait to pursue her claim, and Yovilli, managed to cross into the interior of the United States but now has been apprehended.

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

The material below also addresses a recent Supreme Court case that rejected a challenge to the constitutional sufficiency of the expedited removal procedures for a recent border crosser. That case, *Department of Homeland Security v. Thuraissigiam*, below, largely agrees with the reasoning of the Third Circuit Court of Appeals in *Castro v. Department of Homeland Security*, excerpted on pages 220-40 of the text. Read together, *Castro and Thuraissigiam* suggest that people have few procedural rights, even those seeking asylum, if they are at the physical border or apprehended after a brief period.

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

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:

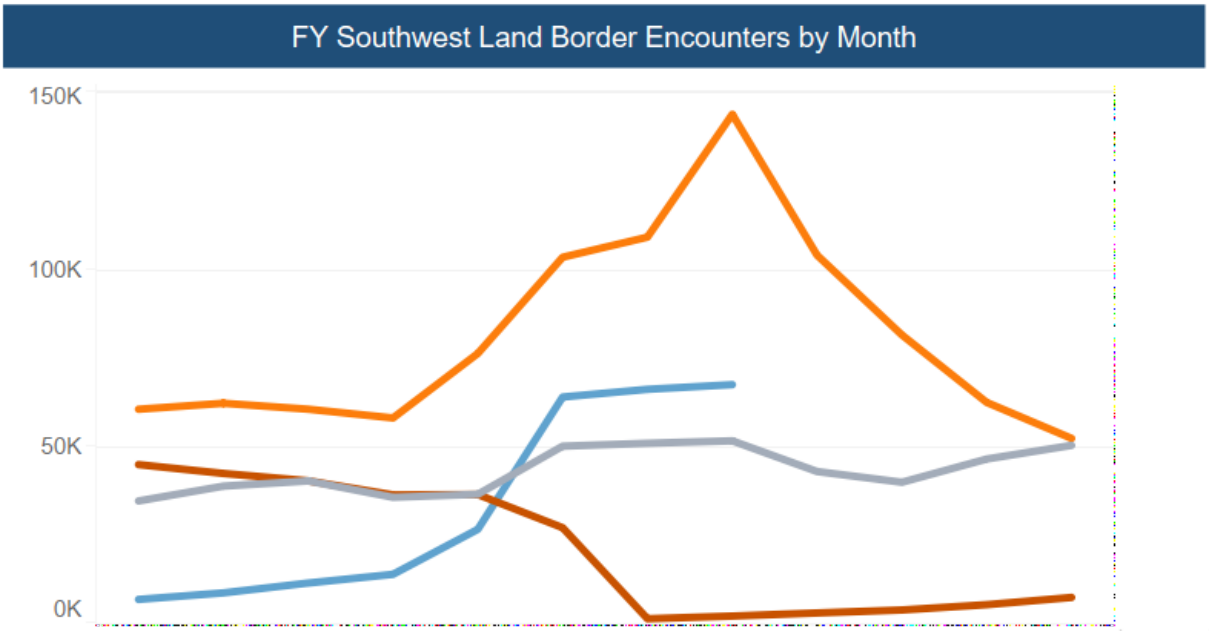
U.S. Customs and Border Protection

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

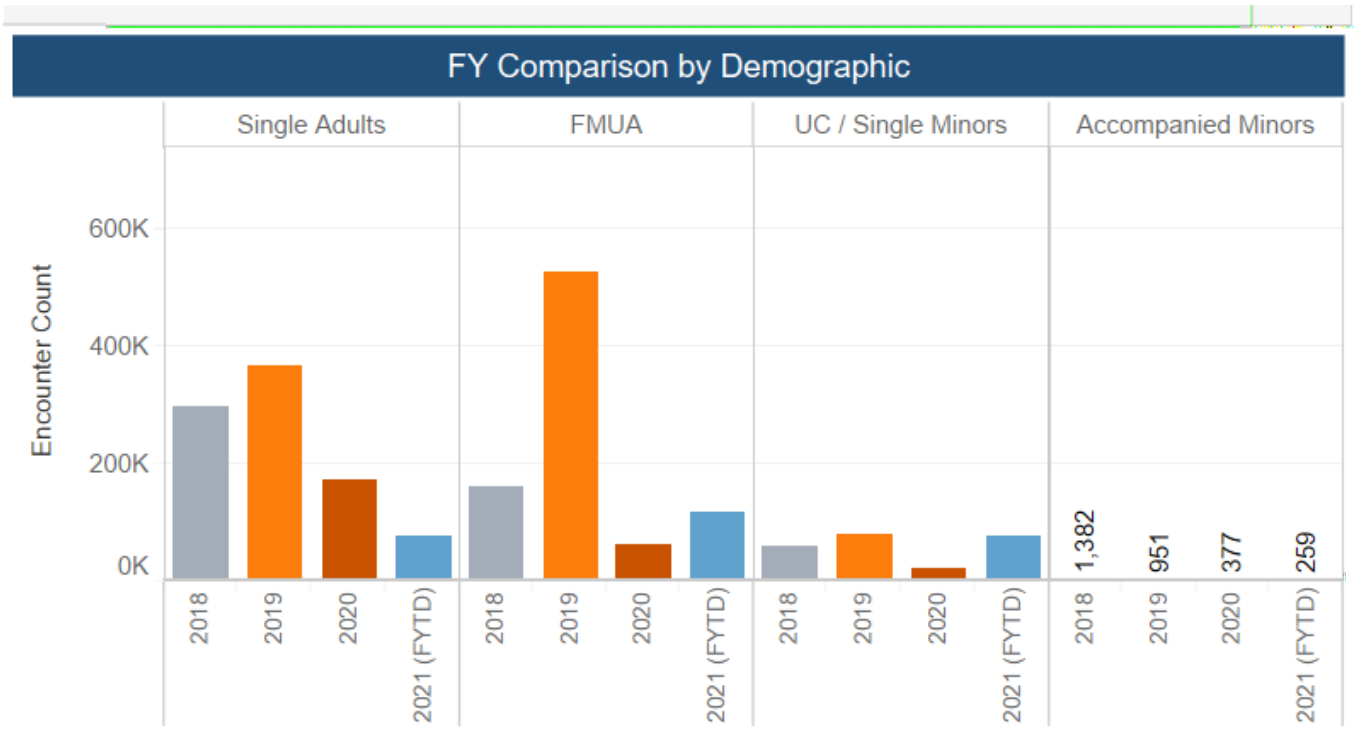
Citizenship Grouping: All | Title of Authority: Title 8 | Reset Filters

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, Southwest Land Border Encounters (last modified June 15, 2022), https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last visited June 17, 2022).

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

New Materials for Additional Notes and Questions page 240:
1A. Expedited Removal Habeas Review Challenge Rejected. In June 2020, the Supreme Court issued a 7-2 decision in *Department of Homeland Security v. Thuraissigiam*, rejecting the suspension clause and due process challenges to restrictions on the ability of asylum seekers to challenge the sufficiency of the expedited removal proceedings. This case, which discusses and distinguishes the use of habeas petitions in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and *Boumediene v. Bush*, 553 U.S. 723 (2008), is excerpted below:

Department of Homeland Security v. Thuraissigiam

Supreme Court of the United States
__ 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

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

[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).

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 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]

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.

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[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).

[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.

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IV

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

Nor is the dissent correct in defending the Ninth Circuit's holding. That holding is contrary to more than a century of precedent. In 1892, the Court wrote that as to "foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law," "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Nishimura Ekiu*, 142 U.S., at 660. Since then, the Court has often reiterated this important rule. *See*, *e.g.*, *Knauff*, 338 U.S., at 544("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"); *Mezei*, 345 U.S., at 212(same); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative").

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

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

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

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

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

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

It is so ordered.

[Concurrence of Justice Thomas omitted.]

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

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

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

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

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

[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 §§ 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.

Waldman, 266 U. S. 113, 119-120 (1924) (observing that immigration officials ignored a Jewish family's claim that they were "refugees" fleeing "religious persecution").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respondent's procedural claims are unlike those that we reviewed in habeas proceedings during the finality era. Throughout that period, the procedural claims that we addressed asserted errors that fundamentally undermined the efficacy of process prescribed by law. *See Chin Yow*, 208 U.

S., at 11 (observing that a noncitizen could obtain habeas relief on procedural grounds if he was denied "an opportunity to prove his right to enter the country, as the statute meant that he should have"). Many of our finality era cases thus dealt with situations in which immigration officials failed entirely to take obligatory procedural steps.

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

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

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

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

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

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

DISSENT

JUSTICE SOTOMAYOR, with whom Justice Kagan joins, dissenting.

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

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

Notes and Questions:

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

[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.

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

4. Credible Fear Review and Standards May Become Much More Difficult. In the summer of 2020, the Trump administration proposed joint regulations guiding and binding both the Asylum officers and the Immigration Judges within the Executive Office for Immigration Review. These proposed rules would have required individuals to demonstrate more than a significant possibility of persecution to establish a credible fear of persecution. The rules would have raised the standard to a "reasonable fear" standard. The proposed rules were over 160 pages long and proposed many procedural and substantive alterations to expedited removal, the asylum withholding, and Convention Against Torture standards. This change was revoked in Executive Order No. 14010, 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 17, 2022).

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

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

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

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

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

> Significant human rights issues included: unlawful killings by the government; torture and cases of cruel, inhuman, or degrading treatment or punishment by government agents; arbitrary arrest and detention by government entities; arbitrary and unlawful interference with privacy; restrictions on free expression and the

> press, including unjustified arrests of journalists and authors; widespread corruption; overly restrictive nongovernmental organization laws; interference with the freedom of peaceful assembly and freedom of association; serious acts of corruption; lack of investigation of violence against women; trafficking in persons; crimes involving violence targeting members of ethnic minority groups; crimes involving violence against lesbian, gay, bisexual, transgender, and intersex persons; and existence or use of laws criminalizing same-sex sexual conduct.
> Police reportedly harassed civilians with impunity. The government took steps to investigate and prosecute some officials who committed human rights abuses.

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

4. Recent Federal Cases Citing *Thuraissigiam*

- *Singh v. Gills*, U.S. Dist. Ct. for the S.D. of Mississippi (Dec. 2020)
  - Cites and follows the decision in *Thuraissigiam* that petitions under Habeas Corpus cannot lead to an administrative review of asylum determination if the petitioner does not seek release from detention, but just a review of the asylum determination. Therefore, refusal to review the habeas petition does not violate the Suspension Clause because the petitioner does not seek release from detention.
  - *Singh v. Gillis*, No. 5:20-cv-86-DCB-MTP, 2020 U.S. Dist. LEXIS 249881 (S.D. Miss. Dec. 17, 2020)
- *Romeo S.K. v. Barr*, U.S. Dist. Ct. for the Dist. of N.J. (Dec 2020)
  - Petition for relief in the form of an order directing the reopening of his case by BIA with a stay on his removal proceedings so he could appeal
  - Petition filed under a Writ of Habeas Corpus and was therefore denied following the precedent of *Thuraissigiam* because relief was not requested in the form of release because of unlawful detention but for the reopening and stay of his removal proceedings
  - *Romeo S.K. v. Barr*, No. 20-18065 (KM), 2020 U.S. Dist. LEXIS 241554 (D.N.J. Dec. 23, 2020)
- DHS is also using *Thuraissigiam* for non-expedited removal cases. See *Ivan A. v. Anderson*, No. 20-2796 (KM), 2021 U.S. Dist. LEXIS 42589, at *15 (D.N.J. Mar. 8, 2021).
  - Provides a thorough analysis of *Thuraissigiam* explaining its application by other district courts and applicability in this case of a petition to re-open removal proceedings 15 years after an order for removal was filed

Page 241 (§ 2.02[D] [Note 6]): Additional Notes and Questions to *Castro v. Department of Homeland Security*: Add the following sentence providing an update to *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017), at the end of the first paragraph in Note 6:
On April 1, 2019, the Ninth Circuit granted the plaintiff's motion to dismiss the case. *Flores v. Sessions*, No. 18-56335, 2019 U.S. App. LEXIS 9580 (9th Cir. Apr. 1, 2019). 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* U.S. Dep't of Homeland Sec., Enforcement Actions 2019 (Sept. 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf

All findings of inadmissibility by DHS (some would not be made using expedited removal):
Air: 53,237
Land: 157,153
Sea: 77,575
Total: 287,977

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

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

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

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

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Note 3 Addition:

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

> According to the most current data, Immigration and Customs Enforcement (ICE) held 22,281 immigrants in detention on May 7,

2022, the highest number in detention since the beginning of 2022 (although still smaller than the summer of 2021 when the number exceeded 27,000).

The number of immigrants monitored on ICE's electronic monitoring program known as ISAP or Alternatives to Detention continued its march upward to about 240,000. The vast majority of these, nearly 187,000, were monitored using a smartphone app called SmartLINK, while GPS ankle monitor use actually declined to less than 23,000, the smallest since 2020 when TRAC began tracking these data.

Importantly, these data show that the number of immigrants in detention and the number of immigrants monitored on ICE's Alternatives to Detention (ATD) program can increase at the same time. Although ICE calls its program "Alternatives" to Detention, the agency makes clear on its website that its ATD program is "not a substitute for detention, but allows ICE to exercise increased supervision over a portion of those who are not detained." Thus, growth in ATD supervision does not necessarily correspond to a decline in immigrant detention.

* * *

- Immigration and Customs Enforcement held 22,281 in ICE detention according to data current as of May 7, 2022.
- 16,034 out of 22,281—or 72.0%—held in ICE detention have no criminal record, according to data current as of May 7, 2022. Many more have only minor offenses, including traffic violations.
- ICE relied on detention facilities in Texas to house the most people during FY 2022, according to data current as of May 5, 2022.
- ICE arrested 5,083 and CBP arrested 20,317 of the 25,400 people booked into detention by ICE during April 2022.
- Stewart Detention Center in Lumpkin, Georgia held the largest number of ICE detainees so far in FY 2022, averaging 1,080 per day (as of May 2022).
- ICE Alternatives to Detention (ATD) programs are currently monitoring 239,957 families and single individuals, according to data current as of May 7, 2022.
- Harlingen's area office has [the] highest number in ICE's Alternatives to Detention (ATD) monitoring programs, according to data current as of May 7, 2022.

David Burnham & Susan B. Long, *New ICE Data Show Both Immigrants Detained and Monitored on ATD Increase in May*, Transactional Records Access Clearinghouse (TRAC), Syracuse University (May 24, 2022), https://trac.syr.edu/whatsnew/email.220524.html.

Page 259 (§ 2.04[A]: Add the following to the end of Note 6 and add new Note 7:
A June 2021 Supreme Court ruling denying an opportunity for a bond hearing for people who passed a reasonable fear interview (a higher standard than the credible fear interview) may indicate that discretionary parole is just one option to secure release. See below in the discussion in Note 7.

PAGE 259 - NOTE 6: When is Parole a Possibility?
Please see the opening narrative at the beginning of this chapter update for a discussion of the use of parole to admit close to 100,000 Afghans and thousands of Ukrainian nationals.
That update also includes challenges by many states to the Executive's use of the parole authority.

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 choose to reinstate the prior order of removal using INA § 241(a)(5); 8 U.S.C. § 1231(a)(5):

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

On June 29, 2021, the Supreme Court held 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. __, 141 S. Ct. 2271 (2021).

New Note 8:
Note on *Johnson v. Guzman Chavez*, _U.S. _, 141 S. Ct. 2271 (2021)

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

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

Both the government and the respondents agreed that detention of aliens was governed by INA §236; 8 U.S.C. § 1226 until the "removal period" of INA § 241; 8 U.S.C. § 1231 began. The Supreme Court found that for the purposes of the case at hand, the respondents' removal period was to begin when they were "ordered removed" and the removal order became "administratively final." As it was undisputed that the respondents had all been previously removed prior to their illegal reentry, the Court found that they had been "ordered removed" under INA § 241; 8 U.S.C. § 1231. On the second issue, the Court determined that the respondents' removal orders were "administratively final" as meant by Congress in INA § 241; 8 U.S.C. § 1231. The Court read INA § 241(a)(1)(B)(i); 8 U.S.C. § 1231(a)(1)(B)(i) in conjunction with the following section (ii) that Congress intended "administrative finality" to be determined when the BIA has reviewed the removal order and DHS is free to remove the aliens, even if the aliens petition for stay of removal proceedings.

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

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

INA § 236; 8 U.S.C. § 1226

> (a) Arrest, detention, and release. On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole; but
>
> (3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.
>
> * * *

INA 241(a); § 8 U.S.C. § 1231(a)

(1) Removal Period

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

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

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

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

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

* * *

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

* * *

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

Note 7: CBP Statistics on Electronic Searches at the Border

The following chart includes data for ALL travelers at the border and ports of entry including U.S. Citizens, Visa Holders, and other non-citizens.

International Travelers Processed with Electronic Device Search			
	FY 2017	**FY 2018**	**FY 2019**
October	2,561	2,539	3,026
November	2,379	2,446	2,962
December	2,404	2,509	3,365
January	2,760	3,090	3,765
February	2,303	2,512	3,096
March	2,605	2,921	3,526
April	2,275	2,701	3,218
May	2,537	2,764	3,138
June	2,304	2,606	3,480
July	2,359	2,798	3,458
August	3,133	3,320	4,085
September	2,580	3,090	3,794
Total	**30,200**	**33,296**	**40,913**

U.S. Customs and Border Protection, CBP Statement on Border Search of Electronic Devices (Oct. 30, 2019, 12:00PM), https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-border-search-electronic-devices.

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

In general, the Fourth Amendment requires probable cause and a warrant for the search of any property held by U.S. citizens. However, there is an exception relevant here referred to broadly as the "border exception." The border exception allows government agents to conduct "routine" searches of persons and property without a warrant or reasonable suspicion. There has been a recent split in the federal circuits about the limits of the border exception and what searches of electronic devices are and aren't allowed. The Supreme Court has yet to rule on this matter and set a precedent for the standard to be applied to tech searches at the border. To read more about the circuit split regarding electronic device searches see Ashley N. Gomez, *ARTICLE: Over the Border, Under What Law: The Circuit Split over Searches of Electronic Devices on the Border*, 52 ARIZ. ST. L.J. 279 (2020).

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

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 have reclassified F-1 student visas as "dual intent" visas. F-1 students would also be able to apply for green cards without going through the H-1B lottery. 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. Unfortunately, the bill was not enacted.

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

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

Page 292 (§ 3.02[C][1]): The annual quota of 85,000 new H-1B registrations was quickly met during the initial registration period that started April 1, 2022. USCIS, FY 2023 H-1B Cap Season Updates (Mar. 29, 2022), https://www.uscis.gov/newsroom/alerts/fy-2023-h-1b-cap-season-updates.

Page 292 (§ 3.02[C][2]): To address the domestic labor shortage, the DHS and the DOL made available an additional 35,000 H-2B temporary nonagricultural worker visas during the second half of

fiscal year 2022. These additional visas are for employers seeking to employ additional H-2B workers on or after April 1, 2022, through Sept. 30, 2022. 87 Fed. Reg. 30,334 (May 18, 2022). The semiannual cap of 33,000 visas for the second half of FY 2022 was reached on February 25, 2022. Press Release, USCIS, DHS and DOL Announce Availability of Additional H-2B Visas for Second Half of Fiscal Year (May 16, 2022), https://www.uscis.gov/newsroom/news-releases/dhs-and-dol-announce-availability-of-additional-h-2b-visas-for-second-half-of-fiscal-year.

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

Page 296 (§ 3.02[H][2]): The annual cap for U visas has been reached every year since 2011, and the backlog of pending applications as of the end of fiscal year 2021 stands at more than 170,000. The USCIS estimates that it now takes more than five years for an eligible applicant to obtain U status. In June 2021, the USCIS released a process to address the mounting backlog. If the petitioner has a bona fide petition, the USCIS determines whether to exercise its discretion to issue a bona fide determination employment authorization document and grant deferred action to the petitioner. USCIS, Policy Manual Volume 3, Chapter 5 – Bona Fide Determination Process, https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5.

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 357 (§ 3.03[E]): EAD Backlogs

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

Page 357 (§ 3.03[E]): USCIS announced a temporary final rule, effective May 4, 2022, that increases to up to 540 days the automatic extension period for work authorization and Employment Authorization Documents (EADs) available to certain EAD renewal applicants. 87 Fed. Reg. 26,614 (May 4, 2022). The USCIS estimates that it will benefit approximately 87,000 workers who have filed for renewal of their work authorization and whose 180-day automatic extension periods have expired or are about to expire. *Id.* at 26618.

Page 357 (§ 3.03[E]): Expedited Work Permits for Healthcare Workers

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

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

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

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

In General:

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

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

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

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

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

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

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

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

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

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

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

Recent Changes to TPS Designations; Supreme Court Decision

On April 18, 2022, the DHS announced that Sudan and Ukraine would be designated for TPS status and outlined an 18-month registration period from April 19, 2022, to October 19, 2023. U.S. Dep't of Homeland Sec., DHS Announces Registration Process for Temporary Protected Status for Ukraine and Sudan (Apr. 18, 2022), https://www.uscis.gov/newsroom/news-releases/dhs-announces-registration-process-for-temporary-protected-status-for-ukraine-and-sudan.

To be eligible under the Sudan TPS designation, individuals must demonstrate their continuous residence in the United States since March 1, 2022, and continuous physical presence in the United States since April 19, 2022. 87 Fed. Reg. 12,190 (Apr. 19, 2022). The USCIS estimates that about 3,000 individuals from Sudan may be eligible for TPS. *Id.*

To be eligible under the Ukraine designation, individuals must demonstrate their continuous residence in the United States since April 11, 2022, and continuous physical presence in the United States since April 19, 2022. 87 Fed. Reg. 23,211 (Apr. 19, 2022). Ukrainians outside the United States are not eligible for TPS under this designation. USCIS estimates that 59,000 Ukrainians may be eligible under the designation. *Id.*

On May 20, 2022, DHS published a notice designating Afghanistan for TPS for 18 months, ending on November 20, 2023. 87 Fed. Reg. 30,976 (May 20, 2022). Afghans residing in the United States. since March 15, 2022, and continually present in the Unites States since May 20, 2022, can apply for TPS. *Id.* DHS estimates that approximately 72,500 individuals are eligible to file applications for TPS under the designation of Afghanistan. *Id.* at 30,977.

In 2021, the Supreme Court resolved a circuit split and held that a Temporary Protected Status recipient is not eligible for lawful permanent resident (LPR) status solely because of the lawful nonimmigrant status granted to them through TPS. *Sanchez v. Mayorkas*, 141 S. Ct. 1809, 21, L.Ed.2d 52 (2021). The Court noted that under 8 U.S.C. § 1255, an admission in the United States is necessary for an applicant to be eligibility for LPR status. 141 S. Ct. at 1813. Given that the concepts of admission and status are distinct in immigration law, a grant of TPS does not eliminate the statutory requirement that an applicant be admitted to be eligible for LPR status. *Id.*

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/. Unfortunately, the bill failed to be enacted.

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/.

Page 425 (§ 4.01[A]): Add the following to the end of this subsection:

One factor in considering any green card petition is whether the person was properly admitted to the United States. In 2021, the Supreme Court resolved a circuit split and held that a Temporary Protected Status recipient is not eligible for lawful permanent resident (LPR) status solely because of the lawful nonimmigrant status granted to them through TPS. *Sanchez v. Mayorkas*, 141 S. Ct. 1809, 21, L.Ed.2d 52 (2021). The Court noted that under 8 U.S.C. § 1255, an admission in the United States is necessary for an applicant to be eligibility for LPR status. 141 S. Ct. at 1813. Given that the concepts of admission and status are distinct in immigration law, a grant of TPS does not eliminate the statutory requirement that an applicant be admitted to be eligible for LPR status. *Id.* For more on TPS, see the end of the Chapter 3 supplement.

Page 430 (§ 4.01[F]): Add the following to the end of this subsection:

One factor in considering any employment-based green card petition is how long it will take. Starting in 2001, USCIS has offered premium processing, by which the agency will provide expedited processing for an additional, non-waivable fee. 8 C.F.R. § 106.4. On March 30, 2022, the USCIS published a final rule implementing the Emergency Stopgap USCIS Stabilization Act. 87 Fed. Reg. 18,227 (Mar. 30, 2022); Emergency Stopgap USCIS Stabilization Act, Pub. L. No. 116-159, 134 Stat. 738 (2020). Before this expansion, premium processing was only available to petitioners filing a Form I-129, Petition of Nonimmigrant Worker and certain petitioners filing Form I-140, Immigrant Petition for Alien Workers. INA § 286(u) (2019); 8 U.S.C. § 1356(u) (2019). The final rule expands premium processing services to additional Form I-140 petitioners as well as petitioners filing Form I-539 and Form I-765. 87 Fed. Reg. 18,227 (Mar. 30, 2022).

USCIS will expand its premium processing services in phases. On June 1, 2022, USCIS began accepting premium processing requests for E13 multinational executive and manager petitions received on or before Jan. 1, 2021. USCIS, USCIS to Implement Premium Processing for Certain Previously Filed EB-1 and EB-2 Form I-140 Petitions (May 24, 2022), https://www.uscis.gov/newsroom/alerts/uscis-to-implement-premium-processing-for-certain-previously-filed-eb-1-and-eb-2-form-i-140. On July 1, 2022, USCIS began accepting premium processing requests for E21 national interest waiver green card petitions received on or before June 1, 2021, and E13 multinational executive and manager green card petitions received on or before March 1, 2021. *Id.*

Page 506 (§ 4.03[F]): Add the following to the end of the EB-5 subsection:

In March of 2022, Congress passed a law to reauthorize the EB-5 immigrant investor regional center program for five years through September 30, 2027. EB-5 Reform and Integrity Act of 2022, Pub. L. No. 117-103, 136 Stat. 49. The new law also increased the minimum EB-5 investment to $800,000 for investments in targeted employment areas and certain infrastructure projects. *Id.* The minimum for other projects is now $1,050,000. *Id.* USCIS will continue to adjudicate pending EB-5 applications that were suspended after the program expired on June 30, 2021. *Id.* USCIS will audit regional centers at least every five years. *Id.* Third-party agent fees and involvement must be disclosed. *Id.* The act took effect on May 14, 2022. *Id.*

On May 24, 2022, a group of EB-5 regional center investment firms sued DHS, arguing that by categorically decertifying more than 600 existing EB-5 regional centers and requiring them to recertify, USCIS "eviscerated" the program and determined that a wholly new regional center program was created rather than following congressional intent to reauthorize the program with a few changes and allow existing regional centers to continue their work. This is the second lawsuit challenging USCIS's claim that all regional centers must be redesignated.

Page 506 (§ 4.04[A]): Add the following to the end of this subsection:

One factor in getting any green card is how long the process will take. Processing times at USCIS have ballooned over the last several years. On March 29, 2022, the USCIS announced a series of efforts to reduce backlogs in processing and improve processing times. USCIS, USCIS Announces New Actions to Reduce Backlogs, Expand Premium Processing, and Provide Relief to Work Permit Holders (Mar. 29, 2022), https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work.

The agency established new internal cycle time goals to guide backlog reduction efforts by the agency. USCIS, Reducing Processing Backlogs (Mar. 29, 2022), https://egov.uscis.gov/processing-times/reducing-processing-backlogs. USCIS also intends to start implementing a DHS final rule expanding premium processing premium processing. *See* 87 Fed. Reg. 18,227 (Mar. 30, 2022). The USCIS is also streamlining many EAD processes, including

extending validity periods for certain EADs and providing expedited work authorization renewals for healthcare and childcare workers. 87 Fed. Reg. 26,614 (May 4, 2022).

Page 509 (§ 4.04[C]): Add the following to the start of this subsection:

On May 16, 2022, the Supreme Court ruled that federal courts lack jurisdiction to review facts found as part of discretionary-relief proceedings under the adjustment of status provisions of 8 U.S.C. § 1255. *Patel v. Garland*, 142 S. Ct. 1614 (2022). The Court resolved a circuit split and held that "[w]ith an exception for legal and constitutional questions, Congress has barred judicial review of the Attorney General's decisions denying discretionary relief from removal." *Id.* at *7. This bar precludes judicial review of factual findings that underlie a denial of relief. *Id.*

Page 526 (§ 4.04[12]): Add a new subsection on Humanitarian Parole

In General:

Although not specifically defined in any regulation, the United States has frequently granted humanitarian parole to noncitizens who need to travel to the United States for emergent reasons. Humanitarian parole is commonly sought by noncitizens needing urgent medical treatment in the United States or by noncitizens experiencing exceptional hardship.

The statutory authority to grant humanitarian parole is derived from INA § 212(d)(5); 8 U.S.C. § 1182(d)(5), which provides that:

> (A) The Attorney General may except as provided in subparagraph (B) or in section 214(f) [8 U.S.C. § 1184(f)], in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States…

Following the United States withdrawal from Afghanistan and subsequent collapse of the Afghan government in August 2021, over 45,000 Afghans have applied for humanitarian parole. USCIS reviews these applications under the same case-by-case basis as normal humanitarian parole requests. As of June 2022, USCIS had only approved 340 of the Afghan humanitarian parole applications.

On April 21, 2022, President Biden announced the Uniting for Ukraine program to provide Ukrainians displaced by Russia's invasion of the country with the opportunity to come to the United States. Unlike other humanitarian parole applications, applicants for Uniting for Ukraine can discern their eligibility beforehand. Namely, Ukrainians are eligible for the program if they:

- Resided in Ukraine immediately before the Russian invasion (through February 11, 2022) and were displaced as a result of the invasion;
- Are a Ukrainian citizen and possess a valid Ukrainian passport (or are a child included on a parent's passport);

- Have a financial supporter who filed a Form I-134 on their behalf that USCIS has vetted and confirmed as sufficient; and

- Pass biographic and biometric security checks.

As of May 2022, USCIS had granted travel authorization to 14,000 of the 25,000 Ukrainian humanitarian parole applications received by the agency.

For more information on humanitarian parole, see Immigration Law and Procedure § 62.04.

Chapter 5: Inadmissibility: In Every Context

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

The State Department has released data for fiscal year 2020 on the number of people found to be inadmissible:

	Immigrants	Non-Immigrants
Total Grounds of Ineligibility:	170,399	1,699,630
Grounds overcome:	153,713	400,547

The data is available at https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2020AnnualReport/FY20AnnualReport-Table%20XIX.pdf.

Page 529 (§ 5.02): Add simplified chart on grounds of inadmissibility under INA § 212(a) before [A]:

INA Section	Ground of Inadmissibility
§ 212(a)(1)	Health related grounds
§ 212(a)(2)	Criminal and related grounds
§ 212(a)(3)	Security and related grounds
§ 212(a)(4)	Public charge
§ 212(a)(5)	Labor certification and qualifications for certain immigrants
§ 212(a)(6)	Illegal entrants and immigration violators
§ 212(a)(7)	Documentation requirements
§ 212(a)(8)	Ineligible for citizenship
§ 212(a)(9)	Aliens previously removed
§ 212(a)(10)	Miscellaneous

For more information, see https://fam.state.gov/fam/09FAM/09FAM030104.html.

Page 541 (§ 5.03[C]: Editors' Note. The INA provisions are not included in the text of the Supreme Court decision in *Trump v. Hawaii*. The key provision at issue was INA § 212(f), codified at 8 U.S.C. § 1182(f). Attorneys in the field usually refer to this provision granting broad executive authority as Section 212(f). Also at issue in the case was INA § 202(a)(1)(A), codified at 8 U.S.C. § 1152(a)(1)(A), which prohibits discrimination on several explicit bases. The statute does not mention religious based discrimination.

On April 24, 2021, the House of Representatives passed legislation that would reform both provisions to limit executive authority and to explicit prohibit religious discrimination. The National Origin-Based Antidiscrimination for Nonimmigrants Act, H.R. 1333, 117th Cong. (2021). As of May 27, 2022, 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 as new Note 10:

Following *Hawaii v. Trump*, the Trump administration issued another expanded ban in February 2020. Proclamation No. 9983, 85 Fed. Reg. 6699 (Feb. 5, 2020). This ban expanded travel restrictions to apply to certain nationals from six new countries: Kyrgyzstan, Nigeria, Myanmar, Sudan, Eritrea, and Tanzania. *Id*. The February 2020 expansion of the ban was controlled by *Hawaii v. Trump*.

The Presidential Proclamation upheld in *Hawaii v. Trump* was implemented much earlier through orders issued by the Supreme Court on December 4, 2017. This shadow docket decision was issued despite the Hawaii and Maryland courts blocking the Proclamation, and despite there being no ruling by the appellate courts and no specific guidance by the implementing agencies. The 'shadow docket' was regularly used in the Trump administration and refers to a body of orders and decisions issued by the Supreme Court without briefing by the parties or deliberation by the judiciary. For more information, see https://www.scotusblog.com/category/special-features/symposium-on-the-supreme-courts-shadow-docket/.

On January 20, 2021, during the first day of his presidency, President Joe Biden issued a presidential proclamation ending the travel bans and repealing the Trump administration executive orders and proclamations that established and expanded the bans. President Biden's proclamation revoked President Trump's Executive Order 13780 and Proclamations 9645, 9723, and 9983. Proclamation No. 10141, 86 Fed. Reg. 7005 (Jan. 25, 2021); *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/#content. The State Department issued guidance on President Biden's January 20, 2021, proclamation rescinding P.P. 9645 and 9983, stating that the Department could immediately resume visa processing from the countries that had been affected by the travel bans. Further, the State Department has stated that all immigrant visa applicants who were denied an immigrant visa on or between December 8, 2017, and January 19, 2020, on the grounds of P.P. 9645 and 9983 are exempt from paying a new fee for their immigrant visa application, upon certain conditions being met. *See* U.S. Dep't of State, Immigrant Visa Fee Exemption for Applicants Previously Refused under Presidential Proclamations 9645 and 9983 (update Jan. 19, 2022), https://travel.state.gov/content/travel/en/News/visas-news/iv-fee-exemption-for-applicants-previously-refused-under-pps-9645-and-9983.html.

Page 554 ((§ 5.03[C]]): Add the following as a new Note 11:

During the onset of the COVID-19 pandemic, the Trump administration issued a number of coronavirus travel suspensions by presidential proclamation. These travel suspensions restricted entry to certain individuals who were physically present in China, Iran, the Schengen Zone, the United Kingdom, Ireland, or Brazil within fourteen days before their anticipated entry into the United States. Proclamation No. 9984, 85 Fed. Reg. 6709 (Feb. 5, 2020); Proclamation No. 9992, 85 Fed. Reg. 12855 (Mar. 4, 2020); Proclamation No. 9993, 85 Fed. Reg. 15045 (Mar. 16, 2020);

Proclamation No. 9996, 85 Fed. Reg. 15341 (Mar. 18, 2020); Proclamation No. 10041, 85 Fed. Reg. 31933 (May 28, 2020). In these proclamations, President Trump cited authority under INA section 212(f) as a basis for these suspensions. For more information on the COVID-19 related travel suspensions, see Katharina Pistor, *Law in the Time of COVID-19* (2020), https://scholarship.law.columbia.edu/books/240.

On October 25, 2021, President Biden announced a Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic, which moves away from restrictions placed on specific countries, and instead adopts an air travel policy relying on vaccination. Proclamation No. 10294, 86 Fed. Reg. 59603 (Oct. 28, 2021).

Page 566 (§ 5.03[H][3]): Add at bottom of page: FAM Crimes Involving Moral Turpitude

The State Department's Foreign Affairs Manual (FAM) has a list of common crimes that are considered crimes involving moral turpitude. The section of the FAM, found in 9 FAM 302.3-2(B)(2), lists the most common offenses which involve moral turpitude as: (1) fraud; (2) larceny; or (3) intent to harm persons or things. The FAM further includes the following crimes as other common crimes which involve moral turpitude: (1) crimes committed against property; (2) crimes committed against governmental authority; (3) crimes committed against persons, family relationship, and sexual morality; and (4) intentional distribution of controlled substances. The FAM also notes that attempt, aiding and abetting, accessories, and conspiracy of crimes involving moral turpitude are themselves crimes of moral turpitude. U.S. Dep't of State, 9 Foreign Affairs Manual (FAM) § 302.3-2(B)(2), https://fam.state.gov/fam/09FAM/09FAM030203.html#M302_3_2_B_2.

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 573 (§ 5.03[I]): Add the following as a new paragraph to the end of the section:

Recent years have seen many states and the District of Columbia legalize marijuana, for medical use and/ or for recreational use. However, for immigration purposes, it is not the state laws that apply to the noncitizen, but federal law. So, even though the state that the noncitizen is residing in has legalized marijuana, if a noncitizen admits to possessing marijuana, they can be found inadmissible or denied entry to the United States. Under certain circumstances, lawful permanent residents can be found removable for possessing marijuana, even if they are residing in a state that has legalized it. For more information, see https://www.ilrc.org/sites/default/files/resources/immigrants_marijuana_may_2021_final.pdf.

On April 1, 2022, the House of Representatives passed legislation that would decriminalize marijuana at the federal level by removing marijuana from the list of controlled substances under the Controlled Substances Act. The Marijuana Opportunity Reinvestment and Expungement Act (MORE Act), H.R. 3617, 117th Cong. (2022). Specifically, this legislation would prohibit denying immigration benefits and protections for marijuana related convictions or conduct. As of May 27, 2022, the bill is pending in the Senate. The status and the text of the bill can be found at https://www.congress.gov/bill/117th-congress/house-bill/3617https://www.congress.gov/bill/117th-congress/house-bill/3617.

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 May 2022, the provisional waiver procedures remain the same.

Chapter 6: Deportability and the Removal Process

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

A more recent statistic demonstrates the growing backlog in the immigration court system. As of Fiscal Year 2022, there are nearly 1.8 million cases pending before the EOIR. *Immigration Court Backlog Tool*, TRAC Reports, http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited June 15, 2022).

The tools at TRAC can also be used to show the average time to case completion. While at first blush some courts may seem faster to close a removal case, in part, the differences are largely based on whether the non-citizen facing removal has counsel, is detained, or has any application for relief pending. In fiscal year 2022, the average length of time for the entire country was 852 days down from 934 days in the prior fiscal year. Here is a chart from the TRAC site listing the longest wait times. *See id.*

State	Average Days
Entire US	852
Virginia	1,161
California	1,026
Nebraska	1,015
Maryland	1,006
New Jersey	994
New York	977
Michigan	929
Oregon	928
Colorado	927
Washington	914
Illinois	899
Georgia	892
Texas	858
Missouri	842

To reduce the backlog and to focus on priority cases, the current administration has encouraged the Office of the Principal Legal Advisor (OPLA) within ICE to review and evaluate whether cases should be terminated as a low priority matter or one where relief may be pending but is delayed due to quota limitations. The greater use of prosecutorial discretion is deferred to our discussion in Chapter 7 on Relief from Removal.

Page 606 (6.01[C]): The Consequences of Greater Removal Enforcement Update to: "As of late 2018, the DHS Office of Inspector General found that the number of 287(g) agreements had risen from 36 to 76, but warned that coordination and planning need to be improved."

During the Trump administration, from January 2017 until September 2020, the number of state and local law enforcement agencies with 287(g) agreements increased by more than 300%, from 35 to 150. U.S. Dep't of Homeland Sec., Off. of Inspector Gen., Lack of Planning Hinders Effective Oversight and Management of ICE's Expanding 287(g) Program (Sept. 18, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-09/OIG-18-77-Sept18.pdf.

To see the most current national map of 287(g) agreements, visit https://www.ilrc.org/national-map-287g-agreements.

Page 628 ([6.02][C] [Add to Note 4]):
4. The Alien Terrorist Removal Court. In 1996, Congress created the Alien Terrorist Removal Court as a special court and authorized the Chief Justice of the United States to designate five U.S. district court judges to review applications for the removal from the United States of alien terrorists. The provisions of the court were part of the Antiterrorism and Effective Death Penalty Act of 1996, codified at 8 U.S.C. § 1532, a broad legislative effort to combat international terrorism. The statute authorized the Attorney General to draft an application for removal of a suspected alien terrorist, and to submit the application to the removal court under seal. Upon granting a removal application, the court must hold a public removal hearing at which the accused has the right to be represented by counsel and the government bears the burden of proving that the accused is an alien terrorist.
As of 2022, the removal court has never received an application from the Attorney General for the removal of an alien terrorist and has therefore never conducted any proceedings. To read more on the subject, visit https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1079&context=nslb.

Page 629 (6.02[D]): Grounds Relating to False Documents and Misrepresentation
[1] *False Documents at Work*
On October 12, 2021, the Department of Homeland Security Secretary (DHS) Alejandro Mayorkas, issued a short, three-page internal memorandum immediately halting immigration raids on workplaces and called on enforcement agencies to instead focus their efforts on "unscrupulous employers who exploit the vulnerability of undocumented workers." Memorandum from Alejandro N. Mayorkas, U.S. Sec'y of Homeland Sec., Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf. It also directed the federal immigration agencies to develop plans to protect workers who come forward with allegations of abuse or exploitation by employers. *Id.*

Page 630 [D][1] Add the following paragraph just before Problem 6-4:
President Trump's Executive Order No. 13768 (withholding grant money to states/localities that establish themselves as Sanctuary Jurisdictions) was revoked by President Biden in Executive Order 13993 on the Revision of Civil Immigration Enforcement Policies and Priorities on January 20, 2021. 86 Fed. Reg. 7051 (Jan. 25, 2021). This order called for relevant agencies and departments to review any agency actions that developed because of Executive Order 13768 and

issue revised guidance as appropriate. For an example of some of the guidance that was issued, see Memorandum, U.S. Immigr. and Customs Enf't, Interim Guidance: Civil Immigration Enforcement and Removal Priorities (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

Page 640 (6.04[D][2][Notes and Questions][Note 4]):
Add the following update to the case note, *In re Barcenas-Barrera, 25 I. & N. Dec. 40* (BIA 2009), pp. 646-649.

4. *In re Barcenas-Barrera* on Appeal. Olga Barcenas-Barrera sought review of her 2009 decision ordering her removal in the Fifth Circuit Court of Appeals. Barcenas-Barrera argued that the BIA erred by (1) conducting *de* novo review of the IJ's findings of fact and by engaging in its own fact finding, and (2) concluding that Barcenas-Barrera made a false representation of United States citizenship within the meaning of INA § 212(a)(6)(C)(ii). The Fifth Circuit held that the BIA's decision that Barcenas-Barrera was removable was not an abuse of discretion. The Fifth Circuit also held the BIA did not err in concluding that Barcenas-Barrera made a false representation of United States citizenship. The BIA concluded that Barcenas-Barrera's conduct amounted to a false representation of citizenship under that statute. In the absence of more specific guidance from the BIA, the court did not decide whether INA § 212(a)(6)(C)(ii) requires evidence of the alien's intent to falsely claim United States citizenship and, if so, how much evidence it requires. *In re Barcenas-Barrera*, 394 Fed. Appx. 100 (5th Cir. 2010).

Page 677 (6.03[C][Notes and Questions][Note 3]): Ineffective Assistance of Counsel in the Criminal Courts
In a recent Third Circuit Court of Appeals decision, three judges applied a two-part test to measure ineffective assistance of counsel: (1) "competent counsel have acted otherwise;" and (2) was the respondent "prejudiced by counsel's performance." *Ford v. Attorney General*, 34 F.4th 201, 2022 U.S. App. LEXIS 13110, at *7 (3d Cir. 2022). The Third Circuit held that the failure of an attorney to review an asylum application with the respondent, the failure to submit any documentation about the political party activities of the respondent, and the inadequate preparation for a final individual immigration hearing constituted "ineffective assistance of counsel." 2022 U.S. App. LEXIS 13110 at *8–9. The Third Circuit stated that former counsel's failure to provide *any* objective evidence about Haiti's political conditions could not be reasonably viewed as a tactical decision and was therefore ineffective assistance. *Id.* at *9–10. The court also concluded that the IJ incorrectly focused on the lack of information about the respondent's engagement with a particular political party. *Id.* at *11. The panel stated there was a "reasonable probability" that if this readily available evidence had been presented, the IJ would have granted cancellation of removal. *Id*. at *11.

Page 679 (6.04[B][1][c]): Immigration Proceedings
As of this writing, the EOIR is considering a revision of its immigration court procedures. With the 2020 closures due to the pandemic and adjustments using technology, removal proceeding practice has increasingly been conducted via video technology. The EOIR is also increasing the use of written pleadings and seeking to make other changes that can reduce in person court appearances.

Note on New Interim Final Rule (IFR) Effective May 31, 2022: In an attempt to streamline certain removal cases, persons entering § 240 removal from expedited removal proceedings will now be subject to a different set of regulations. These new regulations come from the IFR that took effect on May 31, 2022. 87 Fed. Reg. 18,078 (Mar. 29, 2022). Individuals subject to these regulations now have a fast-tracked removal process that still affords the same appeal rights and protections as other facing regular § 240 removal proceedings. See the update for Chapter 2 for more information on the new IFR and its changes to those entering § 240 removal proceedings from expedited removal.

The new streamlined procedure mirrors some streamlined pilot projects that the EOIR implemented in the past. Many of the new changes set firm hearing, motions, and adjudication deadlines, and create special rules for continuances to establish a "good cause" standard. *See generally* 8 C.F.R. § 1240.17.

Note on Biden Administration's Dedicated Dockets: In May 2021, the EOIR issued a policy memorandum establishing a "dedicated docket" for family immigration cases where the families have been admitted to the United States pending removal proceedings. Executive Office for Immigration Review, Dedicated Docket, PM 21-23, 1 (May 28, 2021), https://www.justice.gov/eoir/book/file/1399361/download. While dedicated dockets have been tried before, this program was implemented in ten cities: Denver, Detroit, El Paso, Los Angeles, Miami, Newark, New York City, San Diego, San Francisco, and Seattle. Adults placed on these dockets are admitted with parole to the United States and subjected to alternative forms of supervised release instead of using detention.

This dedicated docket sought to reduce the adjudication time to 300 days instead of the average 4.5 years removal proceedings usually take. Immigrants' Rights Policy Clinic, The Biden Administration Dedicated Docket, 1 (May 2022), https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Dedicated_Docket_in_LA_Report_FINAL_05.22.pdf. A May 2022 report prepared by the UCLA Immigrants' Rights Policy Clinic found that despite the efforts of the EOIR, there has still been a lack of fair and timely proceedings. *Id.* In particular, the report highlights the lack of available qualified immigration counsel who are willing to represent people in rushed procedures. The report also highlighted the low rates of asylum applications: "Only 13.6% of families on the L.A. dedicated docket filed applications for asylum; of those that filed asylum applications, 96.9% had legal representation." Most of the people on the docket were admitted as family groups and 45.5% were children. *Id.*

Evolving Procedures at EOIR

Since the beginning of 2021, the EOIR has adopted 17 new policy memoranda, many which repeal priorities and processing rules issued under the Trump administration. In addition, the Office of the Executive Director of the EOIR has issued six memoranda covering topics such as guidance on granting continuances and increasing pro bono participation in the courts.

The EOIR has also made some improvements in moving toward electronic submissions and greater transparency for attorneys to see court schedules. The EOIR is far behind the federal judiciary and most state judicial systems. And while some new developments in electronic submission and video hearings can allow immigration courts to operate more efficiently, physical appearances are still

required for people who do not have counsel. Respondents without counsel may have to travel to the court and appear in a facility where both the IJ and the government's counsel are remote.

In additional to the published Immigration Court Procedures Manual, individual immigration courts usually have local "standing orders." After interviewing six practicing attorneys and several judges, Professor Lenni Benson found that most agreed that "every judge and every case is different." In some cases, the technological advances helped all of the parties, but in many more cases counsel found that submissions did not reach the court or that cases had been rescheduled without sufficient time to prepare or provide actual notice to the respondent.

As is noted in Chapter 7, the DHS has begun implementing dismissal of long pending removal cases in an exercise of prosecutorial discretion, however, in some cases, the individual judges have dismissed the proceedings without first allowing the Respondent an opportunity to object to the dismissal. For many people who have been waiting years for the adjudication of an application for relief such as cancellation of removal or asylum, a dismissal may leave them without a path to status. Terminations can also complicate qualifying for continued work authorization and can end eligibility for limited public benefits in some states. ICE argues that it is solely within the control of the government to determine which cases should go forward, citing 8 C.F.R. § 239.2(a)(7). However, advocates argue that once a Notice to Appear has been lodged with the court, the respondent is entitled to object to a dismissal and the immigration judge must consider the views of both sides. 8 C.F.R. § 1239.2(c).

Page 680 (6.04[B][1][a]): The Workload of the Immigration Court

Add the following paragraph after the last paragraph in Section [a], The Workload of the Immigration Court:

In *Matter of Cruz-Valdez*, 28 I. & N. Dec. 326 (Att'y Gen. 2021), Attorney General Garland reversed the decision of former Attorney General Sessions in *Matter of Castro Tum*, 27 I. & N. Dec. 271 (Att'y Gen. 2018), which ended the power of immigration judges to grant administrative closures. Several federal courts had also rejected *Castro Tum*, stating that immigration judges have inherent authority to manage their dockets.

Page 697 (6.05[B and C] [Problem 6-6: Notes and Questions]

[Add Update to Note 1 *Padilla v. Immigration & Customs Enf't*]): Litigation continues to swirl around the limits of immigration judges to issue bond during removal proceedings. In March 2020, the Ninth Circuit affirmed in part and vacated and remanded in part a district court's preliminary injunction, affirming plaintiffs' due process right to bond hearings and remanding for further findings with respect to the particular process due plaintiffs. *Padilla v. Immigration & Customs Enf't*, 953 F.3d 1134 (9th Cir. 2020).

On August 24, 2020, the government filed a petition for a writ of certiorari to the Supreme Court. The Supreme Court issued an order granting the government's petition on January 11, 2021, vacating the Ninth Circuit decision and remanding for further consideration in light of *Department of Homeland Security v. Thuraissigiam*. *Immigration & Customs Enf't v. Padilla*, 141 S. Ct. 1041 (2021).

After exploring mediation, the case has now been approved for astay on appellate proceedings pending the resolution of *Garland v. Gonzalez*, Sup. Ct. Dkt. No. 20-322, and *Biden v. Texas*, Sup. Ct. Dkt. No. 21-954. *See Padilla v. Immigration & Customs Enf't*, No. 19-35565, 2022 U.S. App.

LEXIS 15545 (9th Cir. June 6, 2022). *See also Padilla v. Immigr. & Customs Enf't*, No. 19-35565, 2022 U.S. App. LEXIS 8795 (9th Cir. Apr. 1, 2022).
As of this writing in May of 2022, the Supreme Court has not yet ruled on the case.

Page 698 (6.05[B]) [Note 3]): 3. Special Settlement for Children.

[Include the following paragraph after the last paragraph in Section [B] discussing the elimination of the *Flores* settlement and regulations issued by DHS and HHS]:

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

In December 2020, a Ninth Circuit panel affirmed in part and reversed in part the judgment of the district court. *Flores v. Rosen*, 984 F.3d 720 (9th Cir. 2020). The Ninth Circuit rejected the government's argument that the *Flores* Settlement Agreement was terminated simply because the regulations were published. Additionally, the Ninth Circuit rejected the government's argument that a change in circumstances, namely an increase in unlawful migration by UACs and FMUs, warranted termination of the Flores Settlement Agreement. Accordingly, the Ninth Circuit upheld the injunction prohibiting certain aspects of the Trump administration's regulations from taking effect and rejected the Department of Justice's attempt to terminate the Flores Settlement Agreement.
After two years of negotiations, the parties reached a detailed settlement continuing protections for children held in federal government detention. Customs and Border Protection Settlement Agreement, Flores v. Garland, Case No. 2:85-cv-4544 (C.D. Cal.) was submitted to Judge Gee for approval on May 21, 2022. As of early June of 2022, the proposed order is still pending.

Page 698 (6.05[A][Problem 6-6: Notes and Questions][Add Note 4]: Detention Relating to Removal Proceedings

4. Limiting the Availability and Scope of Judicial Review in Removal Proceedings. In a 5-4 decision issued in May 2022, the Supreme Court held that federal courts lack jurisdiction to review factual findings made by the executive branch during deportation proceedings. *Patel v. Garland*, _ U.S. _, 212 L. Ed. 2d 685 (2022). Congress severely restricted the scope and content of judicial review in 1996. In general, decisions about the grant of discretionary relief are immune from judicial review. However, there are many cases where the circuit courts of appeal continued to review the legal determinations of whether an individual was eligible for the relief.

While Pankajkumar Patel's application for adjustment of status was pending at the DHS, Patel filed an application to renew his Georgia driver's license and marked the box "U.S. citizen" even though he was eligible for a driver's license under Georgia law despite not being a U.S. citizen. *Id.* at 693. He was denied adjustment and later placed in deportation proceedings before an IJ. *Id.* The IJ denied Patel's application for adjustment of status as a defense to removal, concluding he intentionally marked "U.S. citizen" on his application, despite Patel's testimony that he made a mistake and did not intend to mark the box. *Id.* Patel sought to have a federal court review the IJ's

factual finding, specifically, whether he intentionally or mistakenly checked the citizen box. *Id.* The government argued that one provision, INA § 242; 8 U.S.C. 1252(a)(2)(B)(i), bars federal courts from reviewing "any judgment regarding the granting of relief" under five specific immigration remedies, including adjustment. *Id.* at 964.

Justice Amy Coney Barrett held that federal courts lack jurisdiction to review facts found as part of adjustment of status proceedings and other discretionary-relief proceedings enumerated in section 1252(a)(2)(B)(i). *Id.* at 701. She reasoned that the statute should be read broadly to include "any judgment *relating to* the granting of relief," including factual findings. *Id.* at 696 (emphasis in original).
Justice Neil Gorsuch dissented, joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Justice Gorsuch led with the danger of administrative power and the consequences of the court's opinion for immigrants: "Today, the Court holds that a federal bureaucracy can make an obvious factual error, one that will result in an individual's removal from this country, and nothing can be done about it. No court may even hear the case. It is a bold claim promising dire consequences for countless lawful immigrants." *Id.* at 701.

This excerpt is adapted from Professor Shoba Sivaprasad Wadhia's analysis of this case for the SCOTUS Blog. Shoba Sivaprasad Wadhia, Justices split over question of federal court review in immigration cases, SCOTUSblog (May 19, 2022, 12:24PM), https://www.scotusblog.com/2022/05/justices-split-over-question-of-federal-court-review-in-immigration-cases/. To read the full opinion, visit https://www.supremecourt.gov/opinions/21pdf/20-979_h3ci.pdf.

Page 698 (6.05[C]): Detention Relating to Removal Proceedings
From 1994 to 2022, the frequency of physical detention of immigrants has grown dramatically. Several journalists worked together to create an exploration of forms and location of this civil detention. For interactive charts, graphs and video interviews about the growth of civil detention related to immigration, see Emily Kassie, *Detained*, The Marshall Project (Sept. 24, 2019), https://www.themarshallproject.org/2019/09/24/detained.

Page 728 Following *Jennings v. Rodriguez* (6.05[A][Update on Detention: Detention Related to Removal Proceedings

1. Release on Bond for Noncitizens in Immigration Detention. In *Garland v. Gonzalez*, plaintiffs, who are non-U.S. citizens subject to a removal order challenged their continued detainment over the course of six months without individualized bond hearings before an IJ. The federal district courts found for the plaintiffs, holding that the Ninth Circuit's ruling in *Diouf v. Napolitano* required that detainees held for six months or more are entitled to a bond hearing before an immigration judge. On appeal, the Ninth Circuit affirmed. The U.S. Supreme Court granted a writ of certiorari in August 2021, and heard oral arguments in January 2022. The case is ongoing as of May 2022.

To follow the ongoing litigation and learn more, visit https://www.scotusblog.com/case-files/cases/garland-v-gonzalez/.

Note on A New Immigration Court System:

For many years, critics have questioned the use of administrative courts to adjudicate removal hearings. Given the life and death consequences at stake, the separation of U.S. citizens from non-citizen relatives, and the extraordinary power of the government to deport, scholars and advocates have asked Congress to create an Article I or statutory court, separate and apart from enforcement agencies such as the DOJ or DHS.

In January of 2021, Representative Jayapal introduced a bill that would detach the current immigration court system from the Department of Justice and create a standalone immigration court. H.R. Res. 64, 117th Cong. (2021). By establishing an independent immigration court, the bill's backers hope to promote a fairer, faster, and more humanitarian approach to immigration and border security. *Id.* To read the full proposed bill, see https://www.congress.gov/bill/117th-congress/house-resolution/64/text?q=%7B%22search%22%3A%5B%22immigration+court%22%2C%22immigration%22%2C%22court%22%5D%7D&r=6&s=3.

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 as a new Note 3:

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 4 that reads as follows:

3. *Pereida v. Wilkinson*. In 2021, the Supreme Court held in *Pereida v. Wilkinson*, __ U.S. __, 141 S. Ct. 754, 209 L. Ed. 2d 47, 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.

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.

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III.

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

A. 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."

To ascertain the ordinary meaning of words, "[w]e refer to standard reference works such as legal and general dictionaries." Dictionaries define the word "connected" similarly. Miriam-Webster defines it as "having the parts or elements logically linked together;" the Oxford English Dictionary defines it as "related, associated (in idea or nature);" and Black's Law Dictionary defines it as "to associate as in occurrence or in idea." Together, these definitions indicate that the term "connected to" means "having a causal or logical relationship."

The government argues that the plain meaning of "connected to" is too broad to be unambiguous; however, "a term in a statute is not ambiguous merely because it is broad in scope." Application of the plain, expansive meaning of "connected to" is called for as long as it is supported by the "broader context of the statute as a whole," and, indeed, the statutory context does support such application. Two other VAWA-based provisions in the INA are instructive because Congress expressly limited the broad scope of "connection" in those provisions. Under the first statute, battered spouses are exempt from a certain ground of inadmissibility if they can show, inter alia, that "there was a substantial connection between the battery or cruelty . . . and the

alien's unlawful entry into the United States." A second statute, which applies to VAWA self-petitioners who are divorced from their abusive spouses, requires petitioners to demonstrate "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty." Both of these provisions reveal that Congress knew how to narrow the otherwise expansive term "connection"—either by including a modifier like "substantial" or a temporal requirement—but chose not to for VAWA cancellation of removal.

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

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

Lastly, the government cites a U.S. Citizenship and Immigration Services interoffice memorandum that addresses the meaning of "connected to." This memo does not affect our analysis. The memo first defines "connected to" as compulsion or coercion, but then conflates "connected to" with but-for causation. As an initial matter, this memo's interpretation is not binding on this Court or the BIA, and it is entitled to respect only to the extent it has the power to persuade. It is not persuasive. Its interpretation is at odds with the plain meaning of "connected to" to the extent that it requires compulsion and coercion rather than a causal or logical relationship. It is also internally inconsistent because compulsion/coercion and but-for causation are very different standards.

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

IV.

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

On February 10, 2022, USCIS issued an update to the USCIS Policy Manual, implementing the *Da Silva v. Attorney General* nationwide. Alert, U.S. Immigrations and Customs Enforcement, USCIS Updates Policy Guidance on VAWA Self-Petitions (Feb. 10, 2022), https://www.uscis.gov/newsroom/alerts/uscis-updates-policy-guidance-on-vawa-self-petitions.

P. 798 (§ 7.01[I]): Add the following as a new Note 9:

On May 6, 2022, a new USCIS policy began that allows those with approved SIJS petitions to have their cases considered for a four-year grant of deferred action, solely if they are unable to apply for adjustment of status because a visa is not available. News Release, U.S. Immigrations and Customs Enforcement, USCIS Announces Policies to Better Protect Immigrant Children Who Have Been Abused, Neglected, or Abandoned (Mar. 07, 2022), https://www.uscis.gov/newsroom/news-releases/uscis-announces-policies-to-better-protect-immigrant-children-who-have-been-abused-neglected-or. According to the End SIJS Backlog Coalition, this policy will help to alleviate the SIJS backlog of individuals waiting for a green card. This policy allows individuals to apply for work authorization once granted deferred action, which otherwise would not be available to them until they can adjust status. National Immigration Project of the National Lawyers Guild, Frequently Asked Questions About USCIS's SIJS Deferred Action Policy (May 20, 2022), https://nipnlg.org/PDFS/2022_16May_CoalitionFAQs-USCIS-SIJS-Deferred-Action-Policy.pdf.

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. Exec. Order No. 13993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 25, 2021).

On February 18, 2021, U.S Immigration and Customs Enforcement issued interim civil enforcement priorities. Memorandum, U.S. Immigrations and Customs Enforcement, Interim Guidance: Civil Immigration Enforcement and Removal Priorities (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf. Those priorities include 1) national security; 2) border security; and 3) public safety. The February memo includes requirements for data collection and also includes specific equities that should be considered in making discretionary decision, among them a serious medical illness or being elderly. For more information, see Shoba Sivaprasad Wadhia, *Prosecutorial Discretion in a Biden Administration Part 2*, Yale Journal on Regulation (Feb. 18, 2021), https://www.yalejreg.com/nc/prosecutorial-discretion-in-the-biden-administration-part-2-by-shoba-sivaprasad-wadhia/.

On March 5, 2021, ICE announced a case review process for individuals who believe that their case does not align with ICE's enforcement, detention, and removal priorities. The process "offers another channel through which noncitizens and their representatives can request that ICE exercise its prosecutorial discretion on a particular noncitizen's behalf, and to resolve questions and concerns, consistent with law, policy and the interests of justice." News Release, U.S.

Immigrations and Customs Enforcement, ICE Announces Case Review Process (Mar. 5, 2021), https://www.ice.gov/ICEcasereview#.
https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf.

On September 30, 2021, DHS Secretary Mayorkas issued a new memo providing guidance on civil immigration law enforcement. Specially, the memo outlines three enforcement priorities for apprehension and removal. The priorities are 1) threats to national security; 2) threats to public safety; and 3) threats to border security. The memo further states that the Department will conduct assessments that will look at a "totality of the facts and circumstances," when determining whether to exercise prosecutorial discretion. *See* Memorandum from Alejandro N. Mayorkas, DHS Secretary, to Tae D. Johnson et al., *Guidelines for the Enforcement of Civil Immigration Law* (September 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.

On April 3, 2022, the Office of the Principal Legal Advisor (OPLA) issued a memo to all OPLA attorneys regarding the September 2021 memo. Memorandum from Kerry E. Doyle, Principal Legal Advisor, to all OPLA attorneys, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdfhttps://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf. The memo took effect on April 25, 2022. The memo elaborates on the priorities for OPLA attorneys to follow when assessing whether to remove a noncitizen. It instructs OPLA attorneys to assess each case independently to determine whether the case falls into one of the three enforcement priority categories. Priority A includes threats to national security, described as those who are "engaged in or [are] suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or who otherwise poses a danger to national security." Priority B includes threats to public safety, described as those "who pose[] a current threat to public safety because of serious criminal conduct," which is evaluated by a totality of the circumstances. And Priority C includes threats to border security, described as individuals who "are apprehended at the border or port of entry while attempting to unlawfully enter the United States," or those who "are apprehended in the United States after unlawfully entering after November 1, 2020." If the case is determined to be a nonpriority case, then OPLA attorneys should exercise discretion. Further, the memo includes guidance on stages where OPLA attorneys may exercise discretion, including but not limited to: not filing Notice to Appears, moving to administratively close cases, moving to dismiss removal proceedings, focusing appeals on priority cases, etc.

Litigation is challenging the new enforcement guidelines. As of June of 2022, the guidelines have been enjoined for failing to comply with the notice and comment requirements of the Administrative Procedure Act. Texas v. United States, 2022 U.S. Dist. LEXIS 104521 (S.D. Tex. June 10, 2022).

P. 806 (§ 7.02[B]): Remove Note 8 (No DACA Program for Parents). Replace Note 4 with the following:

4. Status of DACA Today. The Trump administration tried to end DACA through a memorandum, but this was challenged in the courts. On June 18, 2020, the Supreme Court held in *Dep't of Homeland Security v. Regents of the Univ. of California* that the way DACA was ended was "arbitrary and capricious" under administrative law and vacated the DHS memo rescinding DACA. Nearly six weeks after the Supreme Court decision in *Regents*, then Acting DHS Secretary Wolf issued a July 28, 2020 memorandum ("Wolf Memo"), seemingly ignoring the Supreme Court decision, by enacting a form of DACA that rejected first time applicants, effectively ended advance parole requests except in "exceptional circumstances;" and reduced renewal periods for existing DACA recipients from two years to one year.

In December 2020, a federal district court in New York held that the Wolf Memo was invalid and that DACA must be reinstated immediately, holding the Wolf Memo to be invalid. For more information see Shoba Sivaprasad Wadhia, *DACA Restored,* Medium (Dec. 5, 2020), https://shobawadhia.medium.com/daca-restored-10da2c888acc; Michael A. Olivas & Shoba Sivaprasad Wadhia, *Remove the Sword of Damocles from DACA*, Jurist (Aug. 12, 2020 7:00AM), https://www.jurist.org/commentary/2020/08/olivas-wadhia-daca-dhs-memo/. On July 16, 2021, a federal district court in Texas in a separate legal case concluded that DACA is unlawful. Texas v. United States, No. 1:18-CV-00068, 2021 U.S. Dist. LEXIS 133117 (S.D. Tex. July 16, 2021). The ruling does not affect current DACA recipients but does prevent the Department of Homeland Security from approving new DACA requests. *Id.*

On January 20, 2021, President Biden issued a Memorandum titled *Preserving and Fortifying Deferred Action for Childhood Arrivals.* Memorandum on Preserving and Fortifying Deferred Action for Childhood Arrivals, 2021 Daily Comp. Pres. Doc. 64 (Jan. 20, 2021).

On March 26, 2021, the Secretary of the Department of Homeland Security (DHS), Alejandro N. Mayorkas, released a statement announcing that DHS will issue DACA as a regulation under notice and comment rulemaking. Statement from Alejandro Mayorkas, Sec'y of the Dep't of Homeland Sec. (Mar. 16, 2021), https://www.dhs.gov/news/2021/03/26/statement-homeland-security-secretary-mayorkas-daca.

On September 28, 2021, the DHS's U.S. Citizenship and Immigration Services (USCIS) published a proposed rule that would codify the DACA 2012 policy. 86 Fed. Reg. 53736 (Sept. 28, 2021). The language of the proposed regulation is similar to DACA 2012. The proposed rule would differ on procedure by allowing a person to request deferred action without applying for work authorization (and by extension lowering the filing fee); by creating a new work authorization regulation specifically for DACA recipients; and by terminating work authorization automatically when a person's DACA has been terminated (assuming they also applied for and received work authorization). *Id.* For more information on the proposed regulation, see https://www.presidentsalliance.org/wp-content/uploads/2021/09/2021-09-28-The-Proposed-DACA-Regulation-What-You-Need-to-Know.pdf As of May 2022, the proposed rule has not been finalized.

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: June 9, 2022), 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* Exec. Order No. 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:

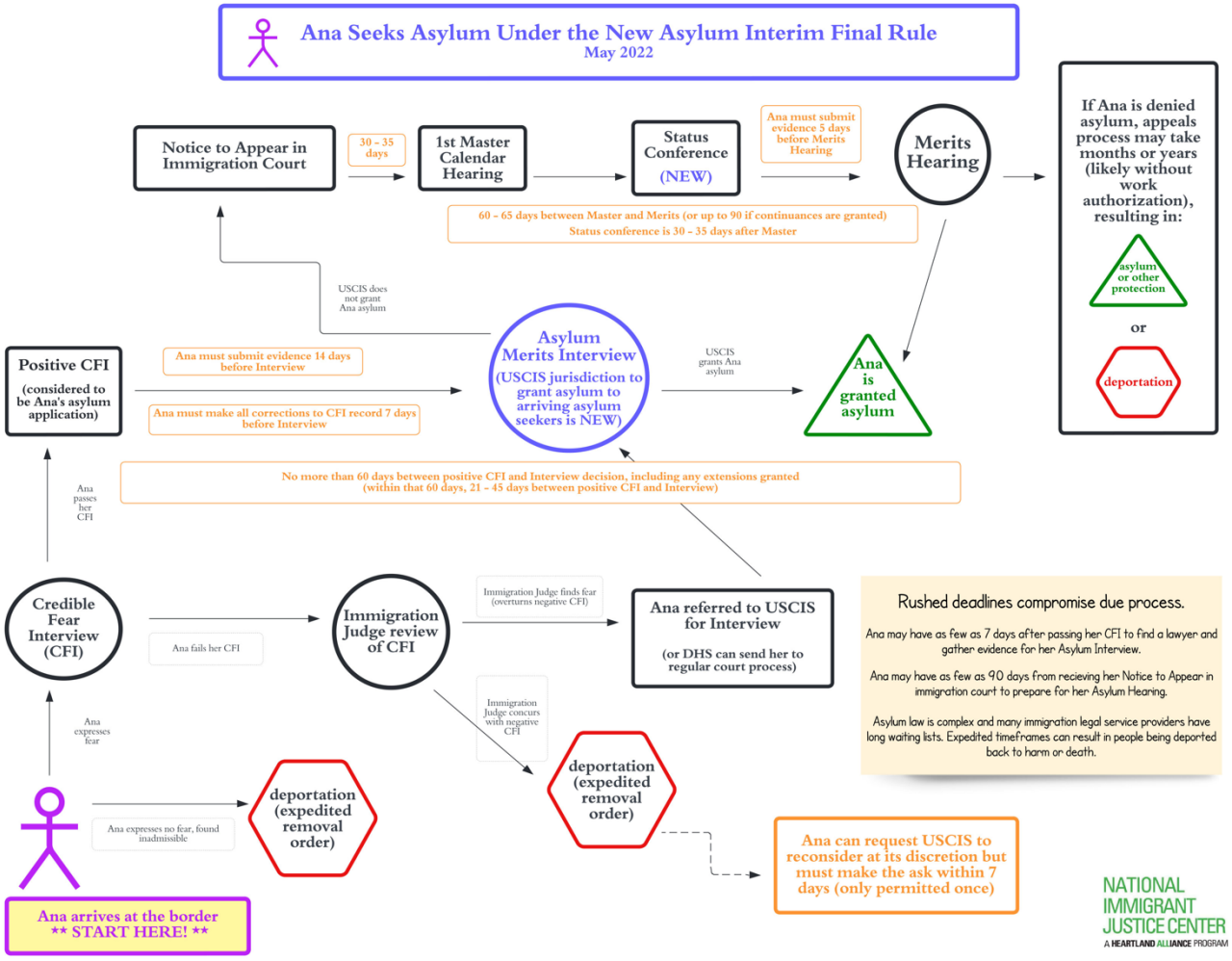
In May 2021, President Biden increased refugee admissions for fiscal year 2021 from 15,000 to 62,500. 86 Fed. Reg. 24475 (May 7, 2021). In October 2021, he authorized the admission of up to 125,000 refugees for fiscal year 2022. Presidential Determination on Refugee Admissions for Fiscal Year 2022, 2021 Daily Comp. Pres. Doc. 827 (Oct. 8, 2021).

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

In March 2022, the Biden administration announced its plans to adopt a new asylum rule to streamline asylum applications. The interim final rule was published on March 29, 2022, and took effect on May 31, 2022. 87 Fed. Reg. 18078 (Mar. 29, 2022). The rule allows USCIS asylum officers to hear and decide asylum claims for noncitizens who have received a positive credible fear determination after being placed in expedited removal proceedings. During the credible fear screening process, the rule states that the "significant possibility" standard is to be used for CAT and withholding of removal screenings, and screenings for asylum and withholding of removal is to occur without applying any bars. Noncitizens who are not granted asylum by an asylum officer will be placed in streamlined proceedings before an immigration judge.

According to a fact sheet published by USCIS on May 26, 2022, the implementation will be in a phased manner. *See* USCIS, FACT SHEET: Implementation of the Credible Fear and Asylum Processing Interim Final Rule (May 26, 2022), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/fact-sheet-implementation-of-the-credible-fear-and-asylum-processing-interim-final-rule.

The asylum rule is a significant change from previous rules, which limited the role of asylum officers during the expedited removal process. Below is a flowchart of how the rule will work:



The interim final rule imposes timelines for USCIS and EOIR in reviewing asylum applications. According to Human Rights First, the rule has many improvements as well as areas of concern. Improvements include relieving the backlog of asylum cases, minimizing detention of asylum seekers, providing all asylum seekers with full asylum interviews with USCIS, and permitting immigration judges to grant asylum without a merits hearing. However, there are also concerns regarding the timelines and deadlines imposed by the rule. Some concerns include making it harder for noncitizens to obtain counsel and thoroughly prepare their cases, mistaken decisions because of rushed deadlines, and due process violations. *See* Human Rights First, Fact Sheet: Asylum Process Rule Includes Welcome Improvements, But Critical Flaws Remain to Be Resolved (May 6, 2022), https://www.humanrightsfirst.org/sites/default/files/AsylumProcessIFRFactSheet.pdf.

As of May 27, 2022, there is also litigation pending that challenges the interim final rule.

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

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 3:

3. Regulating Social Group. On February 2, 2021, President Biden issued Executive Order 14010, titled "Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border." Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 2, 2021) https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration. The executive order directed the Attorney General and DHS to, within 270 days, "promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a "particular social group," as that term is used in 8 U.S.C. 1101(a)(42)(A), as derived from the 1951 Convention relating to the Status of Refugees and its 1967 Protocol." *Id.* at 8271.

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. Memorandum from Alejandro Mayorkas, Sec'y of the Dep't of Homeland Sec., Termination of the Migrant Protection Protocols Program (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf. Later the same month, on June 23, 2021, DHS announced that it was expanding the pool of individuals enrolled in MPP who would be eligible to be processed into the United States. The expansion included MPP-enrolled individuals who had their cases terminated or were ordered removed in absentia, as well as MPP-enrolled individuals with pending cases. Press Release, Dep't Homeland Sec., DHS announces Expanded Criteria or MPP-Enrolled Individuals Who Are Eligible for Processing into the United States (June 23, 2021), https://www.dhs.gov/news/2021/06/23/dhs-announces-expanded-criteria-mpp-enrolled-individuals-who-are-eligible-processing.

After the termination of MPP by DHS, litigation started in Texas on the authority of DHS to terminate MPP. Litigation has taken place in the U.S. District Court for the Northern District of Texas, Fifth Circuit Court of Appeals and the Supreme Court of the United States. For a litigation timeline of MPP, see https://refugees.org/wp-content/uploads/2022/03/MPP-TimelineFinal.pdf. The district court held that the termination of MPP failed to comply with administrative law and ordered DHS to reimplement the program. The Fifth Circuit refused to set aside this decision. The U.S. Supreme Court heard oral argument on April 26, 2022, in *Biden v. Texas*, to determine whether the termination of MPP has legal effect. On June 30, 2022, the Supreme Court reversed the Fifth Circuit and held that the Biden administration had the legal authority to end the program. For more on the Supreme Court's decision, see the supplement to Chapter 2.

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 February 2, 2021, President Biden signed Executive Order 14010 which ordered "[t]he Secretary of HHS and the Director of CDC, in consultation with the Secretary of Homeland Security, shall promptly review and determine whether termination, rescission, or modification of [Title 42] is necessary and appropriate." Exec. Order. No. 14010, 86 Fed. Reg. 8267, 8269 (Feb. 5, 2021). On May 12, 2021, DHS announced that it would explore a humanitarian exception to the Title 42 order. Press Release, Dep't of Homeland Sec., DHS Improves Process for Humanitarian Exceptions to Title 42 (May 12, 2021), https://www.dhs.gov/news/2021/05/12/dhs-improves-process-humanitarian-exceptions-title-42. On August 2, 2021, the CDC released an order after a reassessment, continuing Title 42 and exempting unaccompanied children arriving at the border. 86 Fed. Reg. 42828 (Aug. 5, 2021).

Title 42 continues to be controversial. On the litigation front, the D.C. Circuit held in March 2022 that under Title 42 the Executive may not expel noncitizens to places where they may face persecution or torture. Instead, the Executive has the authority under Title 42 to expel noncitizens to places where they would not face persecution or torture, and has the authority to detain noncitizens until they can be removed to those countries. *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022).

On April 1, 2022, the Biden administration announced that it would end Title 42 expulsion beginning on May 23, 2022. Media Statement, Centers for Disease Control and Prevention, CDC Public Health Determination and Termination of Title 42 Order (Apr. 1, 2022), https://www.cdc.gov/media/releases/2022/s0401-title-42.html. In response, DHS Secretary Mayorkas announced that beginning on May 23, 2022, DHS would no longer process individuals pursuant to Title 42. Dep't of Homeland Sec., FACT SHEET: DHS Preparations for a Potential Increase in Migration (Mar. 30, 2022), https://www.dhs.gov/news/2022/03/30/fact-sheet-dhs-preparations-potential-increase-migration.

Texas Attorney General Paxton filed a lawsuit challenging the recission of Title 42, claiming the recission failed to comply with the Administrative Procedure Act (APA) and that the recission would lead to a public safety crisis. *See* AG Paxton Brings 10th Border Crisis Lawsuit Against the Biden Administration (Apr. 22, 2022), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-brings-10th-border-crisis-lawsuit-against-biden-administration. On May 20, 2022, a federal court judge in Louisiana blocked the Biden administration's recission of Title 42 and granted a preliminary injunction, agreeing with the 24 plaintiff states that they would likely be able to prove that sufficient notice was not provided to them when the administration announced the recission, and that the recission would cost severe financial harm to the states. *Louisiana v. Ctrs.*

for Disease Control & Prevention, 2022 U.S. Dist. LEXIS 91296 (W.D. La. May 20, 2022). The same day, DHS announced in a statement that it would comply with the District Court's ruling. Press Release, Dep't of Homeland Sec., DHS Statement on District Court Ruling on Title 42 (May 20, 2022), https://www.dhs.gov/news/2022/05/20/dhs-statement-district-court-ruling-title-42. The Biden administration has also released a statement announcing its intention to appeal the decision, but will continue complying with Title 42 while the appeal is pending. Statement from Karine Jean-Pierre, White House Press Sec'y, on the District Court Ruling on Title 42 (May 20, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/20/statement-by-white-house-press-secretary-karine-jean-pierre-on-the-district-court-ruling-on-title-42/.

Immigration advocates have been quick to respond to this order. According to nonprofits like the International Rescue Committee and the American Immigration Council, this order by the Louisiana District Court will further the harm and turmoil Title 42 has caused so far. As these organizations have stated, asylum is a fundamental right for all people seeking protection, and Title 42 has denied this right to thousands and thousands of individuals over the past two years. Advocacy groups have called out the counter productiveness of the policy as the United States lifts COVID restrictions for tourists and other nonessential travel, and call on the Biden administration and Congress to continue efforts to end Title 42. *See* Press Release, International Rescue Committee, Court injunction to prevent end of Title 42 will continue to endanger thousands fleeing harm (May 20, 2022), https://www.rescue.org/press-release/court-injunction-prevent-end-title-42-will-continue-endanger-thousands-fleeing-harm; Press Release, American Immigration Council, Federal Court Blocks Expiration of Title 42 (May 20, 2022), https://www.americanimmigrationcouncil.org/news/federal-court-blocks-expiration-title-42.

For more information on the racialized impacts of Title 42, see the American Constitution Society's podcast on the current refugee crisis and challenges posed by the U.S. immigration system, https://www.acslaw.org/podcast/episode-43-just-how-broken-is-our-immigration-system/.

P. 883 (§ 8.03): Add a new example hypothetical after above additions, before § 8.04 titled "Problem 8-3: Exploring the Bars to Asylum and Withholding of Removal"

Asal was born in Afghanistan in 1996. She is now 26 years old. For a time, her entire family lived in exile in Pakistan due to harassment by the Taliban. Asal was 6 years old when they arrived there. They had temporary residence in Pakistan that had no specific end date. Asal has a copy of her Pakistan visa in her passport.

As the U.S. and other military forces helped to stabilize the region, her family returned and settled near Kabul. Asal was 22 when her family returned. Asal admired the peacekeepers and with the permission of her family she trained to be a police officer. As part of her training, she was trained in the use of guns and some military equipment.

At age 23, she was part of a group of officers who were specially trained to interrogate and investigate acts of sabotage that might have been perpetrated by female members of any insurgent or terrorist groups. One of the young women in her unit's custody was diabetic but did not tell anyone upon her arrest. During the long hours of interrogation, she asked for water, but water was

only allowed every six hours. The young woman fell into a diabetic coma and died in custody. Her family blamed the police and the military. Several websites named female officers as people responsible for the detained woman's death. Asal was not named in these posts but many people in her family, her neighborhood, and of course, her colleagues knew she was part of the interrogation team.

Asal also was very proud of her work as a police officer where she organized and lead community meetings with women and girls to encourage female education. On several occasions, she traveled to meetings with her supervisor to convince regional leaders to expand opportunities for females to attend school. At these meetings, members of the Taliban would also attend if they were leaders in that regional area. The Afghan government was trying to build a dialogue between Taliban clerics and the civil society. Asal, would provide travel stipends and reimbursement from Police Department funds for all people who submitted travel expenses. Some of the Taliban leaders requested and received funds under Asal's authority.

Asal was evacuated from Afghanistan in August of 2021 by the U.S. military and granted humanitarian parole admission to the United States. She would like to apply for asylum. Her current grant of work authorization and parole will expire in 18 months.

Is Asal subject to any statutory bars found in INA § 208(b)(2)(D); 8 U.S.C. § 1158(b)(2)(D)?
Is Asal subject to a statutory bar found in INA § 212(a)(3)(B)(i); 8 U.S.C. § 1182(a)(3)(B)(i)?
Do these facts raise any other concerns?

P. 886 (§ 8.04): Add new section before § 8.05 on TPS versus asylum:

Another protection that may be available for people who fear returning to their home country is Temporary Protected Status (TPS). TPS is available to individuals from countries that have been designated by the Secretary of Homeland Security and who are physically and continuously present in the U.S. since the date of designation. Individuals who are granted TPS may also be granted work and travel authorization and may not be removed from the U.S. during the designation period. Individuals applying for asylum may not be granted work authorization until asylum is granted. Further, asylees may be granted travel authorization, but risk their status being revoked if they travel to their home country. Unlike asylum, TPS is a temporary form of protection that does not directly lead to lawful permanent resident status. Jill H. Wilson, Cong. Rsch. Serv., RS20844, Temporary Protected Status: Overview and Current Issues (Oct. 10, 2018), https://crsreports.congress.gov/product/pdf/RS/RS20844/48.

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 Fourth Circuit, and distinguished by the First Circuit.

Chapter 9: U.S. Citizenship and Naturalization

Page 894 (§ 9.01): Add the following after [7] Voting in Elections:

On May 25, 2022, multiple applicants for U.S. citizenship sued the U.S. Citizenship and Immigration Services (USCIS) for unreasonable delays in the immigration agency's processing of their naturalization applications. USCIS stores paper-based immigration files at the Federal Records Center (FRC) in Kansas City, Missouri. Plaintiffs claim that they are prejudiced by the USCIS's delay in accessing those records. The plaintiffs claim that they will be unable to vote in the 2022 elections because of the unreasonable delay.

More information on the status of the FRC can be found at the National Archives website. Federal Records Center, FRC Reopening Frequently Asked Questions (Mar. 25, 2022), https://www.archives.gov/frc/reopening-faq.

Page 896 (§ 9.02): Add the following to the end of Note 1 after Problem 9-2:

Former President Donald J. Trump vowed to end birthright citizenship for U.S.-born children of noncitizens and undocumented immigrants. The Trump administration issued a rule allowing customs officials to deny entry to travelers whom they suspected came to the United States only to give birth to their child so that their child could become a U.S. citizen. John Bowden, *Trump Administration Releases Rule to Restrict 'Birth Tourism'*, THE HILL (Jan. 23, 2020, 10:36AM), https://thehill.com/homenews/administration/479540-trump-administration-releases-rule-to-restrict-birth-tourism. 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, 5:13PM), 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/; Greg Siskind, *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.