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Cyrus D. Mehta
Editor-in-Chief

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Letter from the Editor-in-Chief

The *AILA Law Journal* hosted its first symposium, titled "Shaping Immigration Policy Through the Federal Courts," on March 21, 2024, in Washington, D.C. I am pleased to introduce readers to this special symposium issue, which covers the topics of the symposium in detail and also allows those who were not in attendance to catch the novel discussions between immigration practitioners and academics.

The theme is very timely. As Congress has remained paralyzed, and been unable to enact sweeping immigration reform, the federal courts have become crucial in the evolution of immigration law. President Biden, like many of his predecessors, has relied on executive actions to reshape key elements of the immigration system. Many of the initiatives have been challenged in federal court. To what extent do plaintiffs have standing to challenge federal immigration policy? What does the future bode for *Chevron* deference? The panels and presenters covered these important issues and more at the symposium.

One example of an executive action is President Biden's humanitarian parole policy for Cuba, Haiti, Nicaragua, and Venezuela (CHNV), which has been widely successful since its implementation. Section 212(d)(5) of the Immigration and Nationality Act (INA) authorizes the president to parole noncitizens on a case-by-case basis for urgent humanitarian reasons or significant public benefit. To date, 375,000 nationals from these countries have been paroled into the United States in an orderly manner, thus avoiding perilous journeys through other countries with the aid of smugglers. Texas opposed this program, along with 20 other states, and filed a lawsuit to block it on the ground that the humanitarian parole policy was too broad and violated the narrow prescription under INA section 212(d)(5) that parole can only be granted on a "case by case basis for urgent humanitarian reasons."

Texas's lawsuit was dismissed by none other than Judge Tipton for lack of standing.[1] Judge Tipton, who had been receptive to prior challenges by Texas, gave short shrift to Texas's claim that the parole of CHNV nationals would impose additional health care, incarceration or education costs since the CHNV program has resulted in the decrease of migrants entering the U.S. irregularly through the southern border. Prior to the CHNV program the Department of Homeland Security (DHS) released an average of 2,356 CHNV nationals per day but after the implementation of the program there were a total of 1,326 arrivals per day, which was a 44 percent reduction. As a result, Texas was unable to show an "injury in fact" that the CHNV program increased the costs on Texas.

The court's finding that Texas lacked standing allows the CHNV program to continue, which has been a spectacular success thus far as it redirects many migrants from risky journeys through Mexico into a lawful framework.[2]

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This is the second time that Texas's challenge has been smacked down due to lack of standing. Last June 2023, in *United States v. Texas*, the Supreme Court in an 8-1 majority opinion rendered a blow to Texas and Louisiana in holding that they had no standing to challenge the Biden administration on federal immigration policy on enforcement priorities as established in the memo of DHS Secretary Alejandro Mayorkas.[3] Writing for the majority, Justice Brett Kavanaugh said, "The States have brought an extraordinarily unusual lawsuit. They want a federal court to order the Executive Branch to alter its arrest policies so as to make more arrests. Federal courts have not traditionally entertained that kind of lawsuit; indeed, the States cite no precedent for a lawsuit like this."

It remains to be seen whether Texas's challenge to the Deferred Action for Childhood Arrivals (DACA) program can also be denied based on standing. Currently, the Fifth Circuit is reviewing Judge Hanen's ruling[4] in September 2023 holding that DACA is illegal. Judge Hanen also affirmed that Texas had standing to challenge DACA notwithstanding the Supreme Court decision in *United States v. Texas*, in which Justice Kavanaugh also stated that "a challenge to an Executive Branch policy that involves both the Executive Branch's arrest or prosecution priorities and the Executive Branch's provision of legal benefits or legal status could lead to a different standing analysis." Judge Hanen seized upon this sentence from Justice Kavanaugh's decision by holding that DACA involved "non prosecution with benefits" and so it was distinguishable from the enforcement priorities in the Mayorkas memo.

While challenging standing is critical in fending off a lawsuit, there are other significant developments in the federal courts that can reshape immigration policy. Under *Chevron* deference, the courts defer to an agency's interpretation of an ambiguous statute, and this applies even to an immigration statute.[5] Two upcoming Supreme Court cases—*Relentless Inc. v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo*—may narrow *Chevron* or even eviscerate it altogether.[6] If the Supreme Court's holdings in *Relentless* and *Loper Bright* deprive agencies of the ability to interpret ambiguous statutes without explicit congressional authorization, it may result in both good and bad outcomes in the immigration context. According to Think Immigration: "For example, in removal cases, *Chevron* deference hurts those seeking review of immigration judge or Board of Immigration Appeals decisions. It can also hurt employers seeking to obtain a favorable interpretation of a statute granting H-1B or L visa classification to a noncitizen worker. However, *Chevron* deference can help when the immigration agency seeks to give employment authorization benefits, such as with the Deferred Action for Childhood Arrivals program or with F-1 optional practical training."

The Supreme Court also recently heard oral argument in *Securities and Exchange Commission v. Jarkesy*,[7] a case that involves whether the statutes allowing the Securities and Exchange Commission (SEC) to bring administrative enforcement proceedings that impose civil penalties violate the Seventh

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Amendment right to a jury trial, whether the statute allowing the SEC to enforce securities laws through agency adjudication rather than in federal court violates the nondelegation doctrine, and whether the Congress' decision to allow Administrative Law Judges to be removed only for "good cause" violates Article II of the Constitution, which commands the President to "take Care that the Laws be faithfully executed." Although *Jarkesy* is a case involving the SEC's ability to bring administrative proceedings, it could also impact the ability of Administrative Law Judges to hear proceedings involving violations by employers under INA section 274A and INA section 274B. To what extent would *Jarkesy* impact the immigration court system?

And finally, and not the least, there is also a tussle between state immigration laws that conflict with federal immigration law as in Texas's SB4. The question is whether a state can facilitate the deportation of noncitizens. The Fifth Circuit Court of Appeals denied Texas's request to allow Senate Bill 4 (88-4) to go into effect while the court considers its legality.[8] In the meantime, other states are also enacting copycat laws that conflict with federal immigration law.

Within the context of these seismic developments in the federal courts, the symposium featured three panels as well as individual presentations. The interactions between immigration practitioners and academics generated rich and novel discussions. The first panel "Creating Pathways for STEM Workers Through Non-Legislative Means" featured editorial board members William Stock and Diane Rish, along with Amy M. Nice, Distinguished Immigration Fellow and Visiting Scholar, Cornell Law School, and Simon Nakajima, Assistant Director for STEM Immigration, White House Office of Science and Technology. This panel discussed various initiatives through non-legislative means to attract and retain STEM talent through various visa categories. These initiatives are implicitly authorized in the Immigration and Nationality Act and ought to withstand court challenges, according to the panelists. For instance, practical training has been implemented for 70 years and students have been exempted from the Federal Insurance Contributions Act since the 1960s. The transcript of this panel is included in this issue.

The second panel, "DACA Litigation and the Opportunity for All Campaign" featured Kaitlyn Box, editorial board member, and Ahilan T. Arulanantham from UCLA Law School and Anil Kalhan from Drexel University. This panel featured a lively discussion on the DACA litigation, especially the recharacterization of DACA as not only a policy deferring immigration enforcement but also conferring lawful presence and benefits. The panel also included a discussion of the ability of states to employ undocumented persons as the prohibition against unauthorized employment under section 274A(a)(1) does not include states. If states and state entities such as universities could employ undocumented persons, especially those who have been left out of DACA, it would be a huge game changer. There was also a discussion of whether, in the context of Texas's SB4 and wider acceptance of state immigration laws, a state could also decide to employ noncitizens under this novel interpretation

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of section 274A(a)(1). The transcript of the proceedings of this panel is also in this issue.

The third panel, "The Role of Federal Courts in Shaping Asylum Law: A Comparative Analysis," featured Dree Collopy who is the author of *AILA's Asylum Primer* along with editorial board member Rebecca Sharpless and Sabrineh Ardalan, Clinical Professor of Law, Harvard Law School. The panelists discussed the impact of federal courts on the development of gender-based asylum claims, focusing on the protected grounds of membership in a particular social group and political opinion. The article for this panel, authored by Zack Albun and Sabrineh Ardalan, is included this issue. Here too there was an interesting discussion of whether, in the event *Chevron* is eviscerated under *Relentless Inc.* and *Loper Bright Enterprises*, the new social group definitions as established by the Board of Immigration Appeals requiring the group to be "socially distinct" and described with "particularity" can be challenged.[9]

The next part of the symposium involved individual presentations so capably moderated by editorial board member Thomas Ragland. The first presentation, *Correcting Course on Matter of Lozada Through the Federal Courts*, by Sui Chung, Sarah Owings, Susan Roy, and Rekha Sharma-Crawford challenged the requirement to file a bar complaint against immigration practitioners to demonstrate ineffective assistance of counsel under *Matter of Lozada*.[10] In criminal proceedings under *Strickland v. Washington*,[11] the appropriate standard for ineffective assistance of counsel requires both that the defense attorney was objectively deficient and the defendant was prejudiced by the representation. Jenna Ebersbacher presented on Biden's "Circumvention of Lawful Pathways" rule,[12] which has created opposition on both sides of the aisle. Immigration advocates, as well as Texas, have sought to block the rule in court. Next, Jean Binkovitz and Eric Eisner presented on how the legislative history of the Administrative Procedure Act might be used to minimize government use of the foreign affairs exception. Their papers are published in this issue. Finally, Kathryn Brady and Franchel Daniel presented on agency-initiated policy changes in response to increased immigration litigation, but did not publish a paper. Two papers have been published in this issue even though the authors did not present at the symposium: Susan M. Akram's "Can the Law Still Protect Access to Asylum? A Comparative Look at the Fight to Preserve Access to Asylum in the United States and the United Kingdom," and Robert Pauw's "Shaping Immigration Policy Through the Federal Courts."

I thank the members of the editorial board for their hard work in selecting the speakers, putting together the panels, agreeing to serve as moderators, as well as editing the transcripts and papers. This symposium was conceived through trial and error and on a shoestring budget. It was not certain which topics would be relevant, which speakers would confirm, and whether the topic would still be relevant by the date of the symposium. In the end, everything fell into place. All this was largely due to managing editor Danielle Polen's steadfast support, wisdom, and encouragement during the planning stages,

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and for not resting even after the successful symposium until she completed the editing of this special symposium issue. I also acknowledge the role that Richard Link played in ensuring that we all stayed on track. Richard has since left AILA and we wish him all the best in his future endeavors. Finally, I also thank and acknowledge the contributions of long-serving editorial board member Mahsa Khanbabai, who will leave the board after this term, and Dan Berger, who left the board earlier this year. Both made significant contributions to the symposium and its planning.

After the success of this symposium, we hope to make the symposium an annual event featuring important immigration topics of the day where the goal is to foster meaningful dialog and discussion with academics, policy makers, government officials, and immigration practitioners, resulting in a rich exchange of ideas that will be preserved for posterity in future editions of the *AILA Law Journal*!

Cyrus D. Mehta
Editor-in-Chief

Notes

1. *See* State of Texas v. U.S. Department of Homeland Security, 6:23-cv-00007, (S.D. Tex., Mar. 8, 2024).
2. *See* Parole Sponsorship is a Revolution in Immigration Policy, Briefing Paper 165, Cato Institute, Sept. 18, 2023.
3. 599 U.S. 670 (2023).
4. *See* State of Texas v. United States, Case 1:18-cv-00068, (S.D. Tex., Sept. 13, 2023).
5. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).
6. *See* Is Chevron Dead? Thoughts After Oral Argument in Relentless, Inc. and Loper Bright, Think Immigration, https://www.aila.org/blog/is-chevron-dead-thoughts-after-oral-arguments-in-relentless-inc-and-loper-bright-enterprises/.
7. *See* Securities and Exchange Commission v. Jarkesy, No. 22-859 (5th Cir. 2023), cert. granted June 30, 2023.
8. *See* United States v. Texas, Case: 24-50149 (5th Circuit 2024).
9. *See, e.g.*, Matter of M–E–V–G–. 26 I&N Dec. 227 (BIA 2014).
10. 18 I&N Dec. 637 (BIA 1988).
11. 466 U.S. 668 (1984).
12. 88 FR 31314.

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Creating Pathways for STEM Workers Through Non-Legislative Means

William A. Stock, Simon T. Nakajima, Diane Rish, and Amy M. Nice*

Abstract: In this panel, *AILA Law Journal* editorial board members and immigration attorneys William Stock and Diane Rish, along with Amy M. Nice, Distinguished Immigration Fellow and Visiting Scholar, Cornell Law School, and Simon Nakajima, Assistant Director for STEM Immigration, White House Office of Science and Technology, discussed various initiatives through non-legislative means to attract and retain STEM talent in the United States through various visa categories. According to the panelists, these initiatives are actions authorized in the Immigration and Nationality Act for the executive branch to undertake.

William Stock

We celebrate, or bemoan, the thirtieth anniversary of the Immigration Act of 1990, which set the fundamental contours of employment-based immigration in the United States, amended by the American Competitiveness in the 21st Century Act. Perhaps we all should have known that it might have been misnamed. It should have been named the American Competitiveness for the 21st Century Act given how hard it is to move legislation through Congress that would help in positive immigration directions.

That provides the impetus for our first panel, creating pathways for STEM (science, technology, engineering, and mathematics) workers through non-legislative means. I want to briefly introduce Diane Rish, who is Senior Manager for Immigration at Salesforce, to my immediate right. To her right, Amy Marmer Nice, distinguished Immigration Fellow and Visiting Scholar with Cornell's Immigration Law and Policy Program. And to my far right, Simon Nakajima, an Assistant Director of the White House Office of Science and Technology, where he is responsible for STEM Immigration. On behalf of *AILA Law Journal*, thank you all for your participation today.

Diane, can you start by speaking about why is STEM talent so highly desired by U.S. businesses and for our economic competitor countries, but in particular within the tech industry?

Diane Rish

I want to start by saying thank you for the opportunity to speak with you today as part of the inaugural *AILA Law Journal* symposium. My remarks

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today draw upon my experience working in-house at Salesforce, which is a cloud-based software company headquartered in San Francisco; experience working at AILA National, advocating for business immigration reform on behalf of businesses and working closely with business groups and coalition partners. And finally, working in the private sector as an immigration attorney, representing clients in the advanced technology, semiconductor manufacturing, cloud computing arenas, among others.

We are living through an extremely exciting and unprecedented time in the technology industry, in particular with artificial intelligence (AI) transforming the economy across all sectors, including business, health care, the financial sector, and even the legal field. Although AI technologies and tools have been around for years, it was just a little more than a year ago, in November 2022, when ChatGPT, a generative AI tool, hit the mainstream and really took the world by storm. Just two months after its launch, it is estimated that ChatGPT reached over a hundred million active users, making it the "fastest-growing consumer application in history."[1] So I think it comes as no surprise that AI is anticipated to drive a massive transformation in all aspects of our daily lives, in terms of how we live and how we work. Just this past summer, Salesforce's Chief Executive Officer, Marc Benioff, reiterated this sentiment, stating that "AI is not just the most important technology of our lifetime, but probably the most important in any lifetime."[2] Indeed, the tech industry itself has profoundly shifted since the release of ChatGPT. Many of the world's major tech companies, such as Microsoft, Meta, Google, and even Salesforce, are embracing generative AI, and the generative AI "revolution" as it is being dubbed, and racing ahead to innovate and produce products, services, and business opportunities within the generative AI arena. Salesforce itself has launched a number of AI products. We launched Einstein GPT in 2023. And our most recent launch this year is Einstein Copilot, which is an AI-powered virtual assistant. So, the question now that companies are asking themselves is not "why should AI be embraced," but rather "how can AI be embraced and how can its challenges be mitigated and its potential leveraged to transform business operations?"

More broadly, beyond just AI, tech companies have been driving path-breaking innovation for many, many years within the broader technology arena and are continuing to do so by developing innovative products, tools, and services that service our economy and our research institutions, among other things. It's important to highlight that such innovation has led to the creation of new jobs, new opportunities, and new industries here in the United States. Indeed, tech companies are among the nation's foremost creators of jobs for U.S. workers.[3] Yet to maintain their technological competitiveness in a very fierce and fast-moving global marketplace, tech companies seek to attract and retain top talent with STEM expertise to join their workforce.

To attract and retain this top talent, it's not unusual for companies to recruit both domestically and internationally to really cast a broad net on the

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talent that they can attract. In some cases, that STEM talent comes directly from within our borders here in the United States by way of our higher education system. Indeed, it is one of the United States' greatest advantages—the strength of our higher education system—which attracts students from all over the world to study at our universities and colleges. What we're seeing is that international students are graduating with STEM degrees at a high rate. According to the National Center for Education Statistics in the United States, international students represent nearly half of all STEM masters and half of all PhD graduates in the United States.[4]

It's not unusual for tech companies to seek out the brightest and the best talent that is out there. Indeed, companies like Salesforce and others are mindful that they are competing with companies across the world, as well as other nations across the world, for this top talent. Companies are mindful that countries around the world are taking their own measures to attract such talent through their immigration laws and policies. We see this in the United Kingdom, Canada, and Singapore, just to name a few countries where, while here in the United States immigrant advocates have been advocating tirelessly to update our immigration laws, these nations are driving forward with new immigration policies to attract this talent as well.

William Stock

In attracting this STEM talent, what does the current adjudication environment look like for U.S. companies that are trying to retain this foreign talent that is graduating from U.S. schools?

Diane Rish

For businesses, and especially tech companies, particularly for those that are leveraging the legal immigration system to attract and retain skilled foreign talent, the adjudication environment has been relatively consistent and favorable in recent years. For example, we've seen a decrease in Requests for Evidence (RFEs) and denials. H-1B denial rates have dropped significantly, from an all-time high in FY 2018 of a 24 percent denial rate, down to just 2.2 percent in FY 2022, and a 3.5 percent denial rate in FY 2023.[5] Similarly, we've seen visa appointments at U.S. consulates improve greatly in terms of the wait times to get a visa interview appointment.[6] Administrative processing has also decreased substantially at U.S. consulates.[7] In practice, this relatively predictable adjudication environment, where companies are experiencing fewer denials, fewer RFEs, and reduced administrative processing delays at consulates overseas has helped to minimize business disruption. This is because it allows employees to travel more easily around the world and reduces the potential

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for lapses in U.S. work authorization, which could occur, for example, when there's an unexpected RFE or denial.

On the immigration policy side, companies are also seeing a much more favorable policy environment, which we'll be talking about in more detail today, particularly with respect to the policies that the Biden administration has put into place that have helped make the United States more welcoming to STEM talent. In January 2022, for example, the Biden administration released a collection of immigration measures to encourage international STEM researchers, students, experts to contribute to innovation and job-creation efforts in the United States.[8]

William Stock

I think it does point to the fact that the adjudication tone or leadership from the top is an important policy lever that may need to be further looked at as a way of influencing any policy area in particular. In the immigration space, just the sort of tone from the top and saying that this is something we want to facilitate—meaning that when there is clear guidance, more people may feel they can leverage the immigration system, right? What are some of the challenges though within the U.S. immigration system that businesses, and particularly the tech community, are facing at the moment?

Diane Rish

Before I address your question about immigration challenges, I do want to highlight a few policies that have really been instrumental to businesses, and in particular the tech industry, to help attract and retain top talent here in the United States. In particular, I believe the National Interest Waiver (NIW) policy guidance is one of the most impactful measures that the Biden administration has taken toward easing the ability of U.S. employers to attract and retain STEM talent.[9] It's important to note that this is not a new policy, but rather U.S. Citizenship and Immigration Services (USCIS) updated its policy guidance on a visa category that already existed. Essentially, USCIS provided clarity to employers, to immigration practitioners, and even to the agency itself regarding how this visa category will be adjudicated and what type of evidence merits inclusion in a NIW petition that could lead to an approval. Essentially, the government gave companies a clear road map on how to prepare an approvable NIW. In turn, the industry has really grasped at this visa category as a viable legal pathway. In practice, there's been a substantial increase in filings of NIWs since this updated policy guidance was released. There has been nearly a doubling of NIW filings, from FY 2022 when we saw 22,000 filings, up to nearly 40,000 filings just a year later, in FY 2023.[10]

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It's important to note, for those who are not familiar with the NIW, that this is an employment-based second-preference (EB-2) visa category for a green card. The updated NIW policy guidance came at a really important time because the typical pathway for most employment-based green card holders is through the PERM (Program Electronic Review Management) labor certification process, which requires a test of the U.S. labor market. But in recent years, there have been increased processing delays at the Department of Labor to adjudicate PERM labor certification, which is making the PERM pathway more unpredictable and more lengthy. And with reductions in workforce and a more robust labor market, the PERM pathway is no longer a solid option. So the NIW guidance has come at an opportune time and provided a much-needed alternative green card pathway to employers and their employees. While many companies were familiar with the NIW option and filed them occasionally for their employees, due to this policy update, companies are filing a larger volume of NIWs for their employees, essentially filing NIWs more strategically and proactively.

Next I want to highlight the O-1A visa for individuals of extraordinary ability. This is an important nonimmigrant visa pathway that employers, particularly tech companies, use to attract talent. The O-1A is typically reserved for people who have patents, publications, awards, etc., essentially individuals who have set themselves apart from others in their industry. So, of course, tech companies in particular want to attract and retain this type of extraordinary talent. Similar to what we saw for the NIW, the administration provided updated policy guidance clarifying how the agency would go about adjudicating O-1A applications.[11] In practice, we've seen an increase in O-1A filings by 29 percent from FY 2021 to FY 2022.[12] So just within a matter of a year, 29 percent increase in filings. And O-1 approvals have followed a similar trend.[13]

Another important policy development that the administration has put in place is that the Department of Homeland Security (DHS) updated the STEM-designated degree list by adding 22 additional qualifying fields.[14] Among the fields that were included in this list are emerging and multidisciplinary fields such as data science, human-centered technology design, cloud computing, etc. What this means in practice is it makes a broader group of F-1 international students eligible for a STEM Optional Practical Training (OPT) extension. This is beneficial to employers and international students alike. Employers can hire an F-1 student and get them started in the workforce on OPT, where employers can get a better sense of the employee's skill set. Over time, if needed, the STEM student can extend their employment authorization for an additional 24 months by way of a STEM OPT extension. During this period, U.S. employers will often sponsor F-1 students for the H-1B visa lottery. But the challenge is that there is a limited number of H-1B visas available every year, capped at 85,000 visas. So the STEM OPT extension provides an important time frame in which international students

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are able to enhance their skill set in a professional work environment, foster a relationship with a U.S. employer, and explore other visa options.

Now turning to immigration challenges that U.S. employers are facing. There are a handful of challenges on the horizon for businesses, and in particular the tech industry. First, business will soon experience an increase in USCIS filing fees, which will take effect on April 1.[15] This means that companies will soon experience a significant increase in costs associated with sponsoring foreign talent. To give you some examples, one of the most common visa types among employment-based immigration is the H-1B visa for specialty occupations. The H-1B visa will experience a 70 percent increase in filing fees. The O-1 visa for individuals of extraordinary ability will experience a 130 percent increase in filing fees. For L-1s, which are for intracompany transferees, the filing fee will increase by over 200 percent. This does not include the additional $600 asylum fee that will be associated with every work visa that I just mentioned. Although there is litigation pending on the USCIS filing fee rule,[16] the outcome of the litigation is uncertain. Many companies have already prepared their budgets for the year ahead and taken this fee increase into consideration.

Another challenge that businesses are facing is PERM processing delays. Employers are seeing significant delays at the Department of Labor. PERM is the first step of a three-step green card pathway requiring a test of the U.S. labor market. This process has been the traditional green card pathway for many employers and employees for many years. But the challenge now is that employers are experiencing about a two-year time frame to secure the PERM and I-140 immigrant visa petition approval. By the time an employer receives the prevailing wage determination, which is a required step, then runs the recruitment for the test of the labor market, and then files the PERM labor certification, they are looking at least about a year and a half to two years in terms of processing time. Related to that, it's a harder labor market in some situations, with more individuals in the labor market, due to recent reductions in force across various segments of the economy. As such, I think the likelihood of finding a qualified worker is becoming higher.

While employers are extremely appreciative and understand and recognize that the administration and the federal agencies are doing all they can within the framework of the U.S. immigration system as currently written, there are some individuals who just really will not benefit as much as others in some of these policy advancements, such as individuals from India, for example, because of significant green card backlog. As I mentioned, the NIW is an EB-2 visa category. Yet there's a significant green card backlog for individuals in the EB-2 visa category from India. Right now, the government is processing green card applications for applicants born in India who have a priority dates from more than 10 years ago. As such, the updated guidance the administration has provided relating to the NIW, and even the EB-1A visa category, could still involve a significant wait for a green card for some.

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Finally, there's uncertainty about the future. Employers are looking ahead to the upcoming U.S. presidential election. I think employers are very mindful that all of these immigration benefits that we're talking about here today could be undone by another administration or could be rolled back. There could be red tape put in place to limit employers' ability to hire the STEM talent that is so vital to our economy, to our businesses, and to foster our higher education system.

William Stock

Thank you. Let's move to Amy. Could you start talking a bit about the why. Why have there been these opportunities for departments, for agencies to have a policy focus on STEM immigration?

Amy Marmer Nice

Well, I think first of all, yes, it's nice to be here today and to be with this august panel. I think that, first of all, it is interesting to note that the Biden administration is the first administration to ever say that STEM immigration policy should be considered a science and technology policy. And that's why Simon sits in the Office of Science and Technology Policy. That means that there's an opportunity for messaging or ideas or communication from the top on STEM immigration, that flags things we should talk about or think about a subject in a different way. As Diane and Bill suggested, that means that people then start talking and thinking about things in a different way. I think the starting point to address Bill's framing question here on "why" is that I expect departments and agencies were looking at whether and where there are nooks and crannies in the existing statute, in the existing regulations, in the existing authorities that tie to providing more certainty and predictability, and options, for STEM professionals. The start of the "why" was a look at what can departments and agencies do in their daily business that could either be explained better or explained for the first time?

And also, as Diane pointed out, those authorities don't happen to exist to help every category or every profile of STEM professional or STEM expert, but it seems that there were some nooks and crannies that specifically relate to advanced STEM degree holders. That doesn't mean those are the only people that are important, but if there are areas of activity that are already authorized and perhaps could be explained better, the idea was that in itself could provide more certainty and predictability.

The science and technology workforce, the science and engineering workforce is well understood to be important to the country, and Diane helped give us some examples in that regard. I think that as departments and agencies

were thinking about where to act, really taking an accounting, or reflecting an awareness, of how R&D, STEM R&D in our country has changed over the decades was relevant.

When the National Science Foundation first started tracking STEM R&D in 1953, something like 54 percent of all research and development in America was funded by the federal government. And that's mostly basic science, foundational science done by universities or in similar academic environments. Forty-four percent was funded by industry and 2 percent by other nonprofits. But now, 20 percent of the total of all STEM R&D in America is funded by the government. Seventy-three percent is funded by industry. And 7 percent is now funded by grant-making organizations like the Gates Foundation and others.

So what does that mean? It doesn't mean we're doing less basic science. All of these areas of R&D in science, technology, and engineering have grown. What it means is that a much larger percentage of STEM R&D activity in our country is applied, experimental, or developmental. And that is the type of activity focused more on industry as opposed to academia. Thus, fully 90 percent of all experimental STEM activities in America and a little under 60 percent of all applied STEM R&D is funded by and performed by companies. So, I think as the departments and agencies were scouring their current authorities, they could see that it had potential to be consequential if there were areas where further guidance could be useful to the ability of private sector businesses to hire STEM experts. And I think for some activities that departments and agencies were considering in this area, not expanding the STEM OPT–designated fields list, but in the regard to O-1A and NIW that Diane mentioned, those were enacted by statute in 1990 but there was little policy guidance thereafter. Indeed, if you look over all of your resources, you will see that there had never been any guidance from legacy Immigration and Naturalization Service (INS) or USCIS detailing how a STEM PhD or an advanced STEM degree holder would qualify for those particular classifications, the O-1A and the NIW in EB2 and the O-1A.

So, I hope that gives a summary of the "why."

William Stock

So, can you briefly summarize some of those substantive changes that were made for at least some of these policy shifts?

Amy Marmer Nice

Sure. I think I'll talk about two of the ones that Diane mentioned and another one that she didn't mention. This is obviously not a panel to discuss

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all of the details of any particular policy, but to summarize it for perspective of where we've been, because I know Simon's going to talk about where we might go.

The O-1A guidance essentially went through the eight criteria that are already in the regulations. Nothing was changed in the criteria, to emphasize the point that Diane made. The regulations are the same, but the agency created a table that's in an appendix in the USCIS Policy Manual and went through each criteria and explained and gave examples and footnotes about how it might be that a STEM PhD holder in particular, but that was an example, could qualify.[17]

You'll see from the data that Diane referenced that USCIS made public in January, which shares STEM-related petition trends for EB-2 and O-1A, that non-STEM O-1A petitions filings have also gone up.[18] So the point is, the guidance was trying to put meat on the bones, not to expand the pool of people who are qualified, but to create awareness that there are indeed people who are qualified who are not using the O-1A category. So the O-1A guidance was published in the USCIS Policy Manual to both in the text explain some context, but then add this Appendix, as a how-to table of examples.

And for the National Interest Waiver guidance, similarly, the idea there was that we are primarily talking about, most essentially, two prongs for determining if you qualify for a national interest waiver: First, is the endeavor you're engaged in the national interest, and, second, are you poised to make a contribution to that endeavor? That's a lot of discretion for a USCIS adjudicator, so the USCIS Policy Manual update provides details for both the adjudicators and stakeholders as to when is it likely that someone is engaged in an endeavor in the national interest.[19] The USCIS National Interest Waiver policy guidance in the agency's Policy Manual tries to identify this by giving some examples, such as the Critical and Emerging Technology Fields List Update that the White House National Science and Technology Council, consisting of about 17 federal agencies, issued as a public-facing report and has continued to update, and just updated in February 2024,[20] that cited in the guidance so that individual STEM experts and USCIS adjudicators have an idea of, "This is an example of the areas that could be in the national interest."

And then a third example that I wanted to talk about briefly is in the J-1 visa area, because the State Department announced what they call the Early Career STEM Research Initiative.[21] This follows the same model that Diane had described. This is no change in the statute, which mentions that J-1 visa holders can engage in research. No change in the regulation, which specifically says corporate research can be included. But now, on the State Department's BridgeUSA website there is guidance in the form of 37 or 38 different FAQs, explaining how individuals who are engaging in research as a scientist, technologist, or engineer could also be hosted by companies, not just by academic institutions.[22]

Making the announcement about companies hosting J-1 researchers was important just because we have a long tradition, 50-plus years, of the J-1 visa

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being extensively used for researchers on campus but no companion use for the applied, experimental, or development STEM research and development occurring at companies. Almost all international STEM postdocs have J-1 visas to complete their postdoctoral fellowship. But those postdocs, for example, in STEM engineering, are usually two years, so even though they can have up to five years in J-1 status in the "Research Scholar" classification, perhaps the remaining three years could be hosted by a company performing similar research that they had just completed on campus.

So the idea behind the menu of STEM talent policies announced in January 2022 by the White House,[23] which are many of the policies that Diane flagged, was to add clarity about some tools in the toolbox. These are not tools that can be used by everybody. They're not tools that solve all the problems in our immigration system. They're just ways to make the system we already have work a little bit better. So that's about a little bit of the details about some of those, Bill.

William Stock

Thank you very much. Obviously, there's been an enormous amount of leadership from the top that has brought these changes about. Do you think that some of these actions have staying power across administrations? Do you think that these things have life beyond the current administration?

Amy Marmer Nice

Yes. I think the issue is the STEM talent policies that have been announced by the Biden administration in the various areas, the designated fields list for STEM OPT, the O-1A Policy Manual update, the National Interest Waiver Policy Manual update, the State Department's Early Career STEM Research Initiative, these aren't things where there's actually a legal question about whether the department or agency has authority. There have been no lawsuits, but there are not going to be lawsuits anticipated because they are things that are contemplated in the normal business of departments and agencies. Even with whatever the Supreme Court decides in *Loper* should be the new agency deference standard, with a caveat about STEM OPT, these policy shifts aren't the kinds of things that are likely on the chopping block.

So, as far as legal challenges, and considering staying power with regard to legal challenges, the STEM OPT rule, as I think everybody here knows, has been subject to extensive litigation and has gone up and down from the DC district court and the DC circuit multiple times, and gone to the Supreme Court. I think the thing that's different about the STEM OPT rule under whatever the new standard is for deference that emerges from the *Loper* decision,

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which we should probably expect at the end of June, because this is definitely going to be one of the big decisions when big decisions are announced, is that you have a very unique circumstance as far as agency action. It's absolutely true that there's nothing in the statute that says the agency implementing the immigration statute should allow post-completion employment authorization for international students. But it has been done by legacy INS, and now USCIS, and by regulation since 1947. So something that's been done for 70 years, during which time Congress has made multiple amendments to the statute, including amendments to the F-1 student category, including amendments where Congress said, for example, in 1961, F-1 students should not be subject to FICA withholdings, meaning that Congress knew that F-1 students were working. Thus, whatever the deference standard is, this would be an area where it'd be awfully hard to say that the agency has acted out of bounds and made something up from whole cloth. Even after new statutes were changed, the agency then engaged in notice-and-comment rulemaking and repromulgated the same rule. So there was a rule on the books in 1947. After the 1952 Immigration and Nationality Act was enacted, the INS engaged in new notice-and-comment rulemaking to say, "Well, now there's some new definitions of what an F-1 nonimmigrant is. We still think we should be giving post-completion employment authorization."

So just to finish that point about staying power with regard to the legal challenges, I don't see that these STEM talent pieces are areas where the risk in either a Biden 2.0 or a Trump 2.0 is action in the courts. Again, I'm not saying that there's not going to be a STEM OPT challenge. I'm just saying there's good reason to think that there's a way to move forward with those provisions. I think the bigger challenge is, if we don't have reliance interests on these new policies, they are very easy to just fall away through inaction.

Diane made a reference that the guidance in the USCIS Policy Manual was both for adjudicators and stakeholders. I think that's really important to keep in mind. We really need to see that the agency and the career officials are expecting to receive certain kinds of good cases that follow these policy prescriptions, cases where people are largely qualified and largely the right individuals who are eligible are the named beneficiaries. And we need to see that stakeholders, employers, STEM experts, universities, understand and are aware of these policies are tools in their toolbox that are used.

So, I think the main concern that I have is that even with a 30 percent increase, for example, in using the O-1A for STEM activities, that really only represents approximately 10 percent of all foreign-born STEM PhDs that we know are in the United States every year, either earning a PhD from our research universities. That's because about 14,000 international students a year earn a STEM PhD in the United States and about 35,000 individuals are engaged in a STEM postdoc as a foreign-born STEM expert in the United States every year. That's a pool of 49,000 people. The data that USCIS released in January showed that about 4,500 O-1A petition approvals are being issued

for people engaged in STEM activities every year. I don't know how many of the 49,000 are extraordinary and have accomplishments that show that they're making contributions to the field. I'm not saying it's everybody. But I do think it's fair to guess that it's more than 10 percent.

So, we have to be working in 2024 to enhance the awareness by employers. Diane, I call on you to work with your colleagues to make this happen, that employers don't say, "Oh, my first line of defense is I'm going to put people in the H1B lottery for three years. If that doesn't work, I'll do O-1A." If you're hiring STEM PhDs, you should first be looking at the O-1A. Not everybody's eligible, but you should be looking at the guidance carefully and seeing if you think that your new hire is qualified. So, I'm more concerned about creating these reliance interests and people being aware of these things now. I think that's the biggest risk, inaction that voids the possible development of reliance interests.

William Stock

So, speaking of reliance interests, can you briefly give us any thoughts you have on next steps?

Amy Marmer Nice

Well, I do really think that there's a number of projects that lots of organizations could engage in that could help the STEM ecosystem in our country. One of the projects that I'm working on now is the idea of having a multi-donor platform to re-grant money to the right organizations. This seems like something that seems like the time could be useful for that. And a group of people have got together to create what is called the Talent Mobility Fund.[24] We are re-granting money to organizations that could help get the word out and help create and support an ecosystem where there are more reliance interests on these existing U.S. STEM immigration policies. Again, we all know that there's a lot more that can be done, and I think that Simon will talk to us about what he sees in our future. I think those are all things that we're happy to be able to talk about today.

William Stock

Okay, thank you, Amy. And Simon, let's give you the opportunity to speak a bit about the future. Biden's executive order on artificial intelligence includes some consideration of immigration as part of addressing the talent need. Can you explain what's in the order, what opportunities you see moving forward?

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Simon Nakajima

Sure. And first of all, just thanks everyone for being here and thank you very much for the *AILA Law Journal* for inviting me. It's great to be here to speak with you all about STEM immigration. Diane and Amy just went over some good things that the administration's done over the past several years, and it's always nice when people tell you that you're doing something right. So, definitely appreciate that. But I'm going to talk more about relevant actions to the AI Executive Order (EO)[25] (I'm sure you've all seen that that came out last October), including actions that are still forthcoming.

But before I get into that, I just wanted to also mention another EO that came out at the beginning of the administration. It's Executive Order 14012, Restoring Faith in our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans.[26] So, that EO directs the federal government to encourage full participation by immigrants and to eliminate barriers that impede access to immigration benefits.

So, the administration has been largely guided by that EO from the very beginning. In terms of STEM immigration, we've been working hard to do all kinds of good stuff, including the suite of things that were mentioned in the January 2022 announcement,[27] as well as other things, including, for example, premium processing expansion[28] and domestic visa renewal. And as Diane and Amy mentioned, we're very cognizant of having the leadership be very vocal about STEM immigration and how it's important for the country. The administration has, I think, repeatedly mentioned how STEM immigration is important because it's one of America's greatest strengths in our ability to attract global talent, and that attracting global talent strengthens our economy and technological competitiveness. We've seen that STEM fields are filled with examples of America's ability to attract global talent leading to pathbreaking innovations. So, these innovations lead to creation of new jobs, new industries, and just opportunities for all Americans all across the country.

Knowing that we are committed as a nation to welcoming new talent has long provided us that global competitive advantage. And we recognize that we need to maintain that leadership within the world.

And then, so now back to the AI EO, last October, [the] president signed the AI EO, or more precisely the Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence. I'm sure most of you know that within that executive order's a section directing the federal government to use existing authorities to facilitate the ability of highly skilled noncitizens with expertise in critical areas to study, stay, and work in the United States.

What's notable about this immigration section is that it pertains not only to AI but to other critical and emerging technologies as well. So many of the actions that have been implemented and will be forthcoming will be relevant for a broad set of STEM occupations. And in case you're wondering, the list of

critical emerging technologies—Amy also mentioned it—you can find that at the National Science and Technology Council's (NSTC) Critical and Emerging Technologies update list.[29] And that was actually recently updated in February.

So we've seen agencies across the federal government take actions consistent with the EO. For example, the Department of Labor issued the request for information on Schedule A.[30] This is very relevant because with the PERM processing times being the way they are, having more occupations on Schedule A will definitely help with that, right? And then we've seen the Department of Homeland Security issue the H-1B Notice of Proposed Rulemaking (NPRM)[31] to modernize the H-1B program and enhance its integrity and use. We've also seen the Department of State launch a pilot program for domestic visa renewals.[32] And so far, we've heard some good things about that. I know it's still going on right now. And on ai.gov, we published a quick resource for people to learn more about bringing their skills in AI, hopefully in a more layperson way as we've kind of seen.[33] The theme is just to make sure people understand what's out there and what they qualify for already without having to change any of the laws.

So going back to the H-1B rule for a minute, I'm sure you have seen that the skinny part has been finalized, the beneficiary-centric part has been finalized.[34] Hopefully, that will reduce the amount of nonmeritorious registrations that we've seen over the past couple of years. And then on top of that, we are really excited about the electronic filing of the I-129 and the organizational accounts.[35] I'm sure everything might not be completely perfect, but I can tell you that within the administration we're super excited about these new procedural improvements. I was in private practice myself, I remember filing by paper and then filling out stuff by hand. So I know that this could be potentially a nice game changer for us.

And then in regard to the rest of the NPRM, I can't say when it might be finalized, but I can tell you that for me personally, it is one of my top priorities and it's also a top priority for many other people within the administration. There's a lot of good stuff in there. We want to see that implemented. So hopefully, we will get that done sooner than later. And I also mentioned domestic visa renewal. That's something else that lots of people are super excited about. Like I said, we've got positive feedback so far. I'm sure you all know that it's scheduled to end on April 1. Of course, then the question is, what happens next, right? So I can't say if and when domestic visa renewal will return, but, I mean, we do recognize that there are a lot of potential benefits; for example, decrease in work interruptions, more certainty for the H-1B workers, and then on the government side, more capacity for State overseas. So what we really do want to see is that this program become permanent and to cover as many people and classifications as possible. That's our goal at the end.

In terms of other actions in the AI EO, the EO also directs DHS to, and I'll quote, "consider initiating a rulemaking to enhance the process for noncitizens, including experts in AI and other critical and emerging technologies

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and their spouses, dependents and children to adjust their status to lawful permanent resident." So as you probably know, in the 2023 DHS fall regulatory agenda,[36] there's an item that is "Improving the Regulations Governing the Adjustment of Status to Lawful Permanent Residence and Related Immigration Benefits."[37] And according to the abstract for that one, some of the proposed changes would include permitting EB-4 concurrent filing, permitting transfer of underlying basis, clarifying when a visa becomes available for Child Status Protection Act purposes, and authorizing compelling circumstances for certain derivative beneficiaries.

So again, I can't provide specific details about this regulatory agenda item. I can say that this is something that DHS and USCIS are actively working on. And like the H-1B rule, this is at the top of my priority list.

Additionally, the AI EO directs the State Department to (quoting again) "consider initiating a rulemaking to establish new criteria to designate countries and skills on the Department of State's exchange visitor skills list as it relates to two-year foreign residents requirement for certain J-1 nonimmigrants, including those skills that are critical to the United States."[38] So as with the Adjustment of Status NPRM, the administration is actively working on this as well. And you can see that there's a rule currently pending 12866 review with OIRA right now.[39]

So those are some of the actions that are already taken or are underway. Of course, we're not limited to what's in the AI EO. So there may be STEM immigration actions that are outside the scope of the AI EO. For example, expansion of STEM OPT,[40] that's not mentioned in the AI EO, but that's something—there's nothing stopping us from doing that. And hopefully, we can continue to do that on a more regular basis.

And yeah, I mean, just to close, as I mentioned earlier, the Biden-Harris administration believes our ability to attract global talent has long provided America with a competitive advantage in our economic and national security. And today we have given just some examples of how we've been trying to increase the talent that we have on our shores. I know that I'm looking forward to more actions coming in 2024. And yeah, I'm confident that we'll see some good stuff coming down. Thanks.

William Stock

And so once again, thanking our panelists. And to briefly wrap up, I think as we see in the broader context of administrative law that the immigration agency is being pulled in and reviewed under these broad standards that the court is clarifying or changing for court review of administrative action, and as we see the increase in advocacy on both sides of the immigration issue that falls into courts, I think what we heard today was really critical. And I thank the panelists for being thoughtful and highlighting how these changes are

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really well within the agency's granted statutory authority. We are not talking about things that run afoul of that, even in a reinvigorated major-questions doctrine from the court, and I think that this will be an interesting area for further study and scholarship with regard to immigration as an administrative law field. So I thank the panelists and thank the audience.

Notes

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12. *See STEM-Related Petition Trends: EB-2 and O-1A Categories FY2018-FY2023*, *supra* note 10.

13. *Id.* at 3 (noting that O-1A approvals increased by 25 percent from FY 2021 to FY 2022, from 7,320 to 9,120).

14. Update to the Department of Homeland Security STEM Designated Degree Program List, 87 Fed. Reg. 3317 (Jan. 21, 2022).

15. U.S. Citizenship & Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 89 Fed. Reg. 6194 (Jan. 31, 2024).

16. *Moody et al. v. Mayorkas et al.*, No. 1:34-cv-00762 (D. Colo.).

17. USCIS Policy Manual, vol. 2, pt. M, ch. 4 (appendices).

18. *See STEM-Related Petition Trends: EB-2 and O-1A Categories FY2018-FY2023*, *supra* note 10.

19. USCIS Policy Manual, vol. 6, pt. F, ch. 5.D (especially 5.D.2 and 5.D.3).

20. National Science and Technology Council, Fast Track Action Subcommittee on Critical and Emerging Technologies, Critical and Emerging Technologies List Update (Feb. 2024), https://www.whitehouse.gov/wp-content/uploads/2024/02/Critical-and-Emerging-Technologies-List-2024-Update.pdf.

21. *See BridgeUSA* (Early Career STEM Research Initiative), U.S. Department of State, Bureau of Educational and Cultural Affairs, https://j1visa.state.gov/programs/early-career-stem-research-initiative/.

22. *Id.* at https://j1visa.state.gov/programs/early-career-stem-research-initiative/#faqs.

23. The White House, *supra* note 8.

24. *See* Talent Mobility Fund, https://www.talentmobility.fund/.

25. Exec. Order No. 14110, § 5, 88 Fed. Reg. 75191, 75204 (Nov. 1, 2023).

26. Exec. Order No. 14012, 86 Fed. Reg. 8277 (Feb. 5, 2021).

27. The White House, *supra* note 8.

28. 87 Fed. Reg. 18227 (Mar. 30, 2022); *USCIS Expands Premium Processing for Applicants Seeking to Change into F, M, or J Nonimmigrant Status*, USCIS (June 12, 2023), https://www.uscis.gov/newsroom/alerts/uscis-expands-premium-processing-for-applicants-seeking-to-change-into-f-m-or-j-nonimmigrant-status; *USCIS Announces Final Phase of Premium Processing Expansion for EB-1 and EB-2 Form I-140 Petitions and Future Expansion for F-1 Students Seeking OPT and Certain Student and Exchange Visitors*, USCIS (Jan. 12, 2023), https://www.uscis.gov/newsroom/alerts/uscis-announces-final-phase-of-premium-processing-expansion-for-eb-1-and-eb-2-form-i-140-petitions.

29. National Science and Technology Council, *supra* note 20.

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30. *PERM Schedule A RFI*, U.S. Dep't of Labor, Employment and Training Admin., https://www.dol.gov/agencies/eta/foreign-labor/perm-schedule-a-rfi.

31. 88 Fed. Reg. 72870 (Oct. 23, 2023).

32. *Domestic Renewal of H-1B Nonimmigrant Visas for Certain Applicants*, U.S. Dep't of State, Bureau of Consular Affairs, https://travel.state.gov/content/travel/en/us-visas/employment/domestic-renewal.html.

33. *Bring Your AI Skills to the U.S.*, AI.gov, https://ai.gov/immigrate/.

34. *See* 89 Fed. Reg. 7456 (Feb. 2, 2024).

35. *See USCIS to Launch Organizational Accounts, Enabling Online Collaboration and Submission of H-1B Registrations*, USCIS (Jan. 12, 2024), https://www.uscis.gov/newsroom/news-releases/uscis-to-launch-organizational-accounts-enabling-online-collaboration-and-submission-of-h-1b.

36. *Agency Rule List—Fall 2023: Department of Homeland Security*, Office of Management and Budget, Office of Information and Regulatory Affairs, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=1600.

37. *Id.* at RIN 1615-AC22, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=1615-AC22.

38. Exec. Order No. 14110, *supra* note 25, 88 Fed. Reg. at 75205.

39. *Office of Information and Regulatory Affairs (OIRA) Executive Order Submissions Under Review* (Department of State, RIN 1400-AF81), Office of Management and Budget, Office of Information and Regulatory Affairs, https://www.reginfo.gov/public/do/eoReviewSearch.

40. *See* 88 Fed. Reg. 44381 (July 12, 2023).

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DACA Litigation and the Opportunity for All Campaign

Kaitlyn A. Box, Ahilan T. Arulanantham, and Anil Kalhan*

Abstract: In this panel, Anil Kalhan and Ahilan Arunathalam discussed the DACA litigation and the Opportunity for All Campaign, an effort by the University of California to provide work authorization to undocumented students. Anil Kalhan highlights how litigation on the Obama administration's deferred action initiatives and the Supreme Court's decision in *Department of Homeland Security v. Regents of the University of California* have reshaped the understanding of deferred action. Ahilan Arunathalam discusses how IRCA § 1324(a) provides a basis for states to employ undocumented persons, and addresses how legal challenges to state immigration laws, taking Texas's S.B. 4 as an example, could interact with programs like Opportunity For All.

Kaitlyn A. Box

Good afternoon, everyone. Thank you all for being here. And most of all, thank you to our panelists for joining us today. As you know, the topic of the day is shaping immigration policy through the federal courts. If you've been paying attention to the news or if you listened to Cyrus's introductory remarks, you'll know that we've recently seen numerous examples of litigation that could really significantly reshape the immigration policy landscape. Today's panel will center on litigation that has challenged two programs that predominantly concern students, the Opportunity for All campaign and DACA (Deferred Action for Childhood Arrivals). To my left is Anil Kalhan, a professor of law at Drexel University and a professor at the Drexel University Center for Science Technology and Society. He is also an affiliated fellow at the Yale Law School Information Society Project and an affiliated faculty member at the University of Pennsylvania's South Asia Center. To my far left is Ahilan T. Arulanantham, who is a professor from practice and faculty co-director of the Center for Immigration Law and Policy at UCLA's School of Law. Without further ado, I'll turn it over to our panelists.

Anil Kalhan

Thanks so much, Kaitlyn, and thanks so much to the editorial board of the *AILA Law Journal* for inviting me to be a part of this inaugural symposium. It's very exciting to help set a foundation for a tradition that hopefully

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will continue. In my remarks, I want to focus on some peculiarities in the long-running litigation over the Obama administration's deferred action initiatives, which has now spanned three administrations and extended for almost 12 years, through several distinct phases. In other work, I have developed an account of various aspects of that litigation and have explored a number of different questions that emerge from its trajectory, and my comments today specifically draw and build upon an essay I wrote for *Dorf on Law* last fall.[1]

What I want to aim to highlight here are the ways in which that litigation, and the Supreme Court's 2020 decision in *Department of Homeland Security v. Regents of the University of California*, in particular, have contributed to reshaping the very meaning of deferred action as a legal concept in a manner that, analytically speaking, has been and continues to be deeply confused.[2] The understanding of deferred action that has emerged from this litigation bears little relationship to how many people in the field of immigration law understand deferred action—and have understood it for decades—but it does effectively serve the larger anti-immigration agenda of the conservative and restrictionist movements, which have now made great inroads into the federal courts and on the Supreme Court itself.

Most of you probably are familiar with many of the details of this litigation. But to briefly summarize, DACA, of course, was announced by the Obama administration in 2012.[3] Although opponents of the initiative filed a federal lawsuit challenging the initiative right away, that lawsuit failed on procedural grounds.[4] Then, a few years later, the Obama administration announced its 2014 deferred action initiatives, DAPA, the Deferred Action for Parents of Americans and Lawful Permanent Residents and the expansion of DACA, and Republican opponents of the litigation immediately went to court to try to block the initiatives.[5] They successfully judge-shopped for Andrew Hanen in the U.S. District Court for the Southern District of Texas, a Republican-appointed judge in Texas with a long and well-documented anti-immigration record.[6] Hanen quickly kneecapped the 2014 initiatives by issuing an order enjoining them nationwide.[7] Notably, that pattern of bringing lawsuits before single-judge divisions in the federal district courts in Texas and elsewhere has become a road map frequently used by Republican attorney generals, including the Attorney General of Texas, not only in immigration cases but across a range of other substantive areas.[8]

It bears emphasis that the lawsuit challenging DAPA was not a tailored challenge to discrete aspects of the initiative. It was not a challenge to benefits as opposed to the exercise of enforcement and forbearance, for example. Rather, it was a wholesale broadside against the initiative's use of deferred action altogether, which the plaintiffs characterized as nothing less than a circumvention of the immigration statutes, a usurpation of congressional authority, and a violation of the president's obligation under Article II of the Constitution to "take care" that the laws be faithfully executed. In fact, in his ruling Hanen echoed this kind of rhetoric by frequently mischaracterizing deferred action as

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being tantamount or equivalent to a form of legal immigration status, which it is not.[9] When the Fifth Circuit affirmed Hanen's injunction, its conservative members used more refined and careful language than Hanen, but they, too, went out of their way to insist that DAPA was "more than nonenforcement" and instead bestows its recipients with an intertwined package of other "benefits" in one fell swoop, which they inventively subsumed within the label "lawful presence."[10]

Legally speaking, of course, this is not a precise or accurate characterization of what deferred action is or how its beneficiaries might collaterally obtain "benefits" of one kind or another. To the extent that deferred action recipients (whether under initiatives like DACA and DAPA, or otherwise) become eligible for benefits, that eligibility invariably arises from separate federal, state, or local legal authority—not from the guidance memos creating the DACA or DAPA frameworks themselves or even from any particular grant of deferred action under those initiatives.[11] Eligibility for employment authorization, for example, arises from statutory and regulatory authority dating back to the Reagan administration, regulations that were adopted using notice-and-comment rulemaking during the 1980s.[12] And while "lawful presence" does exist as a category in the immigration laws, it does not exist in the manner that the Fifth Circuit characterized it. There are particular places where lawful presence or unlawful presence becomes relevant, but those are very specific contexts.

Like the litigants in the earlier phase of the litigation challenging DACA, the plaintiffs in the litigation before Hanen were not trying to distinguish between the exercise of enforcement discretion, on the one hand, and the conferral of benefits, on the other. Their claim was that the initiative was unlawful in its entirety. In fact, the plaintiffs never specifically challenged any "benefits" or foregrounded the language of "lawful presence" in their pleadings at all. And notwithstanding Judge Jerry Smith's artful but misleading use of the term "lawful presence" in his opinions for the Fifth Circuit, all of the judges ruling in favor of the plaintiffs in that phase of the litigation took the same position. The scope of Hanen's injunction, for example, was not tailored to benefits or in any other manner. Rather, it enjoined DAPA in its entirety, including its authorizing the exercise of enforcement discretion in the form of deferred action, and the Fifth Circuit affirmed that injunction in full. Only when the case got to the Supreme Court did the plaintiffs, taking their cues from Smith's Fifth Circuit's opinion, start to foreground the language of "lawful presence" and begin to suggest that there might be legal questions with respect to benefits like employment authorization.[13] But even then they did not do so for purposes of distinguishing between forbearance and benefits. Rather, like Smith, they invoked "lawful presence" to suggest that DAPA conferred something tantamount or equivalent to lawful immigration status—just as they had been doing in political and media discourse attacking the initiatives.[14]

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In the Supreme Court, the Republican challengers to DAPA defended the nationwide scope of Hanen's injunction in its entirety. Ultimately, the Supreme Court deadlocked four to four, which left the Fifth Circuit's ruling in place without any binding precedent from the Supreme Court, and DAPA never went into effect.[15] But the litigation has left pretty deep imprints that have affected how DACA itself has now subsequently been understood—or maybe more to the point, how it has been misunderstood in court ever since.

Fast-forward to the Trump administration, which eventually tried to terminate DACA not on policy grounds, but by claiming, in a relatively cursory legal memo from Jeff Sessions, the attorney general, that the program was illegal.[16] It's worth noting that while the Trump administration and other conservatives were deeply, deeply invested in this legal position, insisting upon that position ultimately made it more difficult for the Trump administration to terminate the program. If the Trump administration had just said on a straightforward policy basis, "This is not a program that's required. And as a matter of policy, we wish to terminate it," it probably wouldn't have confronted the kinds of roadblocks that it ultimately faced, or at least not *these* roadblocks. And eventually, in *Regents*, the Supreme Court in a 5-4 decision vacated the Trump administration's attempt to end DACA, as we all know.

This outcome was celebrated at the time by many immigrants' rights advocates, understandably, insofar as it allowed DACA to live another day. But the opinion itself contains some more troubling aspects, which didn't get as much attention at the time as perhaps they should have, and which may be more consistent with or indicative about how the Roberts Court has sought to approach immigration issues more broadly. There are two departures in *Regents* from how the lower courts in that litigation examined the issue that I want to surface.

The first departure from the lower courts had to do with why and how the Supreme Court found the initiative reviewable in the first place. To find DACA's rescission reviewable under the Administrative Procedure Act (APA), Chief Justice John Roberts portrayed DACA as conferring affirmative immigration relief, not just creating criteria for the exercise of prosecutorial discretion. This characterization allowed the Court to avoid the presumption of nonreviewability under the APA for nonenforcement decisions that the court had recognized in *Heckler v. Chaney* in the 1980s.[17] But Roberts's approach was by no means the most straightforward way to reach the conclusion that the Trump administration's decision to rescind DACA was judicially reviewable. The lower courts had, by contrast, emphasized that the Trump administration was trying to have it both ways, on the one hand, claiming that it had no discretion because they maintained that the program was illegal, but on the other hand, claiming that because DACA was a framework for the exercise of enforcement discretion and wasn't required in the first place, the courts had no jurisdiction to review its termination.[18] Roberts, however, didn't choose to follow or even engage the approach taken by the lower courts. Instead, he

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concluded that DACA's termination was reviewable because it is not properly understood as simply a non-enforcement policy at all, but rather is purportedly better understood primarily as a form of immigration relief that grants all of these other "benefits."

At no point did Roberts make any effort to explain why he was choosing to take a different approach than the lower courts. His approach to non-reviewability under the APA was not an argument presented by any of the parties. It wasn't an argument addressed in the lower courts. Of course, the characterization that he chose closely echoes what I just described from Smith's opinions in the Fifth Circuit, and it draws pretty directly, in fact, from the language that Smith was using. That characterization in turn allowed Roberts to essentially give his tacit endorsement to the Fifth Circuit's reasoning, which the Supreme Court itself had never endorsed. Which of course also provided a citable sound bite for lower courts now to use in support of this misleading notion that DACA is essentially the simulacrum of legal status.

Roberts's second departure from the lower courts is to the same effect and, in fact, I think even more openly amounts to an endorsement of the Fifth Circuit's reasoning, but also a pretty gross mischaracterization of what the Fifth Circuit actually held. Since the lower courts had all found the termination of DACA to be reviewable because it was based on a purely legal conclusion by Sessions that the initiative was unlawful, they all proceeded rather naturally to actually engage with that legal conclusion itself, which was only a few sentences long. When addressing whether DACA's rescission was arbitrary and capricious, each of the lower courts addressed either whether Sessions's legal explanation was sufficient or whether it ultimately was correct as a matter of law. Two district courts, in fact, concluded that DACA was perfectly lawful, and therefore that even if the Trump administration might be permitted to terminate it on policy grounds, it could not do so based on a claim that the program was unlawful because it was legal.[19] On appeal, the Ninth Circuit reached the same conclusion.[20] In the U.S. District Court for the District of Columbia, Judge John Bates concluded that Sessions' explanation was simply insufficient and way too thin, and therefore was arbitrary and capricious on that basis.[21]

But rather than scrutinizing either the sufficiency of the explanation or whether it was correct, Roberts essentially changed the subject. He suggested, almost in passing, that the lawsuits challenging DACA's rescission might not be proper vehicles for attacking the sufficiency of Sessions's legal conclusion that DACA was unlawful and unconstitutional. But it is not at all clear why that should be the case. This was, after all, precisely the basis on which all of the lower courts had rested their decisions. But instead of scrutinizing the sufficiency of Sessions's opinion, he essentially embraced it.[22] Because Sessions had relied in a cursory way on Smith's Fifth Circuit's opinion in the DAPA litigation, Roberts sought to identify discretionary choices that might have remained available to DHS (Department of Homeland Security) *within the*

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four corners of the Attorney General's legal conclusion—regardless of whether that legal position had been adequately explained or legally correct in the first place. Perhaps DHS could have preserved some version of DACA might be maintained solely with respect to enforcement forbearance, Roberts suggested, while jettisoning any benefits for DACA beneficiaries. However, all of this is revisionist history, since the Fifth Circuit never made that distinction relevant to its analysis—except in support of a conclusion that the whole program was unlawful as a usurpation.

Ultimately, even though the litigation leading up to *United States v. Texas* had failed to yield any precedential Supreme Court decision on the legality of the Obama-era deferred action initiatives, in *Regents*, Roberts effectively created the simulacrum of Supreme Court precedent on those same issues by assuming and embracing a set of conclusions—namely, that the Fifth Circuit's prior decision about DAPA was both legal sound *and* directly applicable to questions concerning DACA's legality—while simultaneously purporting to avoid those issues.

We can talk more about the implications of this approach. For now, I'll close with an observation about how best to characterize and understand Roberts's opinion. Some observers have commended the Supreme Court's ruling as promoting accountability, by fashioning a mechanism to encourage political accountability for the executive branch's discretionary decisions.[23] That certainly is a fair way of characterizing the litigation generally, to the extent that the Trump administration seemed to be trying to avoid being fully candid about its reasons for terminating DACA by hiding behind a flimsy legal assertion that the initiative was unlawful. At the same time, it seems hard to escape the conclusion that the majority's opinion in *Regents* was simultaneously written in a manner tailor-made to help the Court itself deflect accountability for its *own* rather politicized choices on immigration. In the near term, the decision saved a popular program. It allowed the court to align itself with that outcome, but the decision indirectly lends support to the arguments against DACA's long-term viability in ways that are not legally sound and that deflect attention from the broader anti-immigration sweep in some of the Court's other recent decisions.[24]

Ahilan Arulanantham

Thank you, Anil, and thanks to all of you for coming as well. I'll pick up right where you left off with this idea of the deep imprints of both the DAPA and the DACA litigation. They're both very directly relevant to this Opportunity for All campaign and the legal theory underlying it, which I will talk about now.

The basic idea behind it is that states should be able to employ undocumented people with respect to state jobs, notwithstanding IRCA,[25] and that

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IRCA is best read to already permit branches of state government to hire undocumented people. I actually think some local governments have that authority as well.

I think that sounds crazy when you first hear it, so I want to talk about the legal theory in some detail, but also explain what drove us to develop the idea.

It really comes very much from the context that Anil was talking about. DACA has been subject to this endless set of litigation, which has gone on through the various injunctions that Judge Hanen has issued and that the Fifth Circuit has affirmed in different forms. Overall, those have had the effect of basically freezing all new applicants to DACA for most of the past five years, so that, basically, you can apply, but your application cannot be granted. But for a brief window during that five-year period, that has been the norm. To apply for DACA, you have to age into it at age 15. So, you've got lots and lots of people over the last five years who have aged into DACA and should have been able to access its benefits but for the injunction stopping them. In addition to that, the original memo[26] and the regulation[27] that the Biden administration promulgated on DACA says that to be eligible, you have to have been in the United States continuously since June 15, 2007. And, of course, at the time that the memo was first put in place in 2012,[28] that wasn't a particularly big deal. But that date was never updated. I'm sure that the litigation probably had a lot, maybe everything, to do with that. Although it's interesting to note that the regulation that the Biden administration promulgated also did not change that date despite a lot of pressure asking for that to happen. That means today, even if you fit the classic "Dreamer" profile . . . You came here at the age of one or two, or three in 2008 . . . Just do the math. You're 16 or 17, but you don't qualify for DACA because you're "too young"—you came here too late. The effect of that is that you now have a generation of undocumented students coming into high school and university who will remain ineligible for DACA regardless of the outcome of the litigation, absent some further change by the administration. There are thousands and thousands of them. By our account, there's something like 400,000 undocumented students in higher education across the country.[29] In 2020, the President's Alliance on Higher Education said about 40,000-ish of those are undocumented without DACA.[30]

There's not a simple way to keep the data on this in the University of California, which is where I work. But there are thousands of them, and many in the California State University system, and even more still in the California community college system. I'm sure the same is true all around the country. Something like 27,000 undocumented students are graduating from high school in California every year.[31] And just by the math I said, unless you're a non-traditional student, almost all of them are ineligible for DACA. And many of them obviously want to go into higher education.

This is also, I should say, a crisis for universities, because universities adopted, depending on where you are in the country, very inclusive policies toward undocumented students. In California, they're eligible for in-state

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tuition. California has rules to offset the gap in federal financial aid so they can afford to go to school. They're admitted into programs, including graduate degree programs, where you have to work in order to graduate. To be a doctor, you have to have a medical residency. To get a teaching certification, you have to work in a school. The assumption of all of these programs is that students will be employed. In addition, it's just a standard practice that students are going to work for money to help pay their tuition and living expenses during college. That's the norm in many of these universities.

But that assumes you have an employment authorization. And now, it's been five years—a whole generation of students has gone by, and they don't. So, this is an acute problem. And, of course, I'm just talking about students because they were a huge part of the political mobilization that created DACA itself. But, of course, the long-term undocumented population, which was intended to be addressed by DAPA in part . . . they're still here. The majority of the estimated 11 million undocumented people have been here for more than a decade, as I understand it.[32] And, of course, they're still here living in the shadows of our economy without work authorization. That's the factual, or immigrant community, perspective if we pick up where Anil left off.

Now for the legal part of it . . . In a world where we have seen so much aggressive action taken against federal administrative relief programs, where you can handpick your judge (although that may have changed), litigate under very broad standing theories (although Cyrus said that also may be shifting), and get an injunction that stops the program in its tracks, legal strategists like me and others looked at this and thought, "Well, is there a way to have a program run which is not going to be so easily subject to these kinds of litigation strategies, where it's harder to pick a jurisdiction that's likely to be hostile to immigrants, and even harder for a Republican-led state to get standing?"

Also, given the implicit assumption in the *Regents*[33] opinion that what's wrong with DACA is that it combines the stay of removal and the employment authorization—even though that's a very unorthodox reading of traditional deferred action and the regulations on employment authorization—but if that's what the problem is, maybe, sure, the solution is to allow only for deferred action (or the stay of removal) without work authorization. But also another idea is to allow only for the employment authorization. Because if you have an administration that's just engaging in prosecutorial discretion and you have many states that have their own sanctuary policies, perhaps even providing only the employment authorization might allow some of the benefits of DACA.

I should stress none of this is the same as a path to permanent status or to citizenship, as a green card allows you to sponsor your family and provides many other benefits. But it is a huge benefit to allow a student to be able to actually work in order to go to college and complete their degree, even if there is no immediate path to eventual legalization and citizenship for that student. And certainly, the same is true of other people, non-students as well.

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So, this confluence of factors sent us down the rabbit hole of hunting this idea about IRCA. And at least for me personally, I litigated at the ACLU for many years, as I'm sure most of you know, and when I got to UCLA three years ago, I was confronted quite quickly with the fact that there were these professors who wanted to hire these students to be their research assistants and teaching assistants. In many cases, these are the best students, the ones they want to hire, and the students are undocumented. Sometimes, they actually apply for the job and they get the job, or they think they got the job because the professor hires them for the job. But then they hit the HR system, and the HR system says, "No, you can't actually work." It's pretty awful. Both the students and the professors experience that as a form of discriminatory treatment. You thought we were all UCLA Bruins competing on an equal playing field for academic success. And it turns out, actually, there's two different types of students, even though they all carry the same ID card.

So the idea behind our reading of IRCA is based on some deeply conservative concepts of statutory interpretation. It starts with the text of IRCA itself. The prohibition on hiring undocumented people in Section 1324a(a)(1) says, "It is unlawful for a person or other entity" to hire an unauthorized person.[34] "Person" is defined in the general definitional sections of the INA (Immigration and Nationality Act).[35] "Persons" includes organizations and individuals, and various other things.[36]

But none of those definitions mention states. In addition, IRCA was amended in [the Illegal Immigration Reform and Immigrant Responsibility Act] in 1996 to add a provision at subsection (a)(7), which says explicitly, "'Entity' includes any entity in any branch of the Federal Government."[37] So, there's a specific provision stating that it covers the federal government, but again no mention of states. This happens against the backdrop of a mountain of Supreme Court doctrine (that when we were in law school we wouldn't have liked very much), saying that when Congress wants to regulate the states in areas of traditional state control, they have to do it in terms, by explicitly mentioning the states. And there are a lot of federal statutes, which I'm guessing a lot of people in this room would like, such as Title VII and the Fair Labor Standards Act and the Rehabilitation Act, and the Americans with Disabilities Act, and the Family Medical Leave Act, and others that say explicitly in their coverage provisions that they apply to states or states and their governmental subdivisions, or political subdivisions, or other similar language that is very clearly talking about governmental bodies.

But there is no comparable language in IRCA. And the regulations added the phrase "governmental body," right from the jump in 1986. But that is not there in the statute. And then in 1996, as I told you, Congress amended the statute to include the federal government, and it's very hard to understand why they're doing that if it's already covered by the regulation. So, you can see here what the contours of this argument look like.

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The last thing I'll say on the merits of the legal theory is there is a long history of certain kinds of jobs and certain kinds of state functions being carved out as spheres where the states decide, on Tenth Amendment grounds. In the immigration context, the cases I'm talking about have been cases that limited jobs to citizens, limited more narrowly than the federal employment authorization regulations permit. And some of those were upheld. Cases like *Foley* [*v. Connelie*][38] and *Ambach v. Norwick*.[39]

These cases basically say that there are certain important government functions that can be restricted to citizens or narrower groups, but they talk about states being able to define their political community. Some of their logic seems like it's only focused on restricting employment to citizens, but other parts of their logic seem to be focused more generally on state autonomy. And of course, there is a long history of non-citizen voting in this country in certain kinds of state elections. This state autonomy doctrine is not limited to the immigration context. States have the power to decide who gets to be a judge, and they can set those criteria notwithstanding, say, federal age discrimination statutes. That's *Gregory v. Ashcroft*.[40]

In California I think it's a pretty interesting idea. We explicitly allow undocumented people to serve as attorneys. If the governor, say, appointed an undocumented person to be a judge or appointed an undocumented person to be, say, the deputy Attorney General. Whether IRCA would prohibit that person from being employed and paid by the state of California presents quite a serious Tenth Amendment question. And if IRCA might well be unconstitutional in such situations, then the next question is, "Can IRCA be read to avoid that constitutional problem? Or does it make sense to read IRCA to have addressed that major question of federalism in the absence of clear language saying that it did?" I think there's actually quite a good argument, saying, "No, there's a perfectly straightforward way to read the statute to not prohibit such hiring." The way to do that is just to read it according to its plain text. That's the legal theory in a nutshell.

There is a substantial campaign that has run over the last 18 months, involving a huge mobilization of undocumented students throughout the University of California. And in May of 2023, the campaign won a substantial victory. The University of California said they were going to adopt this proposal and set themselves a six-month deadline to develop an implementation plan to put it into place.[41] And then that deadline came, and it went. The UC did not start hiring undocumented students. And then just a couple of months ago in January, the UC reversed course and said they were going to suspend this proposal (that they had adopted in May) for one year.[42] There's public reporting stating that the Biden administration privately pressured the University of California to do this (that is, *not* to permit the hiring of undocumented students).[43] I'm sad that our friend from the Biden administration on the last panel is gone, because I would've love to ask him about that.

As soon as that happened, state legislators in California introduced legislation to essentially force the University of California to permit the hiring of

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undocumented students, and not just the UC, but also the California State University system and California Community colleges as well.[44] That legislation, which is AB2586 in California, would require those university systems to open all student employment to all students regardless of immigration status, and would explicitly put in place the interpretation of IRCA that I just told you about, saying that that is the policy of the state of California.[45]

The very last thing I'll say concerns the implications of these ideas. They started in the university because that's where there's a huge amount of demand for this idea. But the implications of them are broader. If it's true that states and some local governments can employ undocumented people, there's nothing about that logic which is restricted to universities or to students. Potentially, the implications would allow states to run other kinds of employment programs as well. There are other governmental entities in different parts of the country that are also interested in the idea. I'll stop there.

Kaitlyn A. Box

Anil, standing has been a key issue in litigation concerning the migrant protection protocols, the Biden administration's priorities memo, and the humanitarian parole program for nationals of Cuba, Haiti, Nicaragua, and Venezuela. How do you see standing issues playing out with future DACA litigation?

Anil Kalhan

That's a great question. As Cyrus indicated in his opening remarks, the questions about standing may be in a little bit of flux right now. So I'm not going to try to guess or to predict what's going to happen with respect to standing. But on the broader question of standing in all of this litigation, I do want to highlight and draw attention to a law review article written by Jennifer Lee Koh on these issues, which examines the core notion underlying the standing arguments in all of these cases that the very existence of immigrants within a state should fundamentally be understood as imposing financial and other costs, which forecloses any consideration of the benefits that immigrants provide and ultimately reinforces the dehumanizing rhetoric surrounding immigration policy. It's an article that's well worth reading when thinking about this set of questions about standing.[46]

Ahilan Arulanantham

["The Rise of the 'Immigrant-as-Injury' Theory of State Standing"] is the name of the article.

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Kaitlyn A. Box

Ahilan, given the resurgence of state immigration laws like Texas's SB4, which would essentially allow the state to set its own immigration policy,[47] how do you think that challenges to laws like this would interact with state efforts to provide work authorization to undocumented individuals or even specifically with the Opportunity for All program, which in some ways could itself be viewed as a state program?

Ahilan Arulanantham

That's a great question. I think at one level, SB4, the Texas law, feels like it goes much more to the heart of federal supremacy. The line that we have often drawn on both sides of this issue has been between who gets to come in and who gets deported. That's the core of federal supremacy. In contrast, with all the ancillary issues—and I would put employment in that bucket—there's a little bit more room for states also to play. That's consistent with *DeCanas v. Bica*, pre-IRCA case law, which drew a distinction like that.[48] I think you could question the plausibility of such line-drawing in either direction. But that is the line that I would draw as a first-cut description of existing law.

That being said, I think at the slightly more abstract level, the premise of your question is that it's going to be hard for the Supreme Court to give more room to Texas to pass laws like this, and to chip away at *Arizona*,[49] and simultaneously also shut down state innovation on the more immigrant-inclusive side with employment authorization. Because I think the underlying issue presented by the Texas case is, "Is this litigation going to result in either an overrule or a rollback of *Arizona*, the SB1070 case?"[50] It doesn't mean the Supreme Court won't do it. Going back to *Trump v. Hawaii*, if you look at how they read the Muslim ban, the statute issuing a Muslim ban, [INA] 212(f),[51] and look at how they're reading the statutes that Anil is talking about [authorizing DACA], it looks like a different court. It's not the same people reading both laws.

So, it's not impossible for them to do this, but I do think it creates pressure and makes it harder for them. You've got states that want to deport undocumented people, and states that want to let them work. How do you reconcile these? I actually think giving more state autonomy in both directions is one possible avenue of political-legal compromise that could develop.

Anil Kalhan

May I just follow up on that?

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Ahilan Arulanantham

Yes.

Anil Kalhan

Because I have questions about that as a strategy. In some ways, what you have pointed to across all of the different elements is an approach that proposes to take the various legal mechanisms used by the anti-immigration legal movement and try and flip them around and use them for inclusive purposes. For example, with respect to federalism, to the extent that there are states seeking to be exclusionary or restrictionist in their valence, let's use the same kinds of federalism-based arguments used by restrictionists, or versions of them, to be inclusionary in other states. Or to take a couple of other examples, which are not necessarily ones that you are talking about which bear some resemblance to what you are proposing, to the extent that deeply textualist modes of reasoning are ascendant, let's deploy textualist reasoning to inclusive ends, or to the extent that *Chevron* deference might be insulating adverse enforcement decisions by the immigration agency, then maybe the fall of *Chevron* is something to be embraced.

I just wonder about those kinds of strategies and how you think about them, and whether you worry either about reinforcing the exclusionary or restrictionist impulses that underlie how those arguments are being deployed in the first place. I also wonder how successful those kinds of strategies might be if they are met, for example, with arguments to the effect that immigration should be treated as an exceptional domain in some manner, as it so often is. So, I'm just curious how you think about that set of questions, because it strikes me that they are present across the board in all of the examples that you've discussed in your comments.

Ahilan Arulanantham

I definitely struggle with it. I'm not a fan. If you take off my advocacy hat and ask me, "Do you think textualism as a doctrine of statutory interpretation makes sense?" My general answer is no. Words are far too indeterminate for them to bear the weight that conservative legal scholars often give them. I also don't want to overstate the extent to which this is part of some kind of grand theory. Really, my thoughts about IRCA came to me a long, long time ago. Actually, it was when states started passing marijuana legislation that I first looked at this and thought, "Oh, that's interesting." But what really drove the development of this idea was the very acute human need of these students and my search for a way to solve a particular problem.

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And it's not a small problem, because it's literally the same problem that produced DACA in the first place. We're now in that exact same spot, basically 10 years later. And so it's a legal theory to solve a particular problem rather than a broader theory.

That being said, I guess my general take, writ large, on your question is that it's all just happening anyway. I feel like textualism and also federalism-oriented moves in our jurisprudence are here. We're sitting here having this discussion after Texas has passed a law that authorizes deportation. So, I feel like either we can try and shape these movements to our benefit, or we can sit on the sideline and have them all go in one direction. That's my broader general thinking about it. Would it be better to live in a world where there was one uniform, just, and humane immigration policy for everyone? Yeah, I think that probably would be better. You could have a world of private sponsorship without so much centralization, like the [Cuba, Haiti, Nicaragua, Venezuela] program does with private sponsorship,[52] and still simultaneously have basic human rights enforced at the federal level. But that is not our system. That is not our world. We've been waiting for it for decades, and it hasn't come. And so I feel like there's no point just sitting.

Anil Kalhan

Just to add a little bit more to explain what lies behind the question, there are analogous kinds of dilemma that I think people are thinking about in other contexts. If you think about constitutional law litigation, for example, how should advocates respond to the rise of the kinds of history and tradition approaches taken in *Dobbs* or in *Bruen*?[53] One response is to try to play that same history-and-tradition game by making arguments that rely on "better history," or that seek to broaden and democratize the ways in which history and tradition are invoked.[54] But that could then have the effect of reinforcing those kinds of approaches in ways that are ultimately undesirable in the long run. Now, those kinds of responses might still be defensible, but I think that these are dilemmas worth wrestling with expressly, because to the extent that these kinds of responses might risk reinforcing a set of legal worldviews that ultimately might not favor the goals more broadly that one is seeking, it becomes important then to *also* create space to question that overarching and ascendant legal discourse altogether in more fundamental ways.

Ahilan Arulanantham

I completely agree with that. And if you look in particular at constitutional immigration law, we have a lot to lose from this turn to immigration history. There's this case, *Department of State v. Munoz*, which is about what

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due process rights are available to spousal petitioners when the agency gives no explanation for a denial on the ground that the beneficiary is going to break the law in the future at some point.[55] And that's all the explanation that you get. This is the issue that was in *Kerry v. Din*[56] and *Kleindienst v. Mandel*[57] to some extent. And the history that the court is looking to is this history of really horrific sexism and racism in the immigration law, which is all over the immigration law. There's got to be a place to say, "But we repudiated that. So we can't look at that."

I think that's really important. Textualism . . . bothers me less, I guess, because the normative stakes are not quite so great. It's just a theory that doesn't do much to create certainty in statutory interpretation. In contrast, some of the federalism cases that we are relying on were engines for restricting rights. And so what we're trying to do is repurpose them. It's a heavy lift, and that gives me more pause. What you're describing, which is a very similar problem involving how we use history gives me pause for similar reasons, because the history of the country that you're looking to is not a progressive history. It's not a history that respects the dignity and freedom of immigrants or anyone beyond the privileged few. So, I definitely agree. It's a struggle. It's a problem.

Kaitlyn A. Box

As our time is running out, I just want to offer our audience an opportunity to ask questions. If there are any, feel free to just approach the podium or ask your question.

Audience Member 1

For the Opportunities for All, IRCA applies to workers but not to independent contractors, or, could that be one of the strategies, too, where the UCs look to student employment as those students being independent contractors because states, they define what employment is. Right?

Ahilan Arulanantham

Mm-hmm.

Audience Member 1

And so isn't that one way to take that approach to IRCA?

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Ahilan Arulanantham

That's something that undocumented people did a lot prior to DACA, and something that this generation of students, as I know just from working with them, has already done a lot. Some of the leaders of the Undocumented Student-Led Network, which is the engine behind the Opportunity for All movement in the UC, are already part of a worker cooperative. The university has also done other things, fellowships, internships, experiential learning, all these kinds of things.

I think there's two problems with those, maybe three. One is just at a very practical level, it seems it's very hard to push enough money to students before you hit the independent contractor versus worker problem. And obviously, lots of progressive people have fought on the other side of that line in gig economy labor disputes. You want to classify people as workers so they get more protections. If they're independent contractors, they lose those protections. So it creates both political and practical problems that way.

The other problem for, at least, some of these, is that it is very difficult to reclassify some of these workers. For medical residents, you would have to essentially reclassify all of the medical residents as independent contractors. But they're employees in hospitals. For teachers, there are teachers' unions. How can they all be contractors? So, I think that approach has both practical and doctrinal limits, unfortunately.

Audience Member 2

Regarding the benefits for all this, such an intriguing idea. New York was trying to push employment authorization policy, especially a temporary one for asylum seekers. One idea is, "Could the states become the employer, and then subcontract these people to private employers?" The state becomes a staffing agency, and they're the employer, the ultimate employer. It could lead to very interesting outcomes.

Ahilan Arulanantham

I had some conversations with them about that. I don't know exactly what happened to it, although I imagine it may have gotten the same kind of resistance that we got in the UC, perhaps, meaning from the White House. But everything you said I think is right. The one thing that is tricky is when you're talking about a set of people who may have a really clean pathway to immigration status through asylum or something like that, the risk to them of engaging in potentially unauthorized work might be more serious. I'm sure

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you and many other people in this room know this better than me. Sometimes the unauthorized work ground of inadmissibility is waivable. Sometimes it's not. We looked at this for the students. All these students have years of unlawful presence. They're not going to generally adjust through labor or through extended family petitions. So, it doesn't really make much of a difference to them. But it's also true that we advise students, "You should go consult with the UC Immigrant Legal Services," which is a free legal entity that provides immigration advice to students.

How to think about the risk of potentially unauthorized work for, say, a recently arrived person who's just waiting for that 180 days to run before they can get their employment authorization through their asylum application is something you'd want to look at.

But to answer your question: absolutely, I think it has broad potential. You could also imagine a state that just says, "We're going to open all of our jobs to the best person regardless of immigration status." So, it's not a targeted program just for Venezuelans or something. It's just, "We're opening our jobs to everyone." L.A. County has a million undocumented people living in the county.[58] And many of them, of course, have lived here for decades. It makes a lot of sense and not only in L.A., I'm sure in other places, too.

Kaitlyn A. Box

Yes.

Audience Member 3

I was thinking about IRCA and Opportunity for All, which sounds wonderful and creative. But then I also think about, which I think you touched on, how much we celebrated the DACA decision, but how much that very analysis about whether one administration canceling the prior administration's policy had gone through the proper channels of consideration in a way that has not made us particularly happy since then. And I would think that if they tried this, somebody would sue to say that that's not what it means or that states are covered by IRCA. And so I guess my thought is, are there other places in the law where we have these types of favorable ambiguities about, "Are states covered, are states not covered by these regulations that we would be putting potentially in jeopardy if we . . ." And I say we because I'm from California. And it sounds like this is an idea that has momentum there, which I wasn't aware. Do you have any thoughts on what else we're putting at risk if we move forward with this type of policy idea?

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Ahilan Arulanantham

On the first part of your question, the federal government can sue for pattern or practice violations of IRCA. So, there's no question the federal government can sue. In contrast, even before these two recent Supreme Court decisions [that Texas lost], I would've said it's pretty hard for Texas to sue California for hiring its own students. That really is a bridge farther. That is part of the theory that Cyrus, in opening remarks, and Anil were talking about. The response to suits from Republican-led states is you look for something that is really, really hard to shut down that way. It's really hard, I think, for anybody to have Article III standing. You can sue in California just through taxpayer standing, as you know, I'm sure. But the highest court there is going to be the California Supreme Court. That's that.

As to areas outside of immigration, this wave of litigation all happened in the eighties and nineties. Part of why a lot of these statutes got rewritten to explicitly encompass states was because the Supreme Court said, first as to sovereign immunity, states couldn't be sued for violating the Fair Labor Standards Act, or the statute governing children with disabilities, and similar laws. Then later, even as to the scope of the statute itself, they did the same. This wave kind of swept through the civil rights statutes. There was *Alden v. Maine*,[59] and a set of cases that were a big deal back in the nineties about this.

Within immigration, I haven't really looked very carefully. My intuition is that there's probably not a lot that would be harmful within the code for making the switch other than the discrimination provisions right next door, 1324b.[60] If our theory is correct, those do not govern states.

What it means is if the state of Texas decides as a statutory matter, say no lawful permanent residents can work for the state of Texas, there still may be constitutional objections under *Graham v. Richardson*,[61] but IRCA's non-discrimination protections would not apply to state government. That's a big deal. And it's a very small jump from our theory to the theory that 1324b[62] does not apply to state employers.

Anil Kalhan

This is not quite at the specific granular level of your question, but I think the thing that I would wonder about that is in the spirit of your question is that to the extent to which going down this road might reinforce a more state-by-state approach to thinking about membership, fundamentally, in a big picture kind of way, that might in turn put pressures on things like the right to travel, the extent to which states must respect and extend full faith and credit to decisions made by other states, the extent to which states may legislate extraterritorially, and so on. I mean that only in general terms, not in any sort of specific fine-grained manner at the level of legal doctrine. But we

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can see a related set of developments arising in the aftermath of *Dobbs*, which is putting pressure on federalism in precisely these kinds of ways.[63] How do we think about national membership as it relates to state membership when state membership becomes much more salient and solidified, and defined in dramatically different ways from state to state? That invariably is going to have other implications. Maybe that is not something to worry too much about if, for example, that's direction in which the world is moving anyway, as Ahilan suggests, quite apart from strategies like these. In which case perhaps we just live with it and respond within that paradigm. But those are some of the big picture and longer term issues that your question seems to raise.

Ahilan Arulanantham

I'd just very quickly add to what Anil said: this fight is already happening in a huge way. If anybody's reading the newspaper or following abortion politics, states criminalizing people outside of their states is just around the bend. You want to go to another state to get transgender medical care or therapy that wasn't available in your state? That could easily be criminalized. All of this is coming down the pike. Immigration is not even ground zero for that battle. It's probably the third or fourth most prominent area in which all these fights are coming.

Kaitlyn A. Box

I believe our time is just about up. Anil, Ahilan, thank you both for being here and for this fantastic conversation.

Anil Kalhan

Thank you.

Notes

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2. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

3. Memorandum from Janet Napolitano, Sec'y of Homeland Security, for David V. Aguilar et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

4. *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015). In a separate lawsuit toward the end of this first phase of the litigation, the Ninth Circuit called some of the claims against DACA's legality into question, but without squarely ruling on the legality and constitutionality of DACA itself. *Arizona Dream Act Coalition v. Brewer*, 818 F.3d 901, 917-19 (9th Cir. 2016).

5. Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., for Leon Rodriguez et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

6. Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. Rev. Disc. 58, 62-64, 78-84 (2015); *see United States v. Ramirez*, 38 F. Supp. 3d 818 (S.D. Tex. 2014); *United States v. Nava-Martinez*, No. B-13-441-1, 2013 WL 8844097 (S.D. Tex. Dec. 13, 2013); *United States v. Cabrera*, 711 F. Supp. 2d 736 (S.D. Tex. 2010).

7. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (granting preliminary injunction).

8. *See* Anil Kalhan, *Judicial Illiberalism: How Captured Courts Are Entrenching Trump-Era Immigration Policies*, 27 Bender's Immigr. Bull. 1971 (2022); Stephen I. Vladeck, *Don't Let Republicans Game the Courts by Judge Shopping*, N.Y. Times (Feb. 5, 2023), at A18.

9. *See* Kalhan, *supra* note 6, at 70-73.

10. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (affirming preliminary injunction); *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (denying stay pending appeal); *see* Anil Kalhan, *DAPA, "Lawful Presence," and the Illusion of a Problem*, Yale J. Regulation Notice & Comment (Feb. 12, 2016), https://www.yalejreg.com/nc/dapa-lawful-presence-and-the-illusion-of-a-problem-by-anil-kalhan/; Anil Kalhan, *Executive Action on Immigration and the Judicial Artifice of "Lawful Presence,"* Dorf on Law (June 3, 2015), https://www.dorfonlaw.org/2015/06/executive-action-on-immigration-and.html.

11. *See* Kalhan, *supra* note 6, at 68-70.

12. *See* Kalhan, *supra* note 6, at 66-70, 75-78; Geoffrey Heeren, *Work and Employment for DACA Recipients*, 39 Yale J. on Regul. Bull. 46 (2021).

13. Anil Kalhan, *The Strange Career of* United States v. Texas, Dorf on Law (Apr. 18, 2016), http://www.dorfonlaw.org/2016/04/the-strange-career-of-united-states-v.html.

14. *Id.* (describing the litigation as a "political attack in search of a legal rationale").

15. *United States v. Texas*, 579 U.S. 547 (2016) (affirming Fifth Circuit by equally divided court).

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16. Letter from Jefferson B. Sessions III, Att'y Gen., to Elaine Duke, Acting Sec'y of Homeland Sec. (Sept. 4, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf.

17. *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985).

18. *See Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 497 (9th Cir. 2018); *Casa de Maryland v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684, 699 (4th Cir. 2019); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1030-31 (N.D. Cal. 2018) (citing and quoting *National Treasury Employees Union v. Horner*, 854 F.2d 490, 496 (D.C. Cir. 1988) and *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671 (D.C. Cir. 1994)); *NAACP v. Trump*, 298 F. Supp. 3d 209, 233 (D.D.C. 2018) (discussing and applying *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671 (D.C. Cir. 1994) and *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808 (D.C. Cir. 1998)).

19. *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 420-24 (E.D.N.Y. 2018); *Casa De Maryland*, 924 F.3d at 704 (noting that "[t]he courts in the *Texas* litigation . . . did not address constitutional claims"); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1037-42 (N.D. Cal. 2018).

20. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 510 (9th Cir. 2018).

21. *NAACP*, 298 F. Supp. 3d at 238-40; *see also Casa De Maryland*, 924 F.3d at 704 (expressly agreeing with Bates).

22. *See also* Cristina M. Rodríguez, *Reading* Regents *and the Political Significance of Law*, 2020 Sup. Ct. Rev. 1, 13-14 (2021) (describing Roberts as having engaged in "extensive use, bordering on adoption" of Smith's Fifth Circuit opinion and "extended exposition of the Fifth Circuit's analysis").

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24. *See* Nancy Morawetz, *The Perils of Supreme Court Intervention in Previously Technical Immigration Cases*, 64 Ariz. L. Rev. 767 (2022); Rodríguez, *supra* note 22, at 19-26.

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31. *See* Jie Zong & Jeanne Batalova, *How Many Unauthorized Immigrants Graduate from U.S. High Schools Annually?*, Migration Policy Institute (Apr. 2019), https://www.migrationpolicy.org/research/unauthorized-immigrants-graduate-us-high-schools.

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33. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

34. IRCA § 1324(a).

35. 8 USC § 1101(b)(3).

36. *Id.*

37. Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

38. *Foley v. Connelie*, 435 U.S. 291 (1978).

39. *Ambach v. Norwick*, 441 U.S. 68 (1979).

40. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

41. *See* UC Office of the President, *UC Statement from President Michael V. Drake, M.D., and Board of Regents Chair Richard Leib* (May 18, 2023), https://www.universityofcalifornia.edu/press-room/uc-statement-president-michael-v-drake-md-and-board-regents-chair-richard-leib?utm_source=twitter-ucnewsroom&utm_medium=social-organic&utm_campaign=regents.

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44. Cal. Assemb. B. 2586 (2023-2024).

45. *Id.*

46. Jennifer Lee Koh, The Rise of the Immigrant as Injury Theory of State Standing, 72 Am. U. L. Rev. 885 (2023).

47. Texas S.B. 4 (2023).

48. *De Canas v. Bica*, 424 U.S. 351 (1976).

49. *Arizona v. United States*, 567 U.S. 387 (2012).

50. *Id.*

51. *Trump v. Hawaii*, No. 17-965, 585 U.S. ___ (2018).

52. U.S. Department of Homeland Security, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023) https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.

53. *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. 215 (2022); *New York State Rifle & Pistol Association, Inc. v. Bruen*, No. 20-843, 597 U.S. 1 (2022).

54. *See, e.g.*, Reva B. Siegel, Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance, 101 Tex. L. Rev. 1127, 1193-1204 (2023); Simon Lazarus, *Conservatives Don't Have a Monopoly on Originalism*, New Republic (Mar. 29, 2024), https://newrepublic.com/article/180144/liberal-originalism-history-constitution-interpretation.

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55. *Dept. of State v. Munoz*, No. 23-334 (2024).

56. *Kerry v. Din*, 576 U.S. 86 (2015).

57. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

58. Migration Policy Institute, *Profile of the Unauthorized Population: Los Angeles County, CA*, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/county/6037.

59. *Alden v. Maine*, 527 U.S. 706 (1999).

60. 8 USC § 1324b.

61. *Graham v. Richardson*, 403 U.S. 365 (1971).

62. 8 USC § 1324b.

63. *See, e.g.*, Katherine Florey, Dobbs *and the Civil Dimension of Extraterritorial Abortion Regulation*, 98 N.Y.U. L. Rev. 485 (2023); *see also* Kate Masur, *Abortion Rights and Federalism: Some Lessons from the Nineteenth Century United States*, 14 ConLawNOW 151 (2023).

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The Role of Federal Courts in Shaping Gender-Based Asylum

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Abstract: This article explores federal courts' significant role in clarifying that survivors of gender-based violence can qualify for asylum under U.S. law. When adjudicators have found such claims lacking with respect to one or more elements of the refugee definition, federal judicial review has often proven a useful corrective to misguided assumptions and incorrect analyses. This article highlights the role of federal courts in shaping gender-based asylum law, specifically in the context of claims based on membership in a particular social group and feminist political opinion, as well as nexus to a protected ground.

Although the statutory definition of "refugee" does not explicitly reference gender or sex, it is well-established that asylum claims brought by women fleeing domestic violence are encompassed within both international and U.S. law.[1] Over the last four decades, Article III federal courts and the Board of Immigration Appeals (the Board) have repeatedly recognized that women fleeing domestic violence and asylum seekers who fear gender-based violence are eligible for refugee protection. Yet, some adjudicators nonetheless remain confused about gender-based asylum claims, improperly dismissing them as claims based on personal disputes, as opposed to claims based on a protected ground recognized by the Refugee Convention. In one prominent and misguided example, the U.S. Departments of Justice and Homeland Security published in late 2020 twin regulations that would have adopted "a presumption against asylum claims that are rooted in gender-based persecution,"[2] notwithstanding the myriad authorities that contradict any legal basis for that proposition. Crucially, those regulations were enjoined before ever being implemented, and remain enjoined as of this writing.[3] Thus, U.S. law implementing the Protocol to the Refugee Convention protects refugees fleeing gender-based persecution.

This article provides a brief overview of the impact of federal courts on the development of gender-based asylum claims, focusing on the protected grounds of membership in a particular social group and political opinion, as well as nexus to harm in gender-based asylum cases. In so doing, the article seeks to underscore the viability of gender-based asylum claims within the existing refugee definition and framework. Well-intentioned proposals to amend the refugee definition to explicitly include gender or sex as a sixth ground would only exacerbate confusion by bringing the United States further out of step with the definition of "refugee" under Refugee Convention and its Protocol, which Congress codified into U.S. law with the Refugee Act of 1980.[4]

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Gender-Based Particular Social Groups and Domestic Violence-Based Asylum Claims

Federal courts have built on long-standing Board precedent and expanded the recognition of gender-based asylum claims. Although the Board has issued multiple unpublished decisions recognizing the cognizability of gender-plus-nationality-based social groups,[5] it has issued only a handful of precedent decisions addressing gender-based asylum claims. In the absence of Board precedent, federal courts have stepped in to fill the gap and clarify the understanding of the social group ground for asylum in the context of gender-based claims.

Almost 40 years ago, in *Matter of Acosta*, the Board recognized that a group defined by sex can establish a cognizable social group.[6] In *Acosta*, the Board used the *ejusdem generis* canon of statutory construction, which counsels that "general words used in an enumeration with specific words should be construed in a manner consistent with the specific words," to clarify the meaning of "particular social group."[7] The Board found that the other protected grounds—race, religion, nationality, and political opinion—describe "immutable characteristic[s]" that are "beyond the power of an individual to change or [ ] so fundamental to individual identity or conscience that [they] ought not be required to be changed."[8] The Board therefore determined that "particular social group" should be read to encompass "a group of persons all of whom share a common, immutable characteristic."[9] The Board then recognized "sex, color, or kinship ties" as "shared characteristic[s]" that can establish cognizable social groups.[10] In *Matter of Kasinga*, the Board built on the reasoning in *Acosta* to recognize the social group of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM [female genital mutilation], as practiced by that tribe, and who oppose the practice."[11]

More recently, in *Matter of A–R–C–G–*, the Board cited *Acosta* and its finding that "sex is an immutable characteristic" in recognizing as cognizable the social group of "married women in Guatemala who are unable to leave their relationship" in a domestic violence–based asylum claim.[12] The Board further explained that the social group satisfied the additional criteria of particularity and social distinction set forth in *Matter of M–E–V–G–*.[13] In terms of particularity, the Board pointed to the "commonly accepted definitions within Guatemalan society" of the terms "married" and "women" (among others) used to describe the group and the fact that "[i]n some circumstances, the terms can combine to create a group with discrete and definable boundaries."[14] With respect to social distinction, the Board pointed to unrebutted country conditions evidence in the record that "Guatemala has a culture of 'machismo and family violence'" and cited the ineffective laws and institutions put in place in Guatemala to prosecute domestic violence.[15]

In the years since, rather than clarify protections for women fleeing domestic violence, the agency tasked with interpreting the refugee definition

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has contributed to confusion over the viability of gender-based asylum claims, including through former Attorney General Jeff Sessions' misguided efforts to eviscerate gender-based asylum law in *Matter of A–B–*.[16] In 2020, the Department of Justice promulgated regulations that attempted to codify *Matter of A–B–* and create a strong presumption against asylum claims that involve domestic violence.[17] Although the regulations were enjoined before implementation,[18] they nonetheless still create confusion and obstruct accurate adjudication of the refugee definition.[19] As a result, Article III courts have had to step in and bridge the gap.

The First Circuit, for example, has recognized the potential cognizability of the social group of Dominican women when evaluating the asylum claim of a woman from the Dominican Republic fleeing domestic violence.[20] In *De Pena-Paniagua v. Barr*, the First Circuit emphasized that "it is difficult to think of a country in which women are not viewed as 'distinct' from other members of society . . . It is equally difficult to think of a country in which women do not form a 'particular' and 'well-defined' group of persons."[21] As the First Circuit recognized in *De Pena-Paniagua*, the reluctance to recognize gender-based social groups largely stems from concerns, not grounded in law, regarding the size of a particular social group.[22] Yet, as the court explained, the other protected grounds—race, religion, nationality, and political opinion—also refer to large groups of people, and the size of a group is not relevant in evaluating cognizability.[23] The other elements of the refugee definition, including the requirement that the persecution suffered or feared be on account of a protected ground, and that the state be either unable or unwilling to protect against the harm, serve a limiting function and narrow who qualifies for protection.[24]

Other federal courts have also recognized the potential cognizability of gender-based social groups in asylum cases involving femicide, trafficking, and female genital mutilation. The Ninth Circuit in *Perdomo v. Holder*, for instance, recognized a gender-plus-nationality social group in a case involving fear of femicide, and the Second and Seventh Circuits have recognized gender-plus-nationality social groups in cases involving sex trafficking.[25] The First, Third, Sixth, and Seventh Circuit have also recognized the potential cognizability of gender-based social groups in cases where women have refused to conform to societal expectations.[26] Further, multiple federal courts have built on Board precedent in *Kasinga* to recognize the cognizability of gender-based social groups in cases involving women fleeing female genital mutilation.[27]

Feminist Political Opinion as a Protected Ground in Gender-Based Asylum Claims

Article III courts have paved the way for expanded protection for women not only through their recognition of gender-based social groups but also

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through a robust body of case law recognizing actual or imputed feminist political opinions as a protected characteristic. In line with the construction of the Refugee Convention's use of "political opinion" as broader than electoral politics or political parties, federal courts have recognized that political opinion encompasses diverse forms of political belief and expression, including feminist opinions.[28] Indeed, over three decades ago, then-Judge Samuel Alito of the Third Circuit noted that there was "little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes."[29] In the years since, federal courts have upheld and expanded upon the *Fatin v. I.N.S.* court's reasoning. Feminism need not be expressed through more conventional avenues for political participation, such as protest. Rather, possession of a feminist political belief, regardless of the expression thereof, and resistance to patriarchy may constitute political opinion for purposes of refugee protection.[30]

Under both the Refugee Convention and U.S. law, women may establish eligibility for protection based on the feminist political opinions they manifest through conduct, including violations of social or cultural norms. In an early case, the Ninth Circuit in *Lazo-Majano v. I.N.S.* found that a woman's decision to flee rape and beating at the hands of a military sergeant who employed her constituted a "subversive" political opinion opposing male domination.[31]

More recently, courts have explicitly reaffirmed that resistance to patriarchal norms can constitute expression of a feminist political opinion. In *Hernandez-Chacon v. Barr*, for example, the Second Circuit found that "the agency did not adequately consider whether Hernandez-Chacon's refusal to acquiesce was—or could be seen as—an expression of political opinion, given the political context of gang violence and the treatment of women in El Salvador."[32] The court concluded that the agency erred when it "failed to consider whether the attackers imputed an anti-patriarchy political opinion to her when she resisted their sexual advances, and whether that imputed opinion was a central reason for their decision to target her."[33] In *Rodriguez Tornes v. Garland*, the Ninth Circuit recognized that a woman's belief that "there should be equality in opinions[ ] and in worth" and assertion of "her rights as a woman" and "autonomy" constituted a political opinion.[34]

The reasoning in these cases echoes guidance set forth in Asylum Officer training materials, which note that "expressions of independence from male social and cultural dominance in society, and refusal to comply with traditional expectations of behavior . . . may all be expressions of political opinion."[35] The recognition of feminism as a political opinion also reflects guidelines by the United Nations High Commissioner for Refugees (UNHCR) that explain "contrary behavior . . . or failure to conform [to gender expectations] could be interpreted as holding an unacceptable political opinion that threatens the basic structure from which certain political power flows."[36] The recognition that women need not actually express—or even possess—a feminist political opinion so long as their persecutor assumes they do and persecutes them on these grounds is consistent with long-standing Board and federal court

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precedent, as well as UNHCR guidance, regarding imputed political opinion claims, that applies equally to feminist political opinions.[37]

Nexus to a Protected Ground in Gender-Based Asylum Cases

The Board has frequently erred by declaring violence to be an interpersonal dispute rather than persecution on the basis of a protected ground.[38] Courts have overturned this faulty reasoning, recognizing instead that nexus to a protected ground can exist in cases of domestic violence. When determining whether an asylum applicant can establish she was, or reasonably likely would be, harmed on account of any protected ground, the agency must utilize a "mixed motives" or, more properly understood, "mixed reasons" approach.[39] Within this framework, and contrary to both the assumptions of some adjudicators and the enjoined late-2020 asylum regulations attempting to categorically deny protection, domestic violence survivors frequently can establish a sufficient nexus between the harm they suffered (and/or fear) and a protected ground.[40]

Under the Immigration and Nationality Act (INA), an asylum applicant must establish nexus by demonstrating persecution "on account of" a protected ground.[41] The REAL ID Act of 2005 clarified that the "on account of" requirement is satisfied so long as a protected ground is "*at least one* central reason" for the persecution suffered or feared.[42] As the First Circuit explained in *Aldana-Ramos v. Holder*, "the plain text of the statute . . . clearly contemplates the possibility that multiple motivations can exist, and that the presence of a non-protected motivation does not render an applicant ineligible for refugee status."[43] Courts have emphasized that the legislative history of the REAL ID Act confirms Congress's "deliberate" drafting decisions in amending this provision of the INA.[44] As scholars have noted, in enacting the "at least one central reason" standard, Congress expressly rejected proposed language that would have required that a protected ground be "*the* central *motive*"[45]—instead changing "motive" to "reason" and "the" to "at least one." In so doing, Congress codified the mixed-reasons analysis.[46] Thus, in gender-based asylum claims, courts have consistently found an applicant satisfied the nexus element in scenarios where both protected and unprotected reasons for persecution exist.[47] Courts have also found persecution in mixed-reasons cases to be "on account of" a protected ground even where the protected reason is "intertwined with" an unprotected reason.[48]

The mixed-reasons analysis is especially important in gender-based violence cases, where persecution is often improperly characterized as a private matter, a random act of violence, or an interpersonal dispute. In *Qu v. Holder*, for example, the Sixth Circuit found nexus where the persecutor kidnapped the asylum applicant and attempted to force her to marry him in part because her

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father owed money.[49] The court explained that the applicant was targeted both because of a financial dispute with her father and because she was a member of a proffered gender-based social group, and thus the Board erred in denying nexus as "simply a debt collection dispute."[50] In *Garcia-Martinez v. Ashcroft*, the Ninth Circuit similarly rejected an immigration judge's determination that the asylum applicant's rape was "a random criminal act" and thus no nexus existed.[51] The Ninth Circuit then found nexus between the sexual violence suffered and the applicant's gender, despite the government's argument that the persecutor's "carnal desire" was the sole reason for the harm.[52]

In *Hernandez-Chacon*, the Second Circuit called into question the agency's reasoning that Hernandez-Chacon "simply chose to not be a victim" and that the gang's retaliation was not based on a protected ground, explaining that "while Hernandez-Chacon surely did not want to be a crime victim, she was also taking a stand" and "as she testified, she had 'every right' to resist," and came under attack as a result.[53] Similarly, in *Rodriguez Tornes*, the Ninth Circuit rejected the agency's conclusion that the gender-based violence suffered was because of interpersonal dynamics, concluding that while "at some incidents of abuse may also have reflected a dysfunctional relationship is beside the point" since "Petitioner need not show that her political opinion — rather than interpersonal dynamics — played the sole or predominant role in her abuse."[54]

Furthermore, federal courts have required time and again that immigration adjudicators consider the record in its entirety, including country conditions and expert reports, when analyzing nexus in cases of domestic violence. The INA requires immigration judges to affirmatively develop the record and explore all relevant facts by examining the applicant and any witnesses, and nexus can be established through both direct and circumstantial evidence.[55]

Strategies for Continuing to Push the Law Forward

Although federal courts have helped push forward the development of gender-based asylum law, confusion still exists as adjudicators improperly conflate elements of the refugee definition and deny claims based on their floodgates concerns.[56] As a result, it is especially important in the context of gender-based claims to take steps to develop the record if representing the individual in immigration court, such as including country condition information and other circumstantial evidence that helps establish both the legal viability of any protected grounds and nexus to those grounds.

For membership in a particular social group, helpful country condition evidence could include country reports that demonstrate the social distinction of gender, such as examples of local laws that purport to protect women and evidence of disproportionate harm suffered by women within the relevant society. Particularity evidence could include official identity documents, which

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can show that the group has defined boundaries in a given society by illustrating the local government's own classification of those boundaries.

For political opinion-based claims, it is important to explain the law to help individuals understand that their beliefs are political in the context of an asylum claim, despite a lack of personal involvement in traditional party politics, which is often something from which individuals seek distance. It is also important to elicit information from clients about their beliefs and whether they conflict with the beliefs of others in society. More generally, it is often important to develop testimony regarding how an applicant's beliefs or actions with respect to gender roles may be viewed by others in their country of origin.

For nexus, it is important to try to steer clear of words that relegate violence suffered or feared to an interpersonal dispute and to try to provide evidence about the broader societal context about gender dynamics through country condition evidence and country experts as well as experts on gender-based violence, like those who have written declarations available through the Center for Gender and Refugee Studies. At the appellate level, amicus briefs can help make clear the flaws in the agency's reasoning especially as it relates to the protected ground and nexus.

Advocates can dispel misconceptions about the law driven by floodgates concerns by pointing to federal court decisions that highlight the irrelevance of size in analyzing claims for protection and by citing unpublished decisions by the Board itself that reach the contrary result.[57]

In circuits where there is problematic precedent, it is important to emphasize the need for a case-by-case analysis of asylum claims and to develop the record so as to distinguish the facts and grounds presented.[58] Although the Fifth Circuit, for example, has rejected social groups based on the *A–R–C–G–* formulation, immigration judges in the Fifth Circuit have granted protection based on gender-plus-nationality-based social group claims.[59] In the Third Circuit, for example, *Chavez-Chilel v. Attorney General* conflated elements of the refugee definition in rejecting a gender-based claim.[60] But in *Avila v. Attorney General*, the court recognized the claim involving "Honduran women in a domestic relationship where the male believes that women are to live under male domination."[61]

Considering the Department of Justice and Department of Homeland Security's history of inconsistent rulings and regulations on gender-based particular social groups, and the rule set out in *Matter of W–Y–C– & H–O–B–*[62] that the Board is generally not required to consider any particular social group formulations that were not advanced by an applicant before the closing of their individual hearing, advocates should present the immigration judge with alternate formulations for any gender-based particular social groups. In a situation where an individual is seeking appellate review of a determination that one or more gender-based particular social groups was not cognizable, and where the group or groups proffered to the immigration judge were articulated more narrowly than a group defined by gender-plus-nationality (which might have

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more traction on appeal), it is critical to distinguish *W–Y–C– & H–O–B–* by pointing to cases like *Silvestre-Mendoza v. Sessions* and *Ferreira v. Garland*. In *Silvestre-Mendoza*, the Ninth Circuit remanded to the Board for consideration of whether "Guatemalan women" is a particular social group that subsumed the previously articulated, narrower group.[63] Similarly in *Ferreira*, the First Circuit remanded for the Board to consider whether "Trinidadian women" was "substantially similar" to the social group proffered by petitioner below.[64] Practitioners should also note whether the individual was unrepresented below and therefore should not be constrained by the previously proffered social groups.[65]

Conclusion

Federal courts have helped push forward the understanding of the refugee definition in a manner consistent with the Refugee Convention, recognizing that women fleeing domestic violence qualify for protection. But work remains to be done. Given the specter of *Matter of A–B–* and the enjoined regulations, it is critical that advocates continue to ensure that gender-based asylum claims are considered fairly and equitably, as required under the Refugee Convention and U.S. law.

Notes

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1. *See* Sabrineh Ardalan & Deborah Anker, *Resetting Gender-Based Asylum Law*, Harvard L. Rev. Blog (Dec. 30, 2021) ("As scholars, adjudicators, and the UNHCR alike have emphasized, sex and gender are already encompassed within the Convention's definition of refugee"); *see also* Deborah E. Anker, *Law of Asylum in the United States* § 5:46 (2023); Karen Musalo, *The Wrong Answer to the Right Question: How to Address the Failure of Protection for Gender-Based Claims?*, Immigration Prof Blog (Mar. 9, 2021); Rodger Haines QC, *Gender-Related Persecution* in *Refugee Protection in International Law* (Erika Feller et al., eds. 2003).

2. *Pangea Legal Serv's v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966, 970 (N.D. Cal. 2021).

3. *See id.* at 977.

4. With the Refugee Act of 1980, Congress incorporated the definition of refugee from the 1951 U.N. Convention relating to the Status of Refugees and the 1967 Protocol into U.S. law. *See* Immigration and Nationality Act § 101(a)(42)(A); *see also* *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("the abundant evidence of an

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intent to conform the definition of 'refugee' and our asylum law to the United Nations Protocol to which the United States has been bound").

5. The Board has often remanded for consideration of gender- and gender-plus-nationality-based groups. *See, e.g.*, Winograd Index of Unpublished Decisions of the Board of Immigration Appeals (collecting *S–D–C–A–*, AXXX-XXX-373 (BIA Oct. 15, 2020) (unpublished) ("Mexican women"); *R–M–T–*, AXXX-XXX-377 (BIA Sept. 21, 2020) (unpublished) ("women in El Salvador"); *A–R–C–*, AXXX-XXX-103 (BIA Mar. 10, 2020) (unpublished) (remanding for consideration of gender-plus-Guatemalan-nationality group); *E–E–G–R–*, AXXX-XXX-363 (BIA Nov. 14, 2019) (unpublished) (same); *Y–M–L–*, AXXX-XXX-294 (BIA Sept. 10, 2019) (unpublished) (same); *S–R–P–O–*, AXXX-XXX-056 (BIA Dec. 20, 2018) (unpublished) ("Mexican women"); *T–S–M–*, AXXX-XXX-911 (BIA Apr. 16, 2019) (unpublished) ("[B]eing a woman is an immutable characteristic . . . as gender is fundamental to one's individual identity or conscience.")).

6. *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). The Board has since added two criteria to the *Acosta* test, requiring that social groups also be "particular" and "socially distinct." *Matter of M–E–V–G–*, 26 I&N Dec. 227, 236 (BIA 2014).

7. *Acosta*, 19 I&N Dec. at 233.

8. *Id.*

9. *Id.*

10. *Id.* (emphasis added).

11. *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); *id.* at 377 (Rosenberg, concurring) (noting that "recognition of a particular social group based upon tribal affiliation and gender is . . . in harmony with the [federal] guidelines for adjudicating women's asylum claims"). *See also* Memorandum: Considerations for Asylum Officers Adjudicating Asylum Claims from Women 9, Immig. & Naturalization Serv. (May 26, 1995).

12. *Matter of A–R–C–G–*, 26 I&N Dec. 388, 392 (BIA 2014); *see also Matter of A–B–*, 28 I&N Dec. 307 (A.G. 2021) (reinstating *A–R–C–G–* after intervening vacaturs).

13. 26 I&N Dec. at 393.

14. *Id.*

15. *Id.*, citing *Matter of M–E–V–G–*, 26 I&N Dec. at 239.

16. *Matter of A–B–*, 27 I&N Dec. 316, 320 (A.G. 2018); *see also Matter of A–C–A–A–*, 28 I&N Dec. 351 (A.G. 2021), wherein Attorney General Garland vacated another precedential decision by Attorney General Sessions (*Matter of A–C–A–A–*, 28 I&N Dec. 84 (A.G. 2020)) that had reversed an unpublished Board decision affirming a gender-based asylum grant. This back-and-forth typifies the agency's inability (so far) to provide clear, consistent, and legally sound guidance on gender-based claims. In that respect, it echoed *Matter of R–A–*, 22 I&N Dec. 906 (A.G. 2001), wherein Attorney General Janet Reno vacated a previous Board decision denying asylum to a survivor of domestic violence.

17. *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274, 80281-82 (Dec. 11, 2020) (amending 8 CFR 208.1, 8 CFR 1208.1).

18. *Pangea*, 512 F. Supp. 3d 966. For an explanation of which regulations are in effect and which are enjoined, see *Enjoined Asylum Regulations "Cheat Sheet,"* Nat. Imm. Project (Feb. 3, 2023), https://nipnlg.org/work/resources/enjoined-asylum-regulations-cheat-sheet.

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19. *See, e.g.*, Victoria Neilson, The Death to Asylum Regulations Continue to Harm Asylum Seekers Even Though They Are Enjoined, Think Immigration Blog (Dec. 9, 2022), https://www.aila.org/blog/the-death-to-asylum-regulations-continue-to-harm-asylum-seekers-even-though-they-are-enjoined.

20. *De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020). In *De Pena-Paniagua*, the First Circuit recognized the potential cognizability of gender-plus-nationality particular social groups (PSGs) in the case of domestic violence even as *Matter of A–B–* remained in effect, underscoring the power of Article III courts to shape asylum law independent of an administration's priorities.

21. *Id.* at 96.

22. *Id.* at 9-10.

23. *Id.*; *see also Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, U.N. High Comm'r for Refugees, 5, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) ("[t]he size of the purported social group is not a relevant criterion in determining whether a particular social group exists").

24. *Niang v. Gonzales*, 422 F.3d 1187, 1199-1200 (10th Cir. 2005).

25. *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (rejecting argument that groups can be "too large" to be cognizable); *Paloka v. Holder*, 762 F.3d 191 (2d Cir. 2014) (remand for consideration of young women in Albania, unmarried young women in Albania); *Cece v. Holder*, 733 F.3d 662, 676 (7th Cir. 2013) (young Albanian women who live alone). In *Perdomo v. Holder*, for example, the Ninth Circuit found a particular social group of "women in Guatemala" could be cognizable, reasoning that "the size and breadth of a group alone does not preclude [it] from qualifying." *See* 611 F.3d at 668-69; *see also Rodriguez v. Garland*, No. 22-170, 2023 WL 2675064, at *1 n.1 (9th Cir. Mar. 29, 2023) ("[W]e have held that 'women in a particular country . . . could form a particular social group.'" (quoting *Perdomo*, 611 F.3d at 667)).

26. *See, e.g.*, *Ferreira v. Garland*, 97 F.4th 36 (1st Cir. 2024); *Al-Ghorbani v. Holder*, 585 F.3d 980, 996 (6th Cir. 2009) ("[A] particular social group may be made up of persons who actively oppose the suppression of their core, fundamental values or beliefs."); *Sarhan v. Holder*, 658 F.3d 649, 655 (7th Cir. 2011) ("Society as a whole brands women who flout its norms as outcasts[.]"). Decades ago, then-Judge Alito concluded that "to the extent that the petitioner in this case suggests she would be persecuted . . . simply because she is a woman, she has [identified a cognizable social group]"); *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir. 1993) (relying on *Acosta*, 19 I&N Dec. at 213).

27. *See, e.g.*, *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) ("the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law") (referencing, *inter alia*, *Acosta*, 19 I&N Dec. at 233, *Fatin*, 12 F.3d at 1241, and recognizing that a "group comprised of Somalian females" could be cognizable); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (recognizing the cognizability of "Somali females"); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (holding that "Cameroonian widows" is a cognizable group); *Niang*, 422 F.3d at 1199-200 (finding that "female members of a tribe" satisfied the social group requirements).

28. *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (hereinafter "UNHCR Handbook"), 89, U.N. High Comm'r for Refugees (Feb. 2019) ("Political opinion should be understood

in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged. This may include an opinion as to gender roles").

29. *Fatin*, 12 F.3d 1233.

30. *See Rodriguez Tornes v. Garland*, 993 F.3d 743 (9th Cir. 2021) (pointing to "Petitioner's testimony that 'there should be equality in opinions[] and in worth' between the sexes" as well as her "insistence on autonomy" in finding that she held a feminist political opinion).

31. 813 F.2d 1432, 1435-36 (9th Cir. 1987), *overruled in part on other grounds by*, *Fisher v. I.N.S.*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc).

32. *Hernandez-Chacon v. Barr*, 948 F.3d 94, 104 (2d Cir. 2020).

33. *Id.*

34. *Rodriguez Tornes*, 993 F.3d at 752.

35. *RAIO Combined Training Course: Female Asylum Applicants* 36, U.S. Citizenship and Imm. Serv. (Oct. 16, 2012), perma.cc/D3YU-RHCP.

36. *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, 6, U.N. High Comm'r for Refugees (May 7, 2002).

37. *See, e.g.*, *Alvarez Lagos*, 927 F.3d at 254 (finding that the immigration judge erred in failing to consider whether "Barrio 18 *believed* that Alvarez Lagos held an anti-gang political opinion, the immigration judge focused on whether Alvarez Lagos *actually* possessed that opinion" where the 18 gang would "interpret her failure to pay" as well as "her flight to the United States as evidence that she possesses an anti-gang political opinion" and would "punish that imputed political opinion and make an example of her"); *Matter of S–P–*, 21 I&N Dec. 486, 489, 497 (BIA 1996) (finding persecution on account of imputed political opinion where an "underlying reason for the abuse [suffered] was the belief [imputed to him as a suspected Tamil Tiger] that the victim held political views opposed to the government"); *see also* UNHCR Handbook at 89 (noting that an applicant can be persecuted for as-yet-unexpressed political opinions).

38. *See, e.g.*, *Matter of A–B–*, 27 I&N Dec. 316; *see also Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010) ("[I]f there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus."); *Antonyan v. Holder*, 642 F.3d 1250, 1255-56 (9th Cir. 2011) (finding nexus where the persecutor was motivated both by revenge and the applicant's whistleblowing regarding corruption).

39. 8 U.S.C. § 1158(b)(1)(B)(i); *see* Deborah E. Anker, *Law of Asylum in the United States* § 5:13 (2023).

40. *See, e.g.*, *Alvarez Lagos*, 927 F.3d at 250-51 (substantial evidence in the record compelled the conclusion a refugee had been persecuted on account of her membership in a gender-based group).

41. *Id.* § 1101(a)(42)(A).

42. *Id.* § 1158(b)(1)(B)(i) (emphasis added).

43. 757 F.3d 9, 18-19 (1st Cir. 2014).

44. *Ndayshimiye v. U.S. Att'y Gen.*, 557 F.3d 124, 129 (3d Cir. 2009).

45. H.R. 10, 108th Cong. § 3007 (2004) (emphasis added) (proposing "the central motive" standard for nexus); H.R. Rep. No. 109-72, at 165 (2005) (Conf. Rep.) (adopting "at least one central reason" standard for nexus).

46. *See* Deborah E. Anker, *Law of Asylum in the United States* § 5:13 (2023).

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47. *See, e.g.*, *Alvarez Lagos*, 927 F.3d at 251 (discussing how a refugee's protected ground was "intertwined" with other reason for persecution, but the record nonetheless compelled the conclusion she had been persecuted on account of a protected ground); *Sarhan*, 658 F.3d at 656 (holding that nexus is satisfied in the context of an "honor killing" notwithstanding the applicant's brother's "personal motivation" for wanting to kill her).

48. *See, e.g.*, *Perez Vasquez v. Garland*, 4 F.4th 213, 223-24 (4th Cir. 2021) (finding nexus to a protected ground because "it is enough that the protected ground be *at least one* central reason for the persecution—that is, one central reason, *perhaps intertwined with others*, why the applicant, and not another person was threatened"); *Al-Ghorbani v. Holder*, 585 F.3d 980, 997 (6th Cir. 2009) (finding nexus to a protected ground where a persecutor's "personal motives cannot be unraveled from his motives based on" a protected characteristic); *Salgado-Sosa v. Sessions*, 882 F.3d 451, 458 (4th Cir. 2018) (reaching the same conclusion).

49. *Qu*, 618 F.3d at 608.

50. *Id.* at 608-09.

51. *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076-77 (9th Cir. 2004) (noting that persecutors "do not always take the time to tell their victims *all* the reasons they are being beaten, kidnapped, or killed").

52. *See id.* at 1076; *see also Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004) ("There is no exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it.").

53. *Hernandez-Chacon*, 948 F.3d 94 at 104.

54. *Rodriguez Tornes*, 993 F.3d 743 at 753.

55. 8 U.S.C. § 1229a(b)(1); *see Perez Vasquez*, 4 F.4th at 227 ("[U]nder both international and U.S. refugee law, immigration adjudicators have a 'duty to ascertain and evaluate all the relevant facts' and to 'ensur[e] that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant's claim.'" (quoting *Matter of S–M–J–*, 21 I&N Dec. 722, 723, 729 (BIA 1997))); *Toure v. Att'y Gen. of U.S.*, 443 F.3d 310, 325 (3d Cir. 2006) (emphasizing an immigration judge's "duty to develop an applicant's testimony, especially regarding [a dispositive] issue"); *Islam v. Gonzales*, 469 F.3d 53, 56 (2d Cir. 2006) (remanding to another immigration judge where the immigration judge failed to "fairly and reliably" develop the record); *In re S–P–*, 21 I&N Dec. 486 (BIA 1996).

56. *See, e.g.*, *Jaco v. Garland*, 24 F.4th 395 (5th Cir. 2021); *Chavez-Chilel v. Att'y Gen.*, 20 F.4th 138 (3d Cir. 2021).

57. Consider a subscription to Ben Winograd's index.

58. *See Jaco*, 24 F.4th 395.

59. *Compare id.* ("Honduran women who are unable to leave their domestic relationships" held non-cognizable) *with* —, immigration judge decision (Eric Marsteller), New Orleans, LA (May 6, 2022) (on file with authors) (distinguishing *Jaco* and finding "Honduran Women" cognizable).

60. *Chavez-Chilel*, 20 F.4th 138.

61. *Avila v. Att'y Gen.*, 82 F.4th 250 (3d Cir. 2023).

62. 27 I&N Dec. 189 (BIA 2018). For a discussion of the limits of the holding in *Matter of W–Y–C– & H–O–B–*, see Zachary Albun et al., Cantarero-Lagos v. Barr, F.3d (5th Cir. May 6, 2019) Decision Advisory with Practice Pointers 4 (May 14, 2019), perma.cc/NB2K-ULYT.

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63. *See id.*; *Silvestre-Mendoza v. Sessions*, 729 F. App'x 597, 598-99 (9th Cir. 2018).

64. *Ferreira*, 97 F.4th at 54 (instructing the Board to "evaluate whether 'Trinidadian women' is substantially similar to Ferreira's original gender-based PSG, as correctly formulated, before refusing to consider it.").

65. *Zachary Albun et al., Cantarero-Lagos v. Barr*, F.3d (5th Cir. May 6, 2019) Decision Advisory with Practice Pointers 4 (May 14, 2019), perma.cc/NB2K-ULYT.

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Correcting Course on *Matter of Lozada* Through the Federal Courts and Executive Action

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Abstract: Under U.S. law, legal claims are labeled as being civil or criminal in nature. Depending on this distinction, individuals wanting to raise the defense that their prior counsel was deficient are required to satisfy certain elements. Immigration laws, which can include a mix-master of concepts, sometimes merge criminal concepts into civil administrative proceedings. One clear example of this notion is in the context of claims for ineffective assistance of counsel. The Board of Immigration Appeals, in *Matter of Lozada*, has set out a three-prong procedural requirement that includes the mandatory filing of a bar complaint against attorneys representing noncitizens. This requirement applies in both the removal and benefits contexts as a prerequisite to a claim of ineffective assistance of counsel. After more than three decades, the imposition of this oppressive requirement has proven to undermine due process and chill access to counsel. Due process now mandates that the compulsory bar complaint filing requirement, which creates greater harm for the practice, should be eliminated. While traditional grounds for filing a bar complaint in the face of actual unethical conduct remains solidly grounded in normal process, the requirement that it must always be filed to raise a claim of ineffective assistance of counsel must be abolished. This paper reviews the implementation of *Lozada* throughout the decades, discusses potential avenues available for course correction, including executive action by the attorney general, directive memos by the Executive Office for Immigration Review, and suggests new arguments that can then pave the way for the federal courts to reexamine the application of the *Strickland* standard in immigration matters.

Introduction

In May 1984, the Supreme Court in the case of *Strickland v. Washington*[1] announced the standard for determining when the right to counsel extends to the overturning of a criminal conviction due to ineffective assistance of counsel.[2] On the heels of this decision, in June of the same year, the Board of Immigration Appeals (Board or BIA) adopted the *Strickland* standard for civil immigration cases.[3] A mere four years later, however, rather than continuing with the *Strickland* standard, the Board issued *Matter of Lozada*, creating its own deviant standard that requires (1) filing an affidavit (2) informing prior

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counsel of the allegations; and (3) explaining "whether a complaint has been filed with appropriate disciplinary authorities . . . and if not, why not."[4]

Immigration law and process has long been recognized as a civil, not criminal, matter.[5] Despite this classification, the concept of ineffective assistance of counsel, a claim reserved for criminal proceedings,[6] has been shoehorned into the immigration laws. Typically, in civil cases, deficient attorney representation claims are referred to as legal malpractice.[7] No matter the nomenclature, the overall essence of both claims ultimately seeks to determine if an attorney's conduct was inadequate to a degree that resulted in causing harm to the client. Put another way, the criminal courts utilize the *Strickland* standard, while civil courts use a negligence standard to determine if the attorney representation was inadequate and, if so, if there was prejudice. Neither standard requires the filing of a bar complaint in order to advance the issue.

Perhaps because immigration laws speak in terms of ineffective assistance of counsel,[8] rather than legal malpractice, the Board, pre-*Lozada*, also utilized the *Strickland* standard. The approach was reasonable for many reasons. Much like criminal proceedings, the government commences, and prosecutes, removal proceedings.[9] Similarly, the terminology in removal proceedings includes concepts like arrest, detention, and bond.[10] With *Lozada*, the Board devalued these similarities, rejected the civil standard, and charted its own punitive course. While both criminal and civil cases assess the nature and quality of the attorney-client relationship, and the resulting harm or prejudice, neither requires, for any reason, that a bar complaint be filed against a deficient attorney. For immigration practitioners, this requirement sets them apart from attorneys in every other area of legal practice.

Despite the passage of more than three decades, the framework outlined by the Board in *Lozada* has remained etched in stone, and in fact has become even more onerous though subsequent interpretations of the *Lozada* requirements. Through its subsequent decisions, which allow no flexibility in the bar complaint requirement, the Board has all but eliminated the "if not, why not" exception to the third prong of *Lozada*, thereby proving the punitive intent behind its creation.[11]

While it can be said that the *Lozada* framework was originally designed to provide guidance to agencies faced with claims of ineffective assistance of counsel, and to provide some measure of protection to nonimmigrants from deficient representation,[12] it was also designed to "police the immigration bar."[13] Time has now shown that parts of the framework are unworkable, and are harmful not only to attorneys, but to their noncitizen clients as well. And, as the Board has made clear in its subsequent decisions, the real purpose behind the *Lozada* requirements is to prevent alleged "collusion" between noncitizens and their attorneys, rather than ensuring that noncitizens' due process rights are protected.[14]

The regulations dictate that published Board decisions are binding on "the Board, the immigration courts, and DHS [Department of Homeland

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Security]."[15] In this way the harmful effects of the Board's mandatory bar complaint requirement under *Lozada* affect not only those who practice within the immigration courts but also spill over to United States Citizenship and Immigration Services (USCIS) processes as well. Thus, ineffective assistance of counsel claims that are brought to address resulting harms before USCIS require the same *Lozada* compliance.[16]

Adding to the confusion, the federal courts are disparate in their treatment of the procedural requirements under *Lozada*. Applying the *Strickland* standard will allow immigration practice to align with other areas of law. Claims of deficient representation exist in every area of law. In most areas, judges and adjudicators are authorized to review the record to determine if such claims are meritorious or meritless; no bar complaint requirement exists. Immigration practice must align with other areas of law if this area of practice is to thrive, because many attorneys turn away cases or abandon the practice altogether, simply choosing not to incur the added stress of defending against a frivolous bar complaint. The current framework, with its mandatory bar complaint filing procedure, creates barriers to access to counsel, increases the burden on immigrants, and provides little incentive for new attorneys to enter this field even though the need for representation remains critical and is chronically unmet.

The History, Background, and Foundation of the *Matter of Lozada* Decision

The legal system is fraught with peril, both for the individuals who are held subject to accountability under the law, and for the attorneys who are trying to help them navigate the process. As long as there have been legal proceedings, lawyers have been making mistakes. The Constitution is supposed to help protect the public from deprivation of their rights without due process of law,[17] and it is from those constitutional rights that the courts have delineated the remedies for people who experienced ineffective assistance of counsel, including when a do-over of the removal proceedings becomes necessary.

In 1984, the U.S. Supreme Court set the standard for determining when a criminal conviction should be overturned due to ineffective assistance of counsel. In *Strickland v. Washington*, the Court held that a finding of ineffective assistance that violates a criminal defendant's right to counsel under the Sixth Amendment requires both (1) that the defense attorney was objectively deficient and (2) that there was a reasonable probability that a competent attorney would have led to a different outcome.[18] Under this reasonable-probability standard, a criminal defendant does not have to show that it is more likely than not that the outcome would have been different, but instead must demonstrate that the attorney's errors undermine confidence in the outcome.

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There is no requirement for a finding of attorney malpractice to demonstrate the reasonable probability; rather, a criminal attorney can freely admit when they have made a mistake that undermined confidence in the proceedings. Because the consequences for admitting error are minimal, and the upside is the preservation of due process, everyone wins when a reviewing court can take a second look at a case where attorney error is present. It is common in criminal proceedings for defendants to seek review of their convictions under this standard, and defense attorneys are able to fall on their own swords to admit mistakes in order to avoid an unjust outcome. Everyone sleeps better at night, and we all win.

Not so in the immigration law context. Because removal proceedings are civil rather than criminal in nature, and despite the fact that mistakes by counsel can ultimately lead to removal from the United States and its attendant consequences (potential family separation, diminished outcomes for relatives who are affected by the removal of a caregiver, and even exposure to deadly danger, etc.), the courts have held that the right to counsel in removal proceedings springs not from the Sixth Amendment right to counsel, but rather from the Fifth Amendment guarantee of due process.[19] This results in a world of difference from criminal proceedings and leads to a unique standard for determining when proceedings should be reopened for ineffective assistance of counsel.

A mere four years after *Strickland*, the BIA issued its own standard for motions to reopen for ineffective assistance of counsel in the landmark ruling *Matter of Lozada*.[20] In *Lozada*, the Board articulated the standard and required satisfaction of the following three prongs in order to reopen a case, holding that the motion must:

1. be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;
2. that counsel whose integrity or competence is being impugned must be informed of the allegations leveled against them and be given an opportunity to respond; and
3. that the motion reflect whether a complaint has been filed with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and *if not, why not*.[21]

The Board recognized it was creating a high bar for reopening and justified its decision in stating that the "high standard announced here is necessary if we are to have a basis for assessing the substantial number of claims of ineffective assistance of counsel that come before the Board."[22] As is common in questions of immigration law and policy, the specter of opening the floodgates looms large.

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The Board further explained that the potential for abuse of the reopening process remained high, and the standard was necessary to protect former counsel by permitting them the opportunity "to present a version of events if he so chooses, thereby discouraging baseless allegations."[23] The Board's rationale that attorneys would feel impugned by allegations of error and welcome an opportunity to respond is reasonable—appropriate notice and an opportunity to respond are integral to the process and allow for consideration of facts that may be beyond the new counsel's purview. However, this notice requirement and invitation to respond under the second prong of *Lozada* has morphed into a requirement that attorneys must respond to a different kind of notice. Under the third prong the Board has held repeatedly that it is not enough to state whether a bar complaint has been filed, and if not, why not. Instead, the Board has imposed a categorical requirement that a complaint must be filed.[24] This means that attorneys who are notified of deficient conduct and given the opportunity to respond and protect against unjustified aspersions can look forward to also responding to notification of a disciplinary complaint that could materially affect their ability to maintain their license to practice law.

The Implementation of *Lozada*'s Bar Complaint Requirement Throughout the Decades

At the Board of Immigration Appeals

As noted above, the *Lozada* decision itself included an exception to the filing of the bar complaint requirement, the "if not, why not" exception. However, subsequent BIA decisions all but eliminated that exception.

In *Matter of Rivera*, which involved a motion to reopen an in absentia hearing, the respondent stated that she had elected not to file a bar complaint because "if any error was made in this case it was a postal error or an error of inadvertence by [former counsel]."[25] However, the Board denied the motion to reopen, stating that in order to prevail on an ineffective assistance claim, filing a bar complaint was a necessary "inconvenience" to help the BIA determine whether such claims were meritorious and to help prevent collusion between the respondent and their attorneys.[26] Although the purported purpose behind this requirement is to protect respondents from unscrupulous or incompetent attorney representation, the Board belies that purported intent by its own language in *Rivera*: in the decision, the Board refers to "collusion" between attorneys and respondents some *13 times*. Thus, it is clear that the majority was far more concerned about disciplining attorneys by not allowing the reopening of cases (and thus directly harming respondents) than it was about protecting said respondents.

Interestingly, Paul Schmidt, the Board Chairman, joined by three other board members, dissented from the majority opinion. Chairman Schmidt stated

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strongly in dissent that there was no "hint of collusion" between the respondent and counsel, and he found no "basis for making the filing of a state bar complaint the determinative factor" as to whether the respondent has established the attorney's "ineffective assistance" as an exceptional circumstance justifying the reopening of the case.[27] Indeed, he stated that "I do not need a *Lozada* motion or a state bar complaint to find that ineffective assistance has occurred here."[28]

Despite the dissent in *Rivera*, the BIA's shift in focus toward "monitoring" attorneys' professional conduct became even greater in the BIA's decision in *Matter of Melgar*.[29] In *Melgar*, the Board denied the motion to reopen and in so doing, expanded on the third requirement of *Lozada*, by holding that acceptance of responsibility by the attorney does not negate that requirement of filing a bar complaint. The Board characterized the respondent's claim of "ineffective assistance" without having filed a bar complaint as "self-serving" and unacceptable.[30]

When taken together, *Lozada* and *Melgar* have placed an abnormally and unreasonably high bar on how a respondent can potentially seek relief based on the "ineffective assistance" of their attorney.

In between the *Lozada* line of cases and *Melgar*, former Attorney General Michael Mukasey issued *Matter of Compean* (*Compean I*),[31] in which he overturned the third prong of *Lozada*, and determined:

> By making the actual filing of a bar complaint a prerequisite for obtaining (or even seeking) relief, it appears that *Lozada* may inadvertently have contributed to the filing of many unfounded or even frivolous complaints. *See, e.g.*, Comment filed by the Committee on Immigration & Nationality Law, Association of the Bar of the City of New York (Sept. 29, 2008), in response to the Proposed Rule for Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances, 73 Fed. Reg. 44,178 (July 30, 2008) ("Under the *Lozada* Rule, an ineffective assistance of counsel charge is often required in order to reopen a case or reverse or remand an unfavorable decision. The practice of filing such claims is rampant, and places well-intentioned and competent attorneys at risk of discipline."). Such unfounded complaints impose costs on well-intentioned and competent attorneys and make it harder for State bars to identify meritorious complaints in order to impose sanctions on lawyers whose performance is truly deficient.[32]

However, Mukasey then imposed a perhaps even more onerous set of requirements: the respondent "must submit a detailed affidavit setting forth the facts that form the basis of the deficient performance of counsel claim" and attach five documents:

> (i) a copy of his agreement, if any, with the lawyer whose performance he alleges was deficient; (ii) a copy of a letter to his former lawyer

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> specifying the lawyer's deficient performance and a copy of the lawyer's response, if any; (iii) a completed and signed complaint addressed to, but not necessarily filed with, the appropriate State bar or disciplinary authority; (iv) a copy of any document or evidence, or an affidavit summarizing any testimony, that the alien alleges the lawyer failed to submit previously; and (v) a statement by new counsel expressing a belief that the performance of former counsel fell below minimal standards of professional competence.[33]

Worse, Mukasey found that there was no Fifth Amendment right to counsel in immigration proceedings, causing considerable and understandable concern by immigration advocates. As the American Civil Liberties Union (ACLU) noted, *Compean I*, which was issued during the last days of the Bush administration, was "rushed through without input from many groups and individuals—such as the American Bar Association and . . . some of the most prestigious law firms in the country. . . . and renders immigration proceedings fundamentally unfair.[34] Mukasey's decision also directly contradicted eight circuit court decisions recognizing a fundamental right to effective assistance of counsel in immigration court.[35]

Thus, a mere six months later, Attorney General Eric Holder vacated *Matter of Compean I*, in a decision that restored the long-settled understanding that respondents do possess a Fifth Amendment right to counsel in immigration court proceedings.[36] However, Holder also restored the third prong of *Lozada* but directed the agency to promulgate regulations regarding the issue. Unfortunately, as discussed in greater detail below, no regulations were ever adopted.

In the Federal Circuit Courts

As is true with so many issues in immigration law, there is a circuit court split over the issue of how strictly a noncitizen must adhere to the three *Lozada* procedural requirements in order for a case to be reopened based on an ineffective assistance of counsel argument. For example, some circuit courts have excused the need to file the bar complaint against previous counsel, particularly when the motion to reopen addresses the "if not, why not" exception included in prong three of *Lozada*.[37]

However, several other circuit courts have required substantial or strict reliance on *Lozada*'s bar complaint requirement. Specifically, the Third, Fifth, Sixth, and Seventh Circuits generally apply a reasonableness standard: So long as the respondent provides a reasonable explanation for the absence of the bar complaint, the third prong of *Lozada* has been satisfied.[38]

The Tenth and Eleventh Circuits require strict compliance with all three prongs, and failure to file a bar complaint is fatal.[39] The remaining circuits apply a substantial compliance standard, although this is something of a continuum. The Fourth and Eighth Circuits also require *substantial compliance*

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with *Lozada* but have little case law directly addressing the bar complaint requirement. Other circuits have more squarely addressed the issue.

For example, the Second and Ninth Circuits require substantial compliance but may excuse noncompliance where the policy goals underlying *Lozada* are clearly demonstrated in the record.[40] The Second Circuit has found that "where facts supporting a 'claim of ineffective assistance are clear on the face of the record,' noncompliance with those requirements may be excused," including the bar complaint requirement.[41] And the Ninth Circuit employs a case-by-case approach in cases involving noncompliance, evaluating the substance of each ineffective assistance claim to determine whether the record clearly demonstrates ineffectiveness.[42] By contrast, the First Circuit also reviews whether an immigration judge or the Board has arbitrarily applied *Lozada*'s procedural requirements on a case-by-case basis, but is generally not particularly flexible.[43]

The Third Circuit has truly adopted a reasonable approach to *Lozada*'s procedural requirements, finding that not filing a bar complaint is not fatal where a noncitizen provides a reasonable explanation for the absence of the complaint, and, in so doing, is the circuit that has given the most teeth to the "if not, why not" exception in *Lozada* itself.[44] In fact, the Third Circuit addressed the potential impact of strict, formulaic interpretations of *Lozada*, noting that "we are concerned that courts could apply *Lozada*'s third prong so strictly that it would effectively require all petitioners claiming ineffective assistance to file a bar complaint."[45]

Unintended (or Intended?) Consequences of Strict Compliance with *Lozada*'s Bar Complaint Requirement

Strict compliance with the third prong of *Lozada* can create unintended consequences for the very immigrants that *Lozada* was purportedly trying to protect. For example, many immigrants do not feel comfortable filing a bar complaint against their former counsel, or do not believe that any mistakes made by former counsel warrant the filing of a bar complaint. In fact, this was the situation in *Matter of Rivera*. Or, they are intimidated by the bar complaint process, even when they have obtained new counsel. In situations such as this, the noncitizen is thus left with the choice of either not being able to reopen their immigration court proceedings or being forced to file a meritless bar complaint against former counsel. Many clients will simply choose to not file the complaint, thus forfeiting their ability to pursue immigration relief. By extension, this can limit noncitizens' access to the counsel of their choosing, which undercuts the purpose behind the revocation of *Compean I*.

As is noted by a study conducted by the Vanderbilt University Immigration Practice Clinic, only five states treat a *Lozada* bar complaint differently than any other type of bar complaint.[46] In those situations in which noncitizens must file bar complaints against their prior counsel, and choose to do so,

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state disciplinary authorities often receive, and must adjudicate, numerous complaints that would never have been filed but for the *Lozada* requirement, adding to their workloads, sometimes significantly so.[47]

Finally, the requirement of strict, or even substantial, compliance with the third prong of *Lozada* has significantly impacted the immigration bar itself. Attorneys are placed in the position where, in order to take over a case from another attorney, they are forced to allege an ineffective assistance of counsel claim against a colleague—even where there is no ineffective assistance of counsel by prior counsel, or the mistake does not rise to the level of necessitating a bar complaint. And, if the new counsel declines to adhere to the third prong and does not force the client to file the complaint, then the new counsel will leave themselves vulnerable to having a bar complaint filed against them. This pitting of immigration attorneys against each other also impacts noncitizens' ability to hire counsel of their choice, because many attorneys simply will not take a case that presents a potential *Lozada* issue, and, with representation rates before the immigration courts plummeting, the impact of fewer lawyers willing to take cases can have dire consequences for noncitizens in removal proceedings.[48]

Recently, numerous organizations have studied and commented on the rise in mental health issues in the legal profession.[49] The increase in depression, anxiety, suicidal ideation, and drug and alcohol abuse has reached record levels throughout the legal professions, and the immigration bar is no exception.[50] While there are many reasons for this disturbing trend, including the treatment of immigration lawyers before EOIR (Executive Office for Immigration Review) and USCIS, the incessant delays, and the extremely volatile political landscape in which immigration attorneys must practice, a discrete and concrete example of one of the triggers is the third prong of *Lozada*.[51] The thought of having to defend oneself against a meritless, and yet all too real, state bar complaint could easily push an already overwhelmed advocate into a mental health crisis, exacerbated by the fact that every colleague within a strict compliance jurisdiction can be a potential enemy.

Potential Federal Court Arguments

With *Matter of Lozada*, the Board imposed an all-but-mandatory procedural requirement that those in removal proceedings claiming that their prior counsel was deficient file a bar complaint with the state bar or disciplinary authority. This standard has also been incorporated in matters before USCIS and its Administrative Appeals Office (AAO). The AAO conducts appellate review of immigration benefit requests within its jurisdiction and is a sister appellate body to the Board. Specifically, the AAO has appellate jurisdiction over approximately 50 different immigration case types filed with USCIS, as well as limited Immigration and Customs Enforcement (ICE) determinations.[52]

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As discussed above, federal circuit courts have lacked uniformity in upholding the bar complaint requirement in their examination of ineffective assistance of counsel claims. The time has come for new and zealous challenges before the federal courts to halt this requirement altogether. While the following arguments will eventually wend their way up to the federal courts, it is essential that the record of these arguments be preserved at each step of the process. Keeping in mind that new arguments are impermissible as a matter of first instance at the federal circuit courts, the record must be built below in order to give the circuit courts an opportunity to review them on appeal.

In addition, given some of the limitations on jurisdiction with the Supreme Court's recent holding in *Patel v. Garland*,[53] new and creative avenues will need to be crafted in order to establish that the mandatory bar complaint filing procedure is reviewable by the federal courts under the Administrative Procedure Act (APA). These arguments are likely to be difficult, but it is worth noting that in cases where the facts are not controverted, it may be possible to frame these arguments as legal or constitutional in nature, and skirt the limitations found at 8 U.S.C. § 1252(a)(2)(D). Still, it cannot be denied that *Patel* remains problematic, at least for now, in affirmative APA claims.

Importantly, the current state of the law, depending on the circuit in which the case is brought, may still require some compliance with *Lozada* while these new arguments are put forward. In essence, these arguments must be made in the alternative in jurisdictions that provide no leniency in the *Lozada* factors. Even so, in those jurisdictions where strict compliance is not required, practitioners must lead the way in making bold arguments that carve a path for an eventual review by the Supreme Court.

Lozada's Bar Complaint Requirement Is Contrary to Accepted Legal Standards

The Board, in *Matter of Lozada*, recognized that "[a]ny right a respondent in deportation proceedings may have to counsel is grounded in the fifth amendment guarantee of due process."[54] Furthermore, the Board provided that "a denial of due process [occurs] only if the proceeding was so fundamentally unfair that the [respondent] was prevented from reasonably presenting his case."[55] In other words, the Board outlined that a respondent would have to establish that counsel's assistance was "so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the Fifth amendment due process clause."[56] To ensure that all issues are properly preserved for ultimate federal court review, it is essential that challenges to the status quo are fully litigated from the start before the immigration courts. In so doing, it should be argued that as part of constitutional due process protections, immigration courts must ensure that a fundamentally fair hearing that encompasses effective counsel at its core is provided. To determine if counsel is ineffective, the threshold question to be resolved is "if competent counsel would have acted

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otherwise."[57] Having established this element, the second element is to show that prejudice has resulted. Generally, to establish prejudice, it must usually be shown that the outcome would have been different but for the ineffective assistance of counsel.[58]

Looking at these requirements, it is evident that they parallel the measures in the criminal courts where challenges to defense counsel's representation are raised. There, successful claims of ineffective assistance of counsel must meet the *Strickland* standard, which, as noted above, requires a showing that a "trial lawyer's performance fell below an 'objective standard of reasonableness' and 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[59] Even though these standards arise from different contexts, they still aim to preserve the integrity of the processes that often impose life-altering consequences on those who participate.

Moreover, even if the distinction is made that removal proceedings are civil, not criminal, in nature, that distinction is still insufficient to impose a bar complaint filing requirement. A civil malpractice claim has four elements: (1) an attorney-client relationship, (2) negligence or breach of contract by the attorney, (3) proximate causation of plaintiff's damages, and (4) damages to the plaintiff.[60] Again, litigants claiming deficient counsel actions can only satisfy their burden if it can be shown that there was a straight line between the attorney's actions and damage to the plaintiff. In each instance the factors that the court considers in assessing a claim of harm invoked by a party remain consistent. Put plainly, the actions of the prior attorney result in harm and thus the underlying result is subject to amelioration.

Both standards offer a straightforward inquiry for the immigration courts or USCIS to apply: Does the evidence prove that a reasonable attorney would have handled the matter differently and does this mishandling cause prejudice? If the record, by itself, establishes these two factors, then the bar complaint requirement becomes superfluous. Indeed, in practical application, USCIS and the immigration courts rarely await the findings of the disciplinary administrator. In essence, *Lozada* sought to entangle the immigration and the disciplinary processes so that there would be no need for an evidentiary hearing before the immigration court.[61] Practical reality has shown that the immigration processes rarely, if ever, wait for the disciplinary administrator to complete their inquiry and the two processes proceed in totally separate tracks. This dual burden exists only in the immigration setting and is contrary to legal norms, since neither the civil nor the criminal standard imposes the bar complaint requirement as a matter of law.

Lozada's Bar Complaint Requirement Interferes with the Statutory Right to Counsel

The statutes are clear on their face. They provide that in removal proceedings and in any appeal thereafter, the "person concerned *shall* have the privilege

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of being represented"; a nondiscretionary privilege, it can be argued, is a right onto itself. Furthermore, given the plain language of the law, the scope and limitations of such representation are matters that federal courts may decide as a matter of law.[62]

The Supreme Court is poised to overturn 40 years of administrative jurisprudence[63] that compels federal courts to defer to a federal agency's interpretation of an ambiguous or unclear statute.[64] Thus, the time may be ripe to raise anew notions of effective counsel in the context of the plain language of the statutes.[65] Although the Board and the circuit courts have routinely found the *Lozada* factors, including the filing of the bar complaint, as having "largely stood the test of time,"[66] such a position is usually not based on any identifiable evidence, and instead ignores clear evidence to the contrary.[67]

Importantly, when Attorney General Holder vacated *Compean I* just five short months after its enactment, he specifically instructed:

> the Acting Director of the Executive Office for Immigration Review to initiate rulemaking procedures as soon as practicable to evaluate the *Lozada* framework and to determine what modifications should be proposed for public consideration. After soliciting information and public comment, through publication of a proposed rule in the Federal Register, from all interested persons on a revised framework for reviewing claims of ineffective assistance of counsel in immigration proceedings, the Department of Justice may, if appropriate, proceed with the publication of a final rule.[68]

Not only did rulemaking never fully come to fruition, as Holder had directed, the critical observations as to the harmfulness caused by the bar complaint requirement were seemingly lost in time. In any *Lozada* record, it is essential that both historical and contemporary data be included as to the barriers that the bar complaint requirement has now created in terms of access to counsel.

The Bar Complaint Requirement Is Discriminatory on Its Face

Federal courts must prevent further harm to the immigration bar as a result of the *Lozada* bar complaint requirement. Insofar as no other area of law or any other class of practicing attorneys in the United States are subjected to *Lozada*'s mandatory bar complaint requirement, the requirement is discriminatory. In fact, DHS attorneys, even when they have engaged in misconduct, are not subject to mandatory reporting requirements.[69]

While *Lozada* contains language to indicate that if a bar complaint is not filed, an immigration court can determine whether the failure to file is excusable, the Board has effectively closed the "if not, why not" exception contained

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in the *Lozada* decision.[70] In practical applicability, any perceived exception to the bar complaint filing requirement is illusory. With no exceptions and no exemptions for private immigration attorneys, the *Lozada* bar filing requirement protection and is impermissible as applied.

Avenues for *Lozada* "Course Correction," Including Agency Action and Executive Action

Executive Office for Immigration Review

The Executive Office for Immigration Review has been both the forum and the source of the controversy regarding access to remedies for ineffective assistance of counsel. It could now usher in a new chapter in the *Lozada* narrative and create the solution.

In promulgating *Lozada*, and thereby instituting its unique "requirement" that an aggrieved immigrant seeking reopening of their proceedings, to, in theory, properly present their case and achieve a just outcome, the Board presupposed that the immigrant would likely first need to file a bar complaint. In so doing, the Board perhaps failed to anticipate the many negative consequences of this scheme. As stated in *Lozada*, a motion to reopen or reconsider premised upon allegations of ineffective representation must reflect "whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not."[71]

In practice, in the hands of adjudicators at all levels of EOIR, the bar complaint has become a de facto *requirement*, whereas *Lozada* itself contemplated the complaint as one of two alternatives, that is, that the immigrant could equally prove their case with a bar complaint *or* prove their case of prejudice and demonstrate that the bar complaint was not warranted in their particular circumstances—the "if not, why not" alternative.

There are self-evident problems with the bar complaint "requirement," and various reasons that immigrants are deterred from taking this extreme measure. Economics conspire against most immigrants, fresh from paying for trial-level work, to then bring an appeal of their case-in-chief and a well-crafted motion to reopen. Awareness of the mechanics of the system and navigating the complaint interface also serve as a deterrent, preventing many immigrants from effectively proceeding *pro se* in their motion. Building an alternative record and arguing that it demonstrates prejudice is a challenging, almost impossible, task for self-represented litigants. Further, a bar complaint is an effective challenge to a lawyer's livelihood (if not personhood), and the immigrant's decision not to wage a war may be influenced by fear, shame, cultural factors, loyalty, friendship, or forgiveness. The *Lozada* scheme requires notice to the former counsel—perceived as a confrontation, to many—thus heightening these deterrent effects, with or without the aid of counsel.

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Further, the bar complaint process itself is a burden to justice. As discussed below, when the attorney general issued *Matter of Compean I* in 2009, and in the course of doing so temporarily upended both *Lozada* and the settled expectation that constitutional protections extended to effective representation by counsel in removal proceedings, even that flawed decision contemplated some of the unintended consequences of the bar complaint requirement.[72]

Thus, the risks of *Lozada*'s bar complaint element run both ways, often serving as an unwarranted barrier to immigrants seeking relief and as an unwarranted punitive risk to attorneys representing those immigrants. Remedies exist.

EOIR has multiple tools to affect change in immigration policy and the immigration adjudications process. Central, of course, are the published precedent decisions of the Board and the attorney general, with *Lozada* sitting within this canon of jurisprudence.

Attorney General's Certification of *Matter of Lozada*

The attorney general could and should revisit *Lozada* itself under their certification authority.[73] This has happened before in the *Lozada* context, of course, in first deciding and then vacating *Matter of Compean*. Various attorneys general have used the certification authority to narrow or expand immigration laws and/or policies, as has been noted by scholars and even attorneys general themselves.[74] For example, Attorney General Merrick Garland used his certification authority to reinstate the concept of "family" as being a particular social group, in part because previous Attorney General Jeff Sessions had used the certification authority to sharply limit that concept.[75]

Removal proceedings are unique in enumerating a bar complaint as an element of a posthearing motion, even more so in the de facto requirement that the complaint be filed. The more just solution would eliminate the bar complaint requirement and leave that in the hands of the bench and bar to voluntarily file complaints where truly appropriate. A half measure would be for the attorney general to reverse the current de facto system and impose a meaningful "if not, why not" standard that is both generously available and noncynically applied, thus leaving the bar complaint measure for truly egregious cases.

Issuance of an EOIR Director's Memorandum

Within the text of *Lozada* is a two-tiered approach. An immigrant who believes that they can meet the prejudice requirement, in that they can demonstrate that "but for" the ineffective assistance of counsel there is a reasonable probability that the outcome of the proceeding would have been different, finds themselves at a crossroads. To perfect their *Lozada* motion, they must either point to a bar complaint that they filed—ostensibly based on those same reasons—or state why they have not.

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The text of *Lozada* suggests why the Board might assume that complaints would be filed (if ethical or legal duties are violated, a complaint might logically follow; it is perhaps indicia that the immigrant "really means it" if they file a complaint with a bar authority), but the Board neither elucidates a continuum of "degrees" down which a complaint is required in certain instances, nor does the Board demand that the absence of a complaint must be *justified*—it must just be explained.[76]

There are good reasons for this open-ended approach, many of which are enumerated above. Further, the immigrant is not in a good position to know what conduct warrants discipline, and even the absence of a strict requirement of complaints has proven overinclusive, since many litigants believe EOIR expects a complaint in a perfected *Lozada* filing.

The lack of a literal requirement of a complaint makes further sense when EOIR recognizes that EOIR itself holds disciplinary authority. It can mete sanctions as it sees fit or refer matters to state authorities where appropriate. EOIR is in infinitely better position to determine whether conduct is sufficiently egregious to warrant a referral, certainly better so than an aggrieved immigrant or their new counsel engaged solely to bring an effective *Lozada* motion (knowing that failure to prove *Lozada* elements might result in a *Lozada* claim against themself).

Here, however, the flexible standard in the text of *Lozada* standard needs reiteration, so that the "if not, why not" text is given its due weight. A tool for accomplishing this is an EOIR Director's Memorandum (DM),[77] providing guidance to adjudicators on the "if not, why not" subpart of the bar complaint prong of *Lozada*. A DM could reiterate the varying opinions in the circuits on whether the filing of a bar complaint is mandatory, explaining circumstances where the reasons "why not" are not fatal to the *Lozada* motion.

The DM would not be making "new law," but would help give voice to current law and correct its regular misapplication. EOIR can find recent precedent for this action in the forum of motions for administrative closure, where in 2021 the director issued DM 22-03[78] to reorient the immigration bench to its precedent *Matter of Cruz-Valdez*.[79] That context was comparable to the instant scenario, in that "administrative closure" had been the subject of a sequence of disparate decisions by the Board, the attorney general, and the federal circuits.[80] The DM clarified how to resolve cases under existing law, reiterating expectations that former, overruled, and/or abrogated precedent did not dictate outcomes in contemporary removal proceedings.

Training of Immigration Judges

Separately or in tandem with a DM, EOIR could improve the application of *Lozada* through the training of its judges. Beyond the controls of the posthiring probationary period and the workings of the appellate process, EOIR should be mindful that an educated immigration bench is best

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positioned to implement immigration policy, as recognized by the Board in its own precedent.

EOIR can and should be able to monitor the statistics of cases bringing *Lozada* claims and the extent to which immigration judges effectively demand a bar complaint (or effectively reject "if not, why not") as an alternative means for satisfying that element. As the typical fact-finder in immigration cases, immigration judges should be aware of the numerous deterrents to filing bar complaints, as they see immigrant litigants in their courtrooms every day.

Immigration judges have a daunting caseload[81] and might be swayed by the preference for finality voiced in *Matter of Compean I*. Training could reduce cynicism and bias against reopening and/or baseless imposition of a de facto requirement that a bar complaint be filed, especially where the totality of the record establishes both deficient representation and prejudice. Training could also include examples where an overly formalistic application of *Lozada*'s bar complaint clause turned out to be unwarranted, such as *Matter of N–K– & V–S–*.[82] Training should also emphasize the principled mission of removal proceedings, inherent in the Board's own decisions, that "the government wins when justice is done," and the court's role is to "ensure that the applicant presents his case as fully as possible and with all available evidence."[83]

Even in cases where counsel admitted their error, but stopped short of filing a bar complaint against themselves, given the circumstances, the Board has declined to reopen the proceedings, rather than accepting the immigrant's "if not, why not" explanation, and presented a confusing paradox.[84] The immigrant in that case, Mr. Melgar, lost reopening where their own counsel had confessed, but not formally complained, about his own conduct. The record had established that counsel had been ineffective (and counsel admitted such) and that prejudice had occurred. "But for" the strict application of *Lozada*, which does not mandate a complaint, of course, Melgar might have won, but the Board applied an extra-*Lozada* heightened logic, rejecting Melgar's lack of bar complaint as overly self-serving and likely encouraging "collusion" in an effort to buy the immigrant time in the United States, in a case that the immigrant lost, repeatedly, on account of that ineffective counsel. In so doing, the Board in *Matter of Melgar* reiterated its purported concern over the potential for abuse in the context of motions to reopen, despite the fact that history has dissipated the Board's illusion of collusion.

Office of the Principal Legal Advisor/Exercising Prosecutorial Discretion

Finally, the ICE Office of the Principal Legal Advisor (OPLA) could play a role in eliminating the bar complaint requirement. For decades, the impact of fulfilling the bar complaint requirement from *Matter of Lozada* has created wide and negative consequences, significantly impacting the defense bar,

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state bar authorities, respondents, and the immigration court process. Based on the current structure for requesting joint motions to reopen through the prosecutorial discretion process, it is challenging to receive OPLA's position or response to fulfill time bars relevant to motions to reopen when *Lozada* is at issue. As such, a bar complaint, even if not justified, then effectively becomes mandatory prior to filing a direct motion with the immigration judge.

OPLA should consider a mechanism or flag where it would consider those cases marked as *Lozada* requests, and thereby create a process for expedited agreement for time-sensitive motions. This process would only be for those matters where a bar complaint, under the facts of the case and any additional evidence in support of the motion, establishes that a bar complaint would not be necessary.

Conclusion

Over three decades after the Board veered off course and charted a path unlike any in other found in American jurisprudence, the evidence is clear: the Board must now correct course and return to normal legal principles. Not only has the Board's mandatory bar complaint requirement created a hostile culture among immigration practitioners, but its existence also continues to thwart others from entering the profession altogether.

In a time where immigration issues continue to take center stage in political and geopolitical debates, limiting access to counsel for those seeking to enforce their rights seems counterproductive. Likewise, an immigration system that remains consumed by false concerns of attorney-client collusion and the need to police an entire bar feels punitive at its core. Any legal system that promotes mistrust in this way challenges the integrity of the whole process itself. By removing *Lozada*'s mandatory bar complaint requirement, major steps would be taken toward restoring the immigration bar's credibility and ensuring that this area of practice is not treated disparately.

Undoubtedly, there will be times when the filing of a bar complaint with the appropriate disciplinary administrators will be necessary. In cases where there has been misconduct, unethical behavior, or a true violation of an attorney's code of behavior, alerting the appropriate authorities remains proper. The issue with *Lozada* and its progeny is that it requires the filing of a bar complaint in many, many circumstances where a bar complaint is not warranted. Under these circumstances, the universal standard should not require an ineffective remedy. Instead, such considerations should be left to the courts or the agency, in the first instance, to review the facts for evidence of attorney misconduct and any resulting prejudice. This approach is consistent with accepted remedies for ineffective assistance of counsel claims. The time has come for the immigration system to now rejoin other legal disciplines and conform to these accepted standards.

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Notes

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1. *Strickland v. Washington*, 466 U.S. 668 (1984).
2. *Id.*
3. *Matter of Santos*, 19 I&N Dec. 105 (B.I.A. 1984).
4. *Matter of Lozada*, 19 I&N Dec. 637 (B.I.A. 1988).
5. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).
6. *Strickland v. Washington*, 466 U.S. 668 (1984).
7. *Gunn v. Minton*, 568 U.S. 251, 251 (2013).
8. *See generally Matter of Lozada*, 19 I&N Dec. 637 (B.I.A. 1988); *Matter of Grijalva*, 21 I&N Dec. 472, 473-74 (B.I.A. 1996); 8 C.F.R. § 208.4(a)(5)(iii); USCIS Policy Manual, vol. 7, pt. A, ch. 7, https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-7.
9. *See* 8 C.F.R. §§ 1003.13, 1003.14.
10. *See* INA § 236.
11. *Matter of Melgar*, 28 I&N Dec. 169 (B.I.A. 2020) (finding that "Counsel's acceptance of responsibility for error does not discharge the disciplinary authority complaint obligation under *Matter of Lozada*" (internal citations omitted)).
12. *See Matter of Rivera*, 21 I&N Dec. 599, 605 (B.I.A. 1996).
13. *Id.*
14. *Id.*
15. 8 C.F.R. § 1003.1(g).
16. *See, e.g.*, *In Re* 10242916 (A.A.O. May 18, 2020), https://www.uscis.gov/sites/default/files/err/D17%20-%20Nonimmigrant%20E-2%20Treaty%20Investor/Decisions_Issued_in_2020/MAY182020_01D17214.pdf; *see also In Re* 23396779 (A.A.O. Dec. 1, 2022), https://www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2022/DEC012022_01B2203.pdf; *In Re* 26379071 (A.A.O. June 15, 2023), https://www.uscis.gov/sites/default/files/err/A6%20-%20Adjustment%20of%20Alien%20in%20U%20Nonimmigrant%20Status%20I-485%20U%20Sec.%20245%28m%29%281%29%20of%20the%20INA/Decisions_Issued_in_2023/JUN152023_01A6245.pdf.
17. *See, e.g.*, *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922) ("[Deportation] may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.").
18. *Strickland v. Washington*, 466 U.S. 668 (1984).
19. *See, e.g.*, *Matter of Santos*, 19 I&N Dec. 105 (B.I.A. 1984).
20. 19 I&N Dec. 637 (B.I.A. 1988).
21. *Id.* (emphasis added).
22. *Id.* at 639.
23. *Id.*

24. *See Matter of Rivera*, 21 I&N Dec. 599 (B.I.A. 1996) (en banc); *Matter of Assaad*, 23 I&N Dec. 553 (B.I.A. 2003); *Matter of Melgar*, 28 I&N Dec. 169 (B.I.A. 2020).

25. *Matter of Rivera*, 21 I&N Dec. at 605.

26. *Id.* at 604.

27. *Id.* at 608.

28. *Id.*

29. 28 I&N Dec. 169 (B.I.A. 2020).

30. *Id.* at 170-71.

31. 24 I&N Dec. 710 (A.G. 2009) (reversed on other grounds).

32. *Id.* at 737-38.

33. *Id.* at 711.

34. *See, e.g.*, *ACLU Talking Points on Attorney General Mukasey's Compean Decision* (Feb. 17, 2009), ACLU, https://www.aclu.org/documents/aclu-talking-points-attorney-general-mukaseys-compean-decision.

35. *See Zheng v. Gonzales*, 422 F.3d 98, 106 (3d Cir. 2005); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001); *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001); *Akinwunmi v. INS*, 194 F.3d 1340, 1341 n.2 (10th Cir. 1999); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999); *Saleh v. U.S. Dep't of Justice*, 962 F.2d 234, 241 (2d Cir. 1992); *Lozada v. INS*, 857 F.2d 10, 13-14 (1st Cir. 1988); *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985).

36. *Matter of Compean*, 25 I&N Dec. 1, 2 (A.G. 2009) (*Compean II*).

37. *See, e.g.*, *Figeroa v. INS*, 886 F.2d 76 (4th Cir. 1989) (failure of respondent to file a bar complaint against a former attorney did not indicate that the representation had been effective); *Fadiga v. U.S. Att'y Gen.*, 488 F.3d 142, 156-57 (3d Cir. 2007) (no bar complaint needed "where counsel admitted the ineffectiveness and made efforts to remedy the situation"); *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131-32 (9th Cir. 2013) (*Lozada* only requires explanation of *whether* a bar complaint was submitted, not proof that the complaint was filed).

38. *Xu Yong Lu v. Ashcroft*, 259 F.3d 127 (3d Cir. 2001); *Lara v. Trominski*, 216 F.3d 487 (5th Cir. 2022); *Guzman-Torralva v. Garland*, 22 F.4th 617 (6th Cir. 2022); *Stroe v. I.N.S.*, 256 F.3d 498 (7th Cir. 2001).

39. *Yero v. Gonzalez*, 236 F. App'x 451 (10th Cir. 2007); *Gbaya v. U.S. Att'y Gen.*, 342 F.3d 1219 (11th Cir. 2003).

40. *See Yang v. Gonzales*, 478 F.3d 133, 142-43 (2d Cir. 2007); *Lo v. Ashcroft*, 341 F.3d 934, 937 n.4 (9th Cir. 2003) ("We seldom reject ineffective assistance of counsel claims *solely* on the basis of *Lozada* deficiencies.").

41. *Id.*

42. *See Castillo-Perez v. INS*, 212 F.3d 518, 525-27 (9th Cir. 2000) (holding that while the *Lozada* requirements are generally reasonable, they are not sacrosanct, and will not be dispositive when the relevant facts are plain on the face of the administrative record).

43. *See, e.g.*, *Garcia v. Lynch*, 821 F.3d 178, 181 (1st Cir. 2016); *Beltre-Veloz v. Mukasey*, 533 F.3d 7, 10 (1st Cir. 2008).

44. *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 134 (3d Cir. 2001).

45. *Id.* at 133.

46. Vanderbilt University Immigration Practice Clinic Under the Supervision of Professor Karla McKanders & AILA's National Ethics Committee and The Coalition on

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Lozada and Access to Counsel, *Matter of Lozada* and the Bar Complaint Requirement: A Comprehensive Report, AILA Doc. No. 24040433.

47. *Id.*

48. *Too Few Immigration Attorneys: Average Representation Rates Fall from 65% to 30%* (Jan. 24, 2024), TRAC Immigration, https://trac.syr.edu/reports/736/.

49. *See* Marion Nickum & Pascale Desrumaux, *Burnout Among Lawyers: Effects of Workload, Latitude and Mediation Via Engagement and Over-Engagement*, Psychiatr. Psychol. Law. 2023; 30(3): 349-61; Amanda Roberts, *Mental Health Initiatives Aren't Curbing Lawyer Stress and Anxiety, New Study Shows*, ABA Journal (May 19, 2023), https://www.abajournal.com/news/article/mental-health-initiatives-arent-curbing-lawyer-stress-and-anxiety-new-study-shows.

50. *See, e.g.*, The Lifeguard Is Drowning: Identifying and Combating Burnout and Secondary Trauma in Asylum Practitioners (Apr. 7, 2022), https://www.americanbar.org/groups/public_interest/immigration/events-and-cle/the-lifeguard-is-drowning-identifying-and-combating-burnout/ (American Bar Ass'n webinar).

51. *See, e.g.*, Marco Poggio, *Immigration Attorneys Share Stories of Trauma and Burnout*, Law360 (Aug. 10, 2022), https://www.law360.com/articles/1499108/immigration-attorneys-share-stories-of-trauma-and-burnout.

52. *See* 8 C.F.R. § 103.3; *see also Matter of [Name and File Number Redacted]* (A.A.O. Sept. 13, 2018), https://www.uscis.gov/sites/default/files/err/B7%20-%20Immigrant%20Petition%20by%20Alien%20Entrepreneur,%20Sec.%20203(b)(5)%20of%20the%20INA/Decisions_Issued_in_2013/SEP182013_02B7203.pdf.

53. 596 U.S. 328 (2022).

54. *Matter of Lozada*, 19 I&N Dec. 637, 638 (B.I.A. 1988) (citing *Magallanes-Damian v. INS*, 783 F.2d 931 (9th Cir. 1986), and *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975)); *see Contreras v. U.S. Att'y Gen.*, 665 F.3d 578, 584 n.3 (3d Cir. 2012) (citing *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003); *Denko v. INS*, 351 F.3d 717, 723-24 (6th Cir. 2003); *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003); and *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1273-74 (11th Cir. 2005), but finding that due process was not guaranteed under the Fifth Amendment outside of removal proceedings).

55. *Matter of Lozada*, 19 I&N Dec. at 638 (citing *Ramirez-Durazo v. INS*, 794 F.2d 491 (9th Cir. 1986); *Lopez v. INS*, 775 F.2d 1015 (9th Cir. 1985); *Mohsseni Behbahani v. INS*, 796 F.2d 249 (9th Cir. 1986); and *Matter of Santos*, 19 I&N Dec. 105 (B.I.A. 1984)).

56. *Id.*

57. *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004); *see also Fadiga v. U.S. Att'y Gen.*, 488 F.3d 142, 157 (3d Cir. 2007); *Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994); *Paul v. INS*, 521 F.2d at 199.

58. *Contreras v. U.S. Att'y Gen.*, 665 F.3d at 584; *Dakane v. U.S. Att'y Gen.*, 399 F.3d at 1274; *Morales Apolinar v. Mukasey*, 514 F.3d 893, 898 (9th Cir. 2008); *Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994); *Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006).

59. *Strickland v. Washington*, 466 U.S. 668, 670 (1984).

60. *See Viehweg v. Mello*, 5 F. Supp. 2d 752 (E.D. Mo. 1998); *Sandhu v. Kanzler*, 932 F.3d 1107 (8th Cir. 2019); *UFT Commercial Finance, LLC v. Fisher*, 991 F.3d 854 (7th Cir. 2021).

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61. *Matter of Rivera*, 21 I&N Dec. 599, 604 (B.I.A. 1996).

62. INA §§ 240(b)(4)(A), 292 (emphasis added).

63. *Loper Bright Enterprises, Inc. v. Raimondo*, No. 22-451 (argued Jan. 17, 2024); *Relentless, Inc. v. Department of Commerce*, No. 22-1219 (argued Jan. 17, 2024).

64. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

65. INA §§ 240(b)(4)(A), 292.

66. *Matter of Compean II*, 25 I&N Dec. 1, 2 (A.G. 2009).

67. *See generally* Vanderbilt University Immigration Practice Clinic, *supra* note 47.

68. *Matter of Compean II*, 25 I&N Dec. at 2.

69. 8 C.F.R. § 292.3.

70. *See Matter of Melgar*, 28 I&N Dec. 169 (B.I.A. 2020).

71. *Matter of Lozada*, 19 I&N Dec. 637, 639 (B.I.A. 1988).

72. *Matter of Compean I*, 24 I&N Dec. 710, 737 (A.G. 2009).

73. INA §§ 103(a)(1), 101(b)(4); 8 C.F.R. §§ 1003.1(a); 1003.1(d)(7); 1003.1(h).

74. *The AG's Certifying of BIA Decisions* (Mar. 29, 2018), Jeffrey S. Chase, https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions; *see also* Alberto Gonzales & Patrick Glen, Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority, 101 Iowa L. Rev. 841 (2016).

75. *Matter of L–E–A–*, 28 I&N Dec. 304 (A.G. 2021); *Matter of L–E–A–*, 27 I&N Dec. 494 (A.G. 2018); *Matter of L–E–A–*, 17 I&N Dec. 40 (B.I.A. 2017).

76. *Matter of Lozada*, 19 I&N Dec. at 639-40.

77. 8 C.F.R. § 1003.0(b).

78. Memorandum from David L. Neal, Director, Executive Office for Immigration Review, *Administrative Closure*, DM 22-03 (Nov. 21, 2023).

79. 28 I&N Dec. 326 (A.G. 2021).

80. *See Matter of Avetisyan*, 25 I&N Dec. 688, 692 (B.I.A. 2012); *Matter of W–Y–U–*, 27 I&N Dec. 17, 18 (B.I.A. 2017); *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018). *See also Arcos Sanchez v. U.S. Att'y Gen.*, 997 F.3d 113, 121-24 (3d Cir. 2021); *Meza Morales v. Barr*, 973 F.3d 656, 667 (7th Cir. 2020); *Romero v. Barr*, 937 F.3d 282, 292-94 (4th Cir. 2019); *Garcia-DeLeon v. Garland*, 999 F.3d 986, 991 (6th Cir. 2021).

81. *Immigration Court Backlog Tops 3 Million; Each Judge Assigned 4,500 Cases,* TRAC Immigration (Dec. 18, 2023), https://trac.syr.edu/reports/734/.

82. 21 I&N Dec. 879 (B.I.A. 1997) (finding that "Respondent had satisfied the high burden announced in *Lozada*," because the respondent had filed a detailed affidavit that she had not received notice, and that the attorney's representation was limited in scope, and further that respondent had suffered prejudice to such a degree that reopening was warranted). While the immigrant had, in fact, filed a bar complaint, it was superfluous, because the record itself demonstrated both ineffective assistance of counsel and prejudice.

83. *Matter of S–M–J–*, 21 I&N Dec. 722 (B.I.A. 1997).

84. *Matter of Melgar*, 28 I&N Dec. 169 (B.I.A. 2020).

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"Circumvention of Lawful Pathways" or Circumvention of the Law?

A Comparison Across Party Lines

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Abstract: Lately, it seems technology has infiltrated every aspect of our lives—including our laws. Nearly a year ago, the Biden administration promulgated its own unique version of the asylum ban titled "Circumvention of Lawful Pathways." Asylum seekers are now forced to utilize the CPB One smartphone application to schedule an appointment to seek asylum. However, multiple lawsuits threaten the rule from pro-immigrant and anti-immigrant advocates alike. This article examines this rule and the legal challenges that could lead to its demise.

Introduction

On May 16, 2023, the Biden administration published the rule titled "Circumvention of Lawful Pathways" (the Rule), which purports to encourage migrants to "lawfully" present themselves at ports of entry (POE) in order to seek asylum.[1] An aspect of this rule creates barriers to entry for migrants by requiring them to use a phone application—CBP One—to make an appointment for entry.[2] Ostensibly, the administration intends for this requirement to smooth the process for Customs and Border Protection (CBP) and migrants themselves; however, the Rule creates a ground of ineligibility for asylum seekers who either do not know about the CBP One requirement or do not have the means of owning and operating a smartphone capable of downloading the CBP One application.[3]

"Circumvention of Lawful Pathways" is an ambiguous title left with further complexing implications. Despite the end of expelling asylum seekers under Title 42, the Biden administration has found a way to carry on its legacy under the guise of "lawful, safe, and orderly pathways" under its final rule effective May 11, 2023.[4] This Rule has created opposition on both sides of the aisle. Immigrant advocates are bringing a class action suit against the government in *AOL et al. v. Mayorkas*, arguing that this Rule unjustly turns away asylum seekers who are otherwise eligible under the law.[5] Meanwhile, Texas Attorney General Ken Paxton filed a lawsuit against Secretary of Homeland Security Alejandro Mayorkas and Attorney General Merrick Garland arguing the opposite in *State of Texas v. Mayorkas et al.*, stating that this Rule allows individuals, who would otherwise be ineligible, to lawfully enter the country.[6] Who will

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prevail, and more importantly, where does the fate of asylum seekers at the southern border go from here?

This paper will examine the authority of the Department of Homeland Security (DHS) and the Department of Justice in implementing CBP One and whether it can hold up against attacks from all angles. The Immigration and Nationality Act (INA) states, "The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum . . ."[7] However, the Biden administration took this a step too far by creating a rebuttable presumption of owning a smartphone. Technology should be implemented as a tool to facilitate access to our rapidly changing immigration system, not a barrier. However, this Rule instead necessitates technology as a factor in legal determinations and their resulting consequences. Adding to the analysis, this paper will consider the merits of the challenges brought from both sides of the argument, as well as what the future holds for asylum seekers if this rule is upheld or if it is enjoined. Do we return to a pre–Title 42 era of asylum law? Or will the courts allow the government to further chip away at our asylum laws? Although the administration may have had the best of intentions when implementing this Rule, this paper will examine why its effects could be disastrous for both those attempting to administer it and the migrants to whom it will apply.

The Rule

The final rule, "Circumvention of Lawful Pathways," among other things, establishes a rebuttable presumption of ineligibility for asylum for non-Mexican noncitizens who present themselves at a POE at the southwest border or adjacent coastal borders without legal documentation *and without a previously scheduled appointment*, after traveling through a third country where they did not apply for and were not denied asylum.[8] Sounds familiar, right? The rule went into effect the same day as Title 42's expiration, May 11, 2023, and is currently set to end on May 11, 2025.[9]

For simplicity, the Rule can be broken down as follows: Non-Mexican noncitizens who cross the southern border or adjacent land borders (1) without authorization and (2) after traveling through another country will have a rebuttable presumption of ineligibility for asylum unless they have done one of the following:

1. availed themselves of an existing lawful process,
2. presented at a POE at a pre-scheduled time using the CBP One app, or
3. been denied asylum in a third country through which they traveled.[10]

Ignoring, for a moment, the mirroring features of the Rule to those of the Trump era's Title 42, one additional aspect of the Rule adds a wrinkle of

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complexity not found in the previous Title 42 formulation: Non-Mexican asylum seekers who have not applied for and been denied asylum in a third country may still avoid the rebuttable presumption of ineligibility for asylum *if* they present at a POE at a *pre-scheduled time*.[11] They must, however, use the CPB One phone app to pre-schedule their appointment.[12]

Nevertheless, there are some ways to rebut the presumption of ineligibility for asylum. As an initial matter, there is a general catchall for "exceptionally compelling circumstances."[13] The DHS has said that, specifically, exceptionally compelling circumstances exist for a noncitizen who demonstrates that at the time of their unauthorized entry, they, or their family member (with whom they travelled):

1. faced an acute medical emergency;
2. faced an extreme and imminent threat to their life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or
3. were a victim of a severe form of trafficking, as defined in 8 CFR § 214.11.[14]

Immigration advocates would make the argument that with the Trump era Title 42's expiration looming, many Americans anticipated a large surge of migrants at the southern border, leaving the Biden administration to be a defendant in the court of public opinion. The addition of the pre-scheduled appointment exception, while on its face seems like a benefit to asylum seekers to lessen the burden required by Title 42, actually fails to be useful to a large percentage of those seeking to use it. Among the migrants at the Southern border, a majority are seeking asylum after fleeing their home countries. Unfortunately, the vulnerability of these individuals turned out to be the solution to Biden's border problem. How could the government slow down the anticipated influx? Make it a requirement that a specific population that largely consists of individuals fleeing their homes and leaving everything behind have access to a smartphone with enough power and service to download a phone application; that is, if they are lucky enough to be the first to log on and secure one of the limited appointments.[15]

While immigration advocates make the argument that the benefit that the Biden administration is presenting to asylum seekers to "avail themselves of lawful, safe, and orderly pathways" is actually a detriment to the process of asylum, the argument on the anti-immigration side of the aisle is slightly less empathetic—CBP One is an undocumented noncitizen's first-class ticket to live in the United States, and it must be stopped.[16] In other words: "The Biden Administration deliberately conceived of this phone app with the goal of illegally pre-approving more foreign aliens to enter the country and go where they please once they arrive," as Texas Attorney General Paxton argued in a press release.[17] The logic of this opposition to the rule is that whereas Title 42 barred all asylum seekers who did not first seek and get denied asylum in a third country before presenting themselves at the U.S. border to seek asylum,

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the Rule here allows those candidates for asylum to still have eligibility if they do not follow that formulation, as long as they pre-schedule their border appointment.[18] Either way, neither side is happy.

The Biden administration's logic, as expressed in the DHS Fact Sheet, is that this new Rule will create an orderly and manageable asylum process at the border in the face of a projected influx of asylum seekers at the end of Title 42. It argues that it puts "in place a mechanism for migrants to schedule a time and place to arrive in a safe, orderly and lawful manner at ports of entry via use of the CBP One mobile app; and expand[s] refugee processing in the Western Hemisphere."[19] However, the function of the application has fallen overwhelmingly short of being "safe" or "orderly" since its implementation in May.[20] The administration further argues that this Rule will reduce the immigration court backlog; however, individuals who are deemed ineligible under the Rule will still have the ability to seek review of the decision by an immigration judge, meaning immigration courts must hear these cases, as well as the cases of those who are paroled into the United States to seek asylum, arguably doubling the backlog.[21]

Jurisdiction or Not?

In the final rule jointly issued by the Attorney General and Secretary of the DHS, it points to two sources of authority to implement such a regulation.[22] The majority of both offices' concurrent powers are derived from the Homeland Security Act of 2002 (HSA) and the INA.[23] The INA grants the Secretary the authority to establish regulations and take other actions "necessary for carrying out" the duties ascribed to him under Sections 1103(a)(1) and (3) of the INA.[24] Meanwhile, the Attorney General "shall establish such regulations, . . . issue such instructions, . . . delegate such authority, and perform such other acts" as he sees necessary.[25]

Section 208 of the Act also grants the Attorney General and the Secretary joint authority to make determinations surrounding asylum.[26] The statute further authorizes them to "establish," "by regulation," "additional limitations and conditions, consistent with" Section 208, under which a noncitizen "shall be ineligible for asylum."[27] However, the majority of the criticism surrounding the Rule is that it is not consistent with the INA. Most, if not all, immigration practitioners have the following section of the INA, referencing eligibility for asylum, memorized:

> (1) In general:
>
> Any alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* and including an alien who is brought to the United States after having been interdicted in international or United States waters),

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> irrespective of such alien’s status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.[28]

Here, the breach of jurisdiction is two pronged. First, the Secretary and the Attorney General, in making the Rule, have ignored a key clause of Section 208—specifically, that it dictates that no distinction is made in the right to apply for asylum between noncitizens who have arrived at a POE and those who have not.[29] The Rule presumptively denies asylum to a whole class of noncitizens based on the fact that they did not present themselves at a POE, despite Section 208’s clear mandate that no distinction may be made in allowing noncitizens to apply for asylum based on whether they arrived at a designated POE.

The second prong of the Secretary and Attorney General’s breach of jurisdiction—which necessarily follows the first but derives from a different clause of Section 208—is that, under Section 208, a noncitizen may seek asylum “irrespective of . . . status.”[30] However, the Rule only allows the noncitizens who have presented themselves at POEs with a pre-scheduled appointment time via the CBP One application to seek asylum, which is in direct violation of the statute.

In terms of jurisdiction, the Secretary and Attorney General have abused their power, as this rule completely undermines Section 208 of the Act. It not only makes noncitizens who do not arrive at a POE ineligible for asylum in direct contradiction to “whether or not at a designated port of arrival,” but also individuals who do not have a CPB One appointment, which is in direct contradiction to the idea that a noncitizen may seek asylum “irrespective of . . . status.”[31]

It is also important to consider the original source of our asylum law in this analysis and how Congress initially intended to treat those fleeing persecution. In order to be eligible for asylum, an individual must meet the definition of a refugee:

> (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . [32]

This definition derives from the 1967 United Nations Protocol Relating to the Status of Refugees and enacted by the Refugee Act of 1980.[33] The Senate Report on the Senate Bill that was a precursor to the Refugee Act of 1980 states the purpose of the bill:

> The Refugee Act of 1979 establishes for the first time a comprehensive United States refugee resettlement and assistance policy. It reflects one of the oldest themes in America’s history—welcoming homeless refugees to our shores. It gives statutory meaning to our national commitment to human rights and humanitarian concerns . . . And it places into law

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> what we do for refugees now by custom, and on an ad hoc basis, through the use of 'parole authority' in section 212(D)(5) of the [INA].[34]

In this political climate, it is easy to forget the words of the Senate in 1980. At one point in time, our country welcomed refugees at our borders as it was a core part of our values. Congress determined we had a responsibility to the world to create a functioning and fair system to process refugees and asylum seekers at our borders as opposed to the use of "one size fits all" parole authority. Additionally, it did away with geographic and ideological limitations on refugees previously introduced by President Lyndon B. Johnson in the 1965 Amendments to the INA.[35] Meanwhile, the government has undermined the intention of the Refugee Act and reverted to a time where our asylum and refugee law was neither functioning nor fair. And similarly to the 1965 Amendments of the INA, Biden's Rule enforces geographic and ideologic limitations on asylum seekers. By restricting those individuals at the Southwest border who have traveled through a third country from seeking asylum outside the use of CPB One will have a great impact on a specific group of people in Central America—individuals from the Northern Triangle—who must use Mexico as their point of entry to the United States when seeking asylum.[36] The further the government imposes on our asylum law, the further it breaks down. At what point is this a violation of our duties under the United Nations Protocol and how soon will it be before there is nothing left?

Legal Challenges

Currently, multiple legal challenges threaten the Rule as a whole; however, there are two that target the use of the CBP One application specifically.[37] The first challenge, brought by immigration advocates, is before the Southern District of California and specifically targets the CBP One Turnback Policy.[38] This policy allows CBP officials to turn back individuals seeking asylum who present at a POE without an appointment on the CBP One application.[39]

Meanwhile, anti-immigrant Texas Attorney General Paxton misses the mark and challenges the Rule under similar legal structure, but for significantly contradicting reasons.[40] He sued in the Western District of Texas stating that the government is encouraging noncitizens to engage in illegal activity by providing additional pathways to come to the United States without status, leaving Texas to bear the financial burden.[41]

AOL et al. v. Mayorkas

Plaintiffs including Al Otro Lado, Haitian Bridge Alliance, and 10 asylum seekers turned back at the southern border brought a class action complaint against the federal government on July 27, 2023 in the Southern District of

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California.[42] The complaint makes six claims for relief, focused mainly on Section 706 of the Administrative Procedure Act (APA).[43] On August 9, 2023, the plaintiffs filed a motion for provisional class certification and for preliminary injunction; however, the court denied the motion on October 13, 2023.[44] On November 7, 2023, the plaintiffs filed an interlocutory appeal to the ninth circuit.[45] Meanwhile, the defendants filed a motion to dismiss the case for a failure to state a claim on November 13, 2023.[46] The case remains pending before the district court as does the appeal to the ninth circuit.

Arguments

The first issue the Complaint tackles is the statutory distinction between noncitizens present in the United States versus noncitizens arriving at POEs.[47] The plaintiffs make the argument that when referring to the physical location of noncitizens eligible to apply for asylum, it includes both noncitizens physically within the United States and noncitizens who are considered "arriving aliens." The regulations define "arriving alien" as follows:

> [A]n applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.[48]

The plaintiffs emphasize that the group of noncitizens "who arrive" in the United States cannot be treated any differently under this statute than the noncitizens physically present in the United States. Their claim under this argument is titled "Violation of Administrative Procedure Act, § 706(2)(A), (C), Agency Action Not in Accordance with Law and in Excess of Statutory Authority."[49]

Next, the plaintiffs make a claim of violation of the APA under section 706(2)(A), stating that the Turnback Policy is arbitrary and capricious because the defendants failed to provide an explanation as to why the policy was enacted and continue to consider factors in their decision not to process asylum seekers at the border that were not intended by Congress.[50] Additionally, the plaintiffs claim that agency action was "Unlawfully Withheld or Unreasonably Delayed" as a violation of section 706(1) of the APA because the defendants "have engaged in an unlawful and widespread pattern or practice of denying or unreasonably delaying asylum seekers' access to the asylum process by requiring them to obtain a CBP One appointment in order to access the asylum process at a POE."[51] Asylum seekers have limited time, and a matter of days or even hours can put someone at risk. Failing to provide access to a statutorily protected process is a major violation of the INA and, in turn, the APA.

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Next, the plaintiffs look to the Constitution—specifically, a violation of the Due Process Clause of the Fifth Amendment, which may prompt questions as to whether undocumented citizens are afforded certain protections under the constitution.[52] Plaintiffs assert that the CBP Turnback Policy violates due process of noncitizens because "[t]he INA provides individual plaintiffs the right to be inspected and processed at a POE and granted access to the asylum process."[53] While the plaintiffs argue that arriving noncitizens are protected under the Fifth Amendment, the defendants may argue that this right only applies to individuals on U.S. soil.[54]

Third, the plaintiffs turn to our obligations under international law claiming a violation under the doctrine of non-refoulement under the Alien Tort Statute, 28 U.S.C. § 1350.[55] The non-refoulement doctrine prohibits states from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill treatment, or other serious human rights violations.[56] The plaintiffs state, "In order to effectuate an asylum seeker's right to non-refoulement, the United States is obligated to implement and follow procedures to ensure that the request for asylum is duly and efficiently considered."[57] However, nothing about CBP One ensures efficient consideration of asylum requests.

Lastly, the plaintiffs assert something known as the "Accardi Doctrine."[58] The Accardi Doctrine dates back to 1954 where the Supreme Court held that federal agencies are obligated to follow their own regulations, policies, and procedures.[59] If an agency violates this doctrine, its actions may be challenged in court.[60] On November 1, 2021, CBP issued "Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry," providing guidelines to CBP officers on proper procedures for inspecting and admitting noncitizens at POEs.[61] Specifically, the guidance states the following:

> [A]sylum seekers or others seeking humanitarian protection cannot be required to submit advance information in order to be processed at a Southwest Border land POE. The submission (or lack thereof) of advance information should not influence the outcome of any inspection. CBP will continue to make admissibility and processing determinations on a case-by-case basis at the POE.[62]

The plaintiffs argue that the actions of CBP turning back individuals who do not have an appointment through the CPB One application is a violation of its own binding internal guidance considering it remains effective.[63] In addition to the above guidance, the final rule also asserts that noncitizens who present at a POE without an appointment will not be turned away; however, the ten individuals who presented at a POE without an appointment were turned away—the plaintiffs state, "Border-wide data shows that, as of May 2023, the eight Class A POEs that are processing asylum seekers are turning back almost all those who do not have a CBP One appointment."[64]

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Preliminary Injunction

While this Complaint has been pending, the plaintiffs have asked the court to preliminarily enjoin CBP's Turnback Policy based on the arguments presented above. The Court heard oral arguments on October 13, 2023, and ultimately denied the motion based on Supreme Court precedent.[65] The issue here was whether the Court had the authority to enjoin CPB after the ruling in *United States v. Aleman Gonzalez*.[66] *Aleman Gonzalez* focuses on a provision of the INA that only allows the Supreme Court to enjoin the operations related to the inspection, apprehension, examination, and removal of noncitizens.[67] For context, the relevant provision states:

> 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 the provisions* of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings have been initiated.[68]

In *Aleman Gonzalez*, the respondents filed a class action lawsuit against the government for failing to provide them with bond hearings in which they are entitled to after six months' detention under 8 U.S.C. § 1231(a)(6).[69] The Northern District of California granted the injunction and enjoined the government from detaining noncitizens for more than 180 days without a bond hearing.[70] In a divided panel, the Ninth Circuit affirmed the injunction; however, the Supreme Court ultimately upheld Section 1252(f)(1), under its plain meaning, and deprived the District Courts of jurisdiction to entertain respondents' requests for class-wide injunctive relief.[71]

The plaintiffs argue that this ruling does not apply in the case of CBP's Turnback Policy because they are not asking the Court to stop the government from enacting these provisions, but rather to carry out its own internal guidance of refusing to turn back asylum seekers at the southern border.[72] The Court disagreed, stating, "issuing an injunction restricting Customs & Border Protection from turning back asylum applicants for whatever reason, the Court would directly implicate how CBP implements its duty to inspect asylum seekers under § 1225 and the procedures set out therein."[73] The plaintiffs appealed this decision to the Ninth Circuit on November 7, 2023.[74]

Unfortunately, this decision does not bode well for the relief sought in this case. The Ninth Circuit could hold otherwise, but the argument that an injunction here would not restrict the government's operations to inspect and examine noncitizens under the statute is unlikely to succeed when the government specifically points to those provisions as its authority to enact the regulation. If the Ninth Circuit agrees with the district court, then the precedent set in *Aleman Gonzalez* may derail the overall case as a whole.

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State of Texas v. Mayorkas et al.

Further south, in the Western District of Texas to be exact, the government faces further scrutiny and legal challenges to CPB One. In the Complaint, Paxton states, "The Biden Administration's attempt to manage the southern border by app and parole aliens en masse does not meet even the lowest expectation of competency."[75] Like the plaintiffs in *AOL et al. v. Mayorkas*, Texas Attorney General Paxton utilizes tools within the APA to request permanent injunction, in addition to requesting declaratory judgment of the Circumvention of Lawful Pathways rule.[76]

Arguments

Paxton frames the Circumvention of Lawful Pathways Rule as the government "enticing" and "encouraging" citizens to seek lawful parole into the United States despite the validity of their asylum claims.[77] He seeks to vacate and enjoin the specific portion of the rule that creates an exemption from the presumption of ineligibility for asylum for individuals who use the CBP One application essentially returning to the Trump-era asylum ban and third country transit rule.[78]

The first claim against the government is based on section 706(2)(A) and (C) of the APA as exceeding statutory authority and not acting in accordance with the law. The Attorney General argues that CBP One is an affirmative action on behalf of the government that encourages noncitizens to come into the United States without valid entry documents, as opposed to a negative action to deter the influx of asylum seekers at the border as the plaintiffs argue in *AOL et al. v. Mayorkas*. He claims there is nothing in Title 8 of the Act that authorizes this type of encouragement on behalf of the government to parole in "mass" amounts of noncitizens.[79]

The Attorney General has not only misinterpreted what the rule alleges to do on paper but also the legal consequences of the rule. While the state of Texas alleges that the government is encouraging individuals to enter the United States, this is inaccurate. The government claims to simply be encouraging individuals who already are *en route* or planning to seek asylum to utilize the application to access parole as opposed to entering without inspection between POEs. However, the use of the word "encouragement" implies that the use of the application is a suggestion, but it is no suggestion at all. It is a requirement that limits the availability of asylum. Additionally, just because someone is paroled into the United States does not guarantee asylum or any other status. Therefore, this argument is unlikely to succeed.

The next claim is based on Section 706(2)(A) of the APA, stating that the Rule is arbitrary and capricious.[80] This argument is mainly focused on the fact that the government failed to consider the financial impact this would allegedly have on Texas, stating it will "inflict costs on the State for public

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education, law enforcement and incarceration, unreimbursed health care, and other public services" for noncitizens because a majority of the people paroled in will enter through Texas.[81] Further, he claims that it will cause a significant cost to the government in issuing driver's licenses.[82] The Attorney General purports that the government has a duty to consider the expense on states when promulgating regulations and they failed to do so.[83] To advance this argument, the Attorney General is going to have to prove that the CBP One application does in fact increase costs on the state of Texas more so than what they already experienced preceding the enactment of the Rule. Otherwise, this argument is moot. While it is reported that there are about 5 million requests coming in each month to the application, it does not account for individuals who are repeatedly requesting appointments without success.[84]

Lastly, Attorney General Paxton brings a common law *ultra vires* claim and an *ultra vires* claim under section 702 of the APA.[85] The basis of this argument is that the "[d]efendants are granting parole *en masse* to aliens who use the CBP One app, in violation of the INA," and therefore, exceeding their statutory power.[86] Essentially, he is asserting that paroling individuals for anything other than urgent "humanitarian reasons" or "public benefit" is in violation of following provision of the INA:

> The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, 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.[87]

Paxton argues that the implementation of CPB One allows individuals to be paroled as long as they have an appointment—prior to any screening for asylum.[88]

Since the filing of the original complaint, there has not been much movement in this case aside from the amended complaint filed on February 5, 2024, by the state of Texas. There still has not been any response from the government on the Complaint.

Conclusion

One would be hard pressed to find another law that *requires* the use of technology, particularly when the stakes are so high. In an age where we experience technological advancement at every corner, it should be used as a tool to enhance policies and practices, not a weapon of the government. When determining if the use of CBP One under the Circumvention of Lawful Pathways rule should be upheld, the federal courts should consider what precedent they are setting for other government agencies. The government acknowledges

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the dangers that technology presents in the United States, including foreign cyberattacks and predatory usage of artificial intelligence.[89] Will technology soon govern the rule of law permanently, and more importantly, the lives of individuals seeking safety?

Considering the current legal challenges before the courts, and previous rulings on similar asylum-limiting policies, the fate of CBP One appears to be grim. Albeit for different reasons, rarely in immigration law do we see both political parties seeking the same outcome, which is to end the use of CPB One. Valid arguments are brought in both cases above—now it is just going to be a matter of what is most persuasive to the court and what this means for asylum in the future. Since the beginning of the Trump administration, the asylum process has not functioned the way Congress intended it to when they enacted the INA. From third country transit bans to Title 42, now to Biden's ugly hybrid, the question remains: Will asylum ever function lawfully? Or will it continue to be used as a political ploy?

Notes

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1. *See* 88 Fed. Reg. at 31314. The Department of Homeland Security defines a POE as "Any location in the United States or its territories that is designated as a port of entry (POE) for noncitizens and U.S. citizens." *See* U.S. Department of Homeland Security, *Office of Homeland Security Statistics: Glossary*, https://www.dhs.gov/ohss/about-data/glossary#16.

2. *Id.*

3. *Id.*

4. "Title 42" was a rule enacted by the Trump administration through the Center for Disease Control and Prevention (CDC) in 2020 to "protect the public health from an increase in the serious danger" of COVID-19 by expelling migrants seeking entry at the Mexican and Canadian borders under sections 362 and 365 of The Public Health Service Act. *See* Centers for Disease Control and Prevention, Department of Health and Human Services, *Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes*, 85 Fed. Reg. 16559 (Mar. 24, 2020), https://www.federalregister.gov/documents/2020/03/24/2020-06238/control-of-communicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into. This Act was intended to stop the spread of COVID-19; however, the rule remained in effect until May 11, 2023, long past the Country's tight COVID-19 restrictions and not so coincidentally, the same day Biden's "Circumvention of Lawful Pathways" Rule went into effect. *See* Azadeh Erfani, National Immigrant Justice Center, *FAQ: The End of Title 42 Expulsions* (May 10, 2023), https://immigrantjustice.org/staff/blog/faq-end-title-42-expulsions. *Id.*

5. *See* American Immigration Council (AIC), *Challenging CBP One Turnback Policy* (2023), https://www.americanimmigrationcouncil.org/litigation/challenging-cbp-one-turnback-policy.

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6. Texas Attorney General, *Paxton Sues Biden Administration Over Their Illegal Use of a Mobile Phone App to Bring Countless Illegal Aliens into the Country* (May 23, 2023).

7. INA § 208(b)(2)(C).

8. *Supra* note 1.

9. *Id.*

10. *See* The Department of Homeland Security, *Fact Sheet: Circumvention of Lawful Pathways Final Rule* (May 11, 2023), https://www.cbp.gov/document/fact-sheets/cbp-one-fact-sheet-english.

11. *See* 42 U.S. Code § 265.

12. The Department of Homeland Security, *supra* note 10.

13. *Id.*

14. *Id.*

15. *See* U.S. Customs and Border Protection, *CBP Releases January 2024 Monthly Update* (Feb. 13, 2024), https://www.cbp.gov/newsroom/national-media-release/cbp-releases-january-2024-monthly-update.

16. *See* Attorney General of Texas, *Paxton Sues Biden Administration Over Their Illegal Use of a Mobile Phone App to Bring Countless Illegal Aliens into the Country* (May 23, 2023), https://www.texasattorneygeneral.gov/news/releases/paxton-sues-biden-administration-over-their-illegal-use-mobile-phone-app-bring-countless-illegal.

17. Rebecca Santana, *Texas Sues Biden Administration Over Asylum Rule, Saying Phone App Encourages Illegal Immigration*, Associated Press (May 24, 2023), https://apnews.com/article/texas-paxton-cbpone-immigration-border-asylum-5ad591deb956bb192f84c13b64620fc0.

18. The Department of Homeland Security, *supra* note 10.

19. *Id.*

20. *See* Immigration Impact, *CBP One Is Riddled with Flaws That Make the App Inaccessible to Many Asylum Seekers* (Feb. 28, 2023), https://immigrationimpact.com/2023/02/28/cbp-one-app-flaws-asylum-seekers/.

21. *Supra* note 1 (stating, "the rule provides that an AO's adverse determination as to the applicability of the rebuttable presumption, whether an exception applies or the presumption has been rebutted, and whether the noncitizen has established a reasonable possibility of persecution or torture, are all subject to de novo IJ review.")

22. *Id.*

23. *Id.*

24. INA § 208(b)(2)(C); 8 U.S.C. § 1158(b)(2)(C); *see also* INA § 208(d)(5)(B), 8 U.S.C. § 1158(d)(5)(B) (authorizing the Secretary and the Attorney General to "provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with [the INA]").

25. *Id.*

26. 8 U.S. Code § 1158 (a)(1).

27. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), *supra* note 17.

28. 8 U.S. Code § 1158 (a)(1) (emphasis added).

29. *Id.*

30. *Id.*

31. *Id.*

32. 94 Stat. 102, 8 U.S.C. § 1101(a)(42).

33. The Refugee Act of 1980, 94 Stat. 102; *see also INS v. Cardoza-Fonesca*, 480 U.S. 421 (1987) (finding the primary purpose of the Refugee Act of 1980 was to bring

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U.S. Refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees to which the U.S. acceded in 1968).

34. S. Rep. 92-256, 1980 U.S.C.C.A.N. 141.

35. *See* U.S. Citizenship and Immigration Services, *Refugee Timeline* (Feb. 7, 2023), https://www.uscis.gov/about-us/our-history/stories-from-the-archives/refugee-timeline (stating "The 1965 Amendments to the [INA] eliminated the quota system and established a preference category for conditional entrants. These were aliens in noncommunist countries who had fled a communist country or the Middle East and were unwilling to return due to persecution or fear of persecution on account of race, religion, or political opinion. They also included people who were uprooted by catastrophic natural calamities as defined by the president.)

36. *See generally* Diana Roy & Amelia Cheatham, Council on Foreign Relations, *Central America's Turbulent Northern Triangle*.

37. *AOL et al. v. Mayorkas*, Case No. 3:23-cv-01367-AGS-BLM (S.D. Cal.); *State of Texas v. Mayorkas et al.* 2:23-cv-00024 (W.D. Tex.); *see also East Bay Sanctuary Covenant v. Biden*, 993 F.3D 640 (July 25, 2023); National Immigrant Justice Center, *East Bay Sanctuary Covenant v. Biden* (Aug. 4, 2023), https://immigrantjustice.org/court_cases/east-bay-sanctuary-covenant-v-biden (in this case, the plaintiffs challenged the Rule in its entirety. On July 25, 2023, the Court blocked the Rule but stayed the ruling for 14 days to allow the government the opportunity to appeal. On August 3, 2023, the Ninth Circuit held that the Rule could remain in effect as the appeal is heard.).

38. *AOL et al. v. Mayorkas*, Case No. 3:23-cv-01367-AGS-BLM (S.D. Cal.).

39. American Immigration Council, *Challenging CBP One Turnback Policy*, https://www.americanimmigrationcouncil.org/litigation/challenging-cbp-one-turnback-policy.

40. *State of Texas v. Mayorkas et al.* 2:23-cv-00024 (W.D. Tex.).

41. *Id.*

42. *Complaint*, July 27, 2023, 3:23-cv-01367-AGS-BLM.

43. *Id.*

44. *Notice of Filing of Official Transcript*, October 23, 2023, 3:23-cv-01367-AGS-BLM.

45. *Notice of Interlocutory Appeal*, November 7, 2023, 3:23-cv-01367-AGS-BLM.

46. *Motion to Dismiss for Failure to State a Claim*, October 13, 2023, 3:23-cv-01367-AGS-BLM.

47. *Supra* note 42, at 14.

48. 8 C.F.R. § 1.2

49. *Supra* note 42, at 57.

50. *Supra* note 42, at 57.

51. *Id.* at 60.

52. *Id.* at 62.

53. *Id.*

54. *See Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *see also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (explaining that the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent).

55. *Supra* note 42, at 64.

56. 1951 Convention and Protocol relating to the Status of Refugees, 189 U.N.T.S. 137, 176, Art. 33(1), entered into force Apr. 22, 1954.

57. *Supra* at note 42, at 16.

58. *Supra* at note 42, at 55.

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59. *See generally United States ex rel Accardi v. Shaughnessey*, 347 U.S. 260 (1954).
60. *Id.*
61. Troy A. Miller, Acting Commissioner, U.S. Customs and Border Protection, *Memorandum to Executive Assistant Commissioner William A. Ferrera, November 1, 2021*.
62. *Id.*
63. *Supra* note 42, at 55.
64. *Supra* note 42, at 35.
65. *Supra* note 44.
66. *United States v. Aleman Gonzales*, 142 S. Ct. 2057 (2022).
67. *Id.*
68. 8 U.S.C. § 1252(f)(1) (emphasis added).
69. *Supra* note 66, at 2.
70. *Id.*
71. *Id.*
72. *Supra* note 44.
73. *Id.* at 10.
74. *Supra* note 45.
75. *Amended Complaint*, February 5, 2024, 2:23-cv-00024.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Supra* note 75, at 11.
80. *Supra* note 75, at 12. *See also* 5 U.S.C. § 706(2)(A).
81. *Supra* note 75, at 9.
82. *Supra* note 75, at 13.
83. *Supra* note 75, at 20.
84. *See* Camilo Montoya-Galvez, *Migrants in Mexico Have Used CBP One App 64 Million Times to Request Entry into U.S.*, CBS News (Feb. 12, 2024), https://www.cbsnews.com/news/immigration-cbp-one-app-migrants-mexico-64-million/.
85. *Supra* note 75, at 23.
86. *Id.*
87. 8 U.S.C. § 1182(d)(5)(a).
88. *Supra* note 75.
89. Jennifer Gregory, *Cybersecurity Trends: IBM's Predictions for 2024*, Security Intelligence (Jan. 9, 2024), https://securityintelligence.com/articles/cybersecurity-trends-ibm-predictions-2024/.

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Legislative History of the APA as a Tool to Minimize Government Use of the Foreign Affairs Function Exception

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Abstract: Confusion pervades judicial interpretation of the foreign affairs function exception of the Administrative Procedure Act. The D.C. District Court, eschewing legislative history, applies a textualist approach, construing the exception narrowly. Courts in other circuits, using legislative history and other interpretive approaches, have created a tangled mesh of tests for when the exception applies. This article provides advice for immigration lawyers to minimize the scope of the foreign affairs function exception. In the D.C. Circuit, this advice is simple: cite the existing caselaw. In other circuits, we demonstrate how legislative history can be used as a tool to minimize government use of the foreign affairs function exception.

Introduction

The judicial branch's interpretation of the foreign affairs function exception of the Administrative Procedure Act (APA) has fractured. This exception, appearing in both the adjudication[1] and rulemaking[2] provisions of the APA, exempts agencies from following the APA's requirements. Although adjudication was central to early understandings of the APA, the statute's rulemaking requirements now dominate APA litigation.[3] The D.C. Circuit has heeded the Supreme Court's call for textualist statutory interpretation.[4] The D.C. District Court therefore rejects using the legislative history of the APA to interpret the statute.[5] Other circuits have continued to rely on legislative history.[6] Scholars have advocated for various ways of applying the APA, from "APA textualism"[7] to "APA originalism"[8] to "administrative common law."[9] These debates mirror broader dissension in the scholarship surrounding statutory interpretation. We do not take a side in these debates. Rather, we offer advice to immigration lawyers on how to use legislative history as a tool to minimize government use of the foreign affairs function exception.

Just as courts have been divided in their interpretation of the APA, courts have split as to whether to use legislative history in interpreting the APA's exceptions. The result is a fragmentary mishmash of conflicting tests, threatening the uniformity and coherence of immigration law. Confusion pervades judicial interpretation of the APA's foreign affairs function exception. The Supreme Court has cautioned against relying on legislative history,[10] and in

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cases construing the foreign affairs function exception in the immigration context, the D.C. District Court has minimized the exception to a considerable extent.[11] This line of cases is broadly favorable to immigration lawyers,[12] and they can cite it to significant effect. Several other circuits, however, continue to use the legislative history of the APA, and these courts often unduly expand the foreign affairs function exception.[13] As Stephen Migala has recently shown, the legislative history of the APA does not justify letting the exception swallow the rule.[14] The courts have provided limited guidance, as judicial determinations of the scope of the foreign affairs function exceptions are relatively sparse.[15] Immigration lawyers in these jurisdictions can use the APA's legislative history to shrink the foreign affairs function exception to a more reasonable size.

Allowing the foreign affairs function exception to grow excessively large risks letting all immigration-related rulemaking fall outside the scope of the APA. But immigration is not a lawless island bereft of the rules that otherwise govern the administrative state. Courts have warned of "the 'dangers of an expansive reading of the foreign affairs exception' in the immigration context."[16] The Second Circuit has cautioned that "it would be problematic if incidental foreign affairs effects eliminated public participation in this entire area of administrative law."[17] Letting the foreign affairs function exception grow inordinately "distended" risks frustrating the core purposes of the APA.[18]

This article proceeds in three sections. The first section surveys the current state of the foreign affairs function exception in each circuit, revealing the current state of fragmentation. The second section looks to the legislative history of the APA. This account serves two purposes. First, it justifies the textualist approach taken by the D.C. Circuit. Critics of textualism sometimes fear that a strictly textualist approach can undermine the clear intention of a statute. The legislative history of the APA shows that the overarching purpose of the statute was to ensure fair administrative process and the rule of law. Exceptions that are fixed and narrow, rather than free-floating and expansive, further this central purpose. Second, the legislative history of the APA is vital for lawyers practicing in jurisdictions where courts look to the legislative history of the APA to construe the scope of the foreign affairs function exception. Courts should not let APA exceptions grow so large that they undermine the core purpose of the APA to promote fair administrative process. The third section examines how the legislative history of the APA can be applied to minimize the foreign affairs function exception in the immigration context. In particular, while Migala[19] and the Attorney General's Manual[20] read the legislative history broadly to include rulemaking related to visas and passports in the foreign affairs function exception, we argue that these assertions are mistaken. A closer examination of cases surrounding visa and passport rules demonstrates that their domestic consequences often predominate, and the foreign affairs function exception frequently should not apply. In conclusion, immigration lawyers can use the textualist approach of the D.C. Circuit to minimize the foreign affairs function exception. In circuits that have not

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adopted this textualist reading of the exception, immigration lawyers can use the APA's legislative history as a tool to reach a substantially similar result.

The Confused State of Current Caselaw on the Foreign Affairs Function Exception

This section surveys the caselaw on the foreign affairs function exception. The first subsection describes the holdings of several landmark cases applying the APA to immigration law. The next subsection highlights the fractured state of current case law, as circuits have split on the scope of the foreign affairs function exception.

Key Cases in Interpreting the APA in the Immigration Context

Wong Yang Sung v. McGrath,[21] an early judicial interpretation of the APA, emphasized the importance of the APA's core goal of ensuring a fair administrative process. The Supreme Court decided *Wong Yang Sung* in the early days of the APA, the heyday of judicial use of legislative history.[22] *Wong Yang Sung* was a "*habeas corpus* proceeding [that] involve[d] a single ultimate question—whether administrative hearings in deportation cases must conform to requirements of the Administrative Procedure Act . . . ."[23] Noting the APA's emphasis on separation of functions, Justice Robert Jackson explained:

> [T]he safeguards [that the APA] set up were intended to ameliorate the evils from commingling of functions . . . . And this commingling, if objectionable anywhere, would seem particularly so in the deportation proceeding, where we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved.[24]

Jackson rejected the idea that "we should strain to exempt deportation proceedings from reforms in administrative procedure applicable generally to federal agencies."[25] Congress overturned the specific outcome of *Wong Yang Sung*—that deportation proceedings must conform to the requirements of the APA—by statute.[26] But the Court's analysis about the purpose of the APA and its implications for immigration law has never been directly overruled.[27] Today, *Wong Yang Sung*'s statement of the importance of the APA in protecting vulnerable populations merits amplification.

In *Hou Ching Chow v. Attorney General*,[28] decided in 1973, the District Court for the District of Columbia, drawing on legislative history and building on the theory of *Wong Yang Sung*, cabined the application of the foreign affairs function exception in the immigration context. The court used legislative

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history to interpret the exception, quoting from the Senate Report that the foreign affairs function exception "is not to be loosely interpreted to mean any function extending beyond the borders of the United States, but only those 'affairs' which so affect relations with other Governments, that, for example, public rule-making provisions would clearly provoke definitely undesirable international consequences."[29] The court reasoned, citing *Wong Yang Sung*, that "[i]f deportation proceedings do not come within the foreign affairs exemption, most certainly mere adjustment of alien status and labor certification requirements are not so exempt."[30]

The origin of the current circuit split can be traced back to *Yassini v. Crosland*, decided by the Ninth Circuit in 1980,[31] and *Mast Industries v. Regan*, decided by the U.S. Court of International Trade in 1984.[32] *Yassini* is the origin of the "definitely undesirable international consequences test."[33] *Hou Ching Chow* had quoted the Senate Report's assertion that "public rule-making provisions [that] would clearly provoke definitely undesirable international consequences" furnished an "example" of "those 'affairs' which so affect relations with other Governments" that the foreign affairs function exception applies.[34] Citing the same quotation from the Senate Report as *Hou Ching Chow*, the *Yassini* court transformed this example into the rule that the exception applies when "the public rulemaking provisions should provoke definitely undesirable international consequences."[35] The court decided that "the directive of David Crosland, Acting Commissioner of the Immigration and Naturalization Service (INS), to revoke the deferred departure dates that the INS had previously granted to Iranian nationals in this country" satisfied this test and fit within the exception.[36]

Mast rejected the theory that there must be undesirable international consequences for the foreign affairs function test to apply. The *Mast* court contended that "the phrase 'clearly provoke definitely undesirable international consequences'" in the legislative history "appears illustrative."[37] The court reasoned that "a requirement of such a finding would render the 'military or foreign affairs function' superfluous since the 'good cause' exception, § 553(b)(B), would apply."[38] While rejecting *Yassini*'s interpretation, the *Mast* court still relied on legislative history. The court rejected the "argument that 'foreign affairs functions' should be limited to diplomatic activities," because "the phrase 'diplomatic function' was employed in the January 6, 1945 draft of the [APA] and was discarded in favor of the broader and more generic phrase 'foreign affairs function.'"[39] *Mast* instead endorsed the "clearly and directly involved" test.[40] The *Mast* court concluded, quoting from a House Report, that "the [foreign affairs function] exception applies 'only "to the extent" that the excepted subject matter is clearly and directly involved' in a 'foreign affairs function.'"[41]

The Current Circuit Split

There are two layers to the circuit split on the scope of the foreign affairs function exception. First, there is a methodological split on whether to use

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legislative history. Among the circuits that do rely on legislative history, there is a split on how to interpret the legislative history. As a result of these divisions, the federal court decisions on the application of the foreign affairs function exception are in disarray. This section provides a circuit-by-circuit survey of the current state of the caselaw on the foreign affairs function exception in immigration cases.

Roe v. Mayorkas,[42] a First Circuit decision, illustrates the current judicial confusion on the subject. In that case, the court favored a narrow reading of the exception but surveyed the field of possible tests to use. "The First Circuit," the court observed, "has not addressed the question of what test should be applied in evaluating the application of the foreign affairs exception."[43] The court noted that "[t]he Ninth Circuit has held, in the immigration context, that 'the foreign affairs exception applies . . . only when ordinary application of "the public rulemaking provisions [will] provoke definitely undesirable international consequences."'"[44] Similarly, "[t]he Second Circuit has held that 'a case-by-case determination . . . [of] "definitely undesirable international consequences," may well be necessary . . . [in] areas of law like immigration that only indirectly implicate international relations,' but that 'quintessential foreign affairs functions such as diplomatic relations and the regulation of foreign missions are different.'"[45] The *Roe* court ultimately decided that "a showing of 'undesirable international consequences' is not necessary in this [case]," because "[t]here can be no doubt that the sudden withdrawal of U.S. troops from Afghanistan was a matter of great international consequence or that the closure of the U.S. Embassy implicated foreign diplomacy."[46]

City of New York v. Permanent Mission of India to the United States,[47] the Second Circuit decision cited in *Roe*,[48] dealt with taxation of a diplomatic mission, not immigration. The *Permanent Mission* court used the clearly and directly involved test, but Judge Guido Calabresi cautioned that a case-by-case definitely undesirable international consequences test might be necessary in immigration law.[49] This dictum conforms with the Second Circuit's decision two years previously in an immigration case, *Rajah v. Mukasey*.[50] In that case, the Second Circuit used the definitely undesirable international consequences test.[51]

The Third Circuit has not ruled on the appropriate inquiry for determining the applicability of the foreign affairs function exception. At the district court level, immigration decisions have indicated a willingness to employ legislative history. For example, in a waiver delay case, the court held that congressional intent behind 8 U.S.C. § 1182(a)(9)(B)(v) meant that it did not strip the court of jurisdiction. "Courts can ascertain congressional intent with the traditional tools of statutory interpretation," the court argued, including text, context, and legislative history.[52]

The Fourth Circuit addressed the scope of the foreign affairs function exception in the immigration context in *Malek-Marzban v. INS*.[53] The court considered the applicability of the foreign affairs function exception to be "obvious" in the case at hand.[54] "Because of the Iranian Government's failure to

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resolve the international crisis it created by the unlawful detention of American citizens in the United States Embassy in Tehran," the court explained, quoting from the Federal Register, the government's determination to expedite the departure of Iranians unlawfully present was within the exception.[55] More recently, in the absence of this exigency, the Maryland District Court in *Mayor and City Council of Baltimore v. Trump* employed the definitely undesirable international consequences test to require even Foreign Affairs Manual rules to be subject to the APA's rulemaking requirements.[56] The court envisioned a very minimal foreign affairs function exception, commenting, "To my knowledge, the federal appellate courts have recognized the applicability of the APA's foreign affairs exception on just two occasions: responding to the attacks of September 11, 2001, and the Iranian hostage crisis."[57] The court concluded that "where the government seeks to apply the exception to immigration rules, it must establish that the 'ordinary application of the public rulemaking provisions [will] provoke definitely undesirable international consequences.'"[58]

The Fifth Circuit has also only obliquely approached the foreign affairs function exception in immigration. In *Louisiana v. Centers for Disease Control and Prevention*,[59] the court proposed using two different tests, the definitely undesirable international consequences test and the clearly and directly involved test, to determine the lawfulness of the Center for Disease Control's termination of an order excluding certain immigrants at the border.[60] Ultimately, the court used neither test because "[t]he cursory information included in the Termination Order is simply insufficient to satisfy the requirements of either of the proposed tests."[61] Interestingly, the court titled the section dealing with the exception with an earlier version of its name, the "Foreign Relations Exception."[62]

The Sixth, Seventh, and Eighth Circuits have not dealt with the exception in immigration cases. The Ninth Circuit, like the Second Circuit, uses the definitely undesirable international consequences test in the immigration context. The Ninth Circuit quoted the Second Circuit's admonition that, as immigration law always at least incidentally implicates foreign affairs, a more stringent test is needed, because "it would be problematic if incidental foreign affairs effects eliminated public participation in this entire area of administrative law."[63] The Ninth Circuit is home to the series of East Bay Sanctuary Covenant cases. In *East Bay Sanctuary Covenant v. Trump*, the court used the definitely undesirable international consequences test.[64] A lower court in the Ninth Circuit has recently employed the APA in a visa delay case with no argument from the government that the foreign affairs function exception should apply.[65]

The Tenth and Eleventh Circuits have also used the definitely undesirable international consequences test. In *Nademi v. INS*, the Tenth Circuit followed the Fourth Circuit's holding in *Malek-Marzban*.[66] Both cases involved the exigencies of the Iranian hostage crisis.[67] There has been more activity in immigration cases involving the exception in the Eleventh Circuit. In *Jean v.*

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Nelson,[68] the Appeals Court ruled on the APA claim in 1983, using the definitely undesirable international consequences test and distinguishing *Yassini*. "The directive at issue in *Yassini*," the court noted, "was related intimately to the foreign policy of this country," because "[a]t the time the directive issued Iranian militants held American nationals hostage at our embassy in Tehran, and the President was struggling to obtain their release."[69] The "[a]ctions taken by the Commissioner of the INS were in direct response to those release attempts."[70] In the case at hand, however, the government "offered no evidence of undesirable international consequences that would result if rulemaking were employed."[71] Mere claims "that the new policy touched on national sovereignty" are insufficient, because while "many issues with which the President deals involve national sovereignty; not all would have undesirable international consequences if rulemaking procedures were followed."[72]

The Federal Circuit has continued to use the clearly and directly involved test laid out in *Mast*. In 2019, the Court of International Trade quoted *Mast* as the standard for when the foreign affairs function exception applies.[73] In 2022, the Court of International Trade observed, quoting *Mast*, "When invoked, the exemption 'will be construed narrowly and granted reluctantly,' and 'only to the extent that the excepted subject matter is clearly and directly involved in a foreign affairs function.'"[74] Neither of these cases, however, concerned immigration.

D.C. Circuit decisions in *E.B. v. United States Department of State*[75] and *Capital Area Immigrants' Rights Coalition (CAIR) v. Trump*[76] rejected the legislative-history-based reasoning of the other circuits about the scope of the foreign affairs function exception. *E.B.* dismissed the definitely undesirable international consequences test embraced by the Federal, Second, Eleventh, and Ninth Circuits for three reasons: first, it "is unmoored from the legislative text"; second, "requiring a rule to have undesirable consequences would render the foreign affairs function exception superfluous," as the good cause exception is also available; and third, the "'international consequences' test [applies] exclusively to areas of the law 'that only indirectly implicate international relations,'" but "this approach conflicts with the D.C. Circuit's admonition that [to fall within an APA exception] a rule must 'clearly and directly' involve the basis for the asserted exception—here, the foreign affairs function—full stop, without exception."[77] As the APA does not define "foreign affairs" or "function," the *E.B.* court looked to the 1945 edition of Webster's to find that "foreign affairs" meant "matters having to do with international relations and with the interests of the home country in foreign countries," and "function" meant "'[t]he natural and proper action of anything; special activity,' '[t]he natural or characteristic action of any power or faculty,' or '[t]he course of action which peculiarly pertains to any public officer in church or state; the activity appropriate to any business or profession; official duty.'"[78] The word function, therefore, "narrow[s] the exception further; to be covered, a rule must involve activities or actions that are especially characteristic of foreign

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affairs."[79] The *E.B.* court comes to a textualist definition of the foreign affairs function exception: "a rule must clearly and directly involve activities or actions characteristic to the conduct of international relations."[80] Therefore, the court concludes, "at least under the law of this Circuit, the foreign affairs function exception covers heartland cases in which the rule itself directly involves the conduct of foreign affairs."[81] *E.B.* closely echoes *CAIR*, decided two years earlier. In *E.B.*, the court found that "the Diversity Visa Program does not 'clearly and directly' involve activities or actions characteristic of the conduct of international relations."[82] In *CAIR*, the court decided that the "changes to our asylum criteria do not 'clearly and directly' involve activities or actions characteristic of the conduct of international relations."[83] Although the interpretive method is different, the D.C. test has similar language to the clearly and directly involved test from *Mast*. Indeed, Stephen Migala, who dismisses the clearly and directly involved test as "a tautology,"[84] claims that *E.B.* "construed the clearly and directly involved test to be the general law of the circuit."[85] Despite using the "clearly and directly involve" language,[86] neither *E.B.* nor *CAIR* explicitly adopted the clearly and directly involved test, as laid out in *Mast*. It is also important that both *E.B.* and *CAIR* found the exception inapplicable. The D.C. test is clearly stringent. The *E.B.* court observed, "[T]he only circumstance to which the D.C. Circuit has applied" the foreign affairs function exception is "when the rule implements an international agreement between the United States and another sovereign state."[87] The *E.B.* court presents this case as an example, not a rule, but it is also evidence that the test, as applied in the D.C. Circuit, sets a very high bar. It might be better denominated the "heartland cases" test, to distinguish it from the legislative-history-derived clearly and directly involved test.

Legislative History of the APA

Judicial attempts to interpret the APA have generated significant controversy. The next subsection will examine the overarching purpose of the APA. Then the second subsection will demonstrate that while the text, legislative history, and historical context of the APA are insufficiently determinate to provide exact guidance about the scope of the foreign affairs function exception in the immigration context, the purpose and history of the APA can rule out reading the foreign affairs function exception so broadly that it encompasses the whole field of immigration.

The Purpose of the APA

While the general purpose of the APA is clear, mapping its finer points has long proved controversial. The text and legislative history of the APA have lent

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themselves more to some interpretative methods than others. In the purposivist decades when "legal liberalism" was ascendant, courts and scholars treated the APA as a "constitution for the administrative state," emphasizing fealty to the statute's core purposes.[88] The laconic text, sparse legislative history, and animating purpose of fair administrative procedure made the APA a good fit for purposivism.[89] As textualism waxed and purposivism waned, interpretive difficulties increased. The "APA's sketchy legislative history and its inflexible, feast or famine procedural requirements"[90] presented problems for courts. More recently, scholars have turned to an "APA originalism," examining the APA in a more capacious historical context.[91] These different interpretative approaches lead to different conclusions for many specific questions related to the APA. The text, legislative history, and historical context of the APA, however, all reveal the same core purpose: fair administrative process.

The APA announces its purpose with its title: "[t]o improve the administration of justice by prescribing fair administrative procedure."[92] In a 1947 case, taking note of the unhappy plaintiff, "galled by the appearance of [administrative] unfairness," and the full title of the recently enacted APA, the Fifth Circuit optimistically predicted that the APA "should go far to do away with [such appearances of unfairness], if its purpose is given effect."[93] The APA, reflecting concerns about the government's need for secrecy and dispatch in certain sensitive arenas, makes certain exceptions from the general requirements for adjudication and rulemaking.[94] The brief text of the APA, however, gives relatively little guidance on how expansively to read these exceptions to fair administrative procedure.

The congressional record shows that the supporters of the APA saw the statute as strengthening the rule of law. As the Tenth Circuit has observed:

> In the face of a rapidly growing and largely unregulated body of administrative law during the first half of the twentieth century, and concerns about the commingling of functions within administrative agencies, Congress enacted the APA, which provides governing principles. As observed by Senator Pat McCarran in the foreword to the APA's compiled legislative history, the Act was celebrated as "a comprehensive charter of private liberty and a solemn undertaking of official fairness" that "enunciates and emphasizes the tripartite form of our democracy."[95]

In 1946, Senator Edwin Johnson read into the record an article by Allen Moore, published in the January 1945 issue of *Dicta*, the official publication of the Denver and Colorado Bar Associations. Moore noted that the idea of administrative process calls to mind bureaucracy and "[f]rom bureaucracy to autocracy to dictatorship is a simple transition in some people's thinking."[96] These critics treat "the administrative process as if it were an antonym of that supposedly immemorial and sacred right of every Englishman, and every

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American, the legal palladium of the rule of law."[97] But Moore dismissed this "theory [because it] is based on the moribund concept that law cannot prevail or justice be done except through the courts."[98] The Report of Attorney General's Committee on Administrative Procedure, inserted into the record of the House in 1945, expressed a similar view: "The committee reached the conclusion that the administrative process is not an encroachment upon the rule of law, but is an extension of it."[99]

This concern that administrative process further the rule of law, evident in the congressional record, is explained by the historical context of the APA. In the 1930s and during World War II, the dual specters of Nazi Germany and the Soviet Union inspired increasing anxieties about the threat of authoritarian and arbitrary government.[100] The APA was intended not only to enable the growing administrative state to function efficiently, it was also intended to cabin potential overreach by requiring the government to follow fair administrative procedures. "Of the several administrative evils sought to be cured or minimized," the Supreme Court observed in *Wong Yang Sung*, the "[m]ore fundamental . . . was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge."[101] Although it may "sound foreign to modern ears," the early judicial understanding of the APA was grounded in the importance of impartial adjudication.[102] Importantly, *Wong Yang Sung* was an immigration case, and the Court, despite the absence of any immigration statutes that provided a hearing before deportation, decided that a fair hearing was required.[103]

The Clarity of the APA

The text, the legislative history, and the historical context of the APA do not by themselves lend themselves to delimiting the exact scope of the foreign affairs function exception in the immigration context. Nevertheless, the purpose and history of the APA make clear that the foreign affairs function exception should not be read so broadly that it exempts all of immigration law from the APA. The government has argued that presidential proclamations on immigration policy fall under the foreign affairs function exception because immigration decisions "implicate our relations with" foreign countries.[104] Accepting such a proposition would essentially take immigration decisions outside of the APA.

The legislative history demonstrates that Congress did not intend for the foreign affairs function exception to be read so expansively. A 1945 Senate Report clarified,

> The phrase "foreign affairs functions," used here and in some other provisions of the bill, is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only

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> those "affairs" which so affect relations with other governments that, for example, public rule making provisions would clearly provoke definitely undesirable international consequences.[105]

There is no indication in the legislative history of the APA that Congress intended the foreign affairs function exception to apply to immigration adjudications and rulemaking generally.

Effectively taking immigration law outside of the APA would frustrate the statute's purpose of protecting the rule of law. As the Ninth Circuit has noted, "[t]he foreign affairs exception would become distended if applied to [an immigration enforcement agency's] actions generally, even though immigration matters typically implicate foreign affairs."[106] Congress reversed *Wong Yang Sung*, exempting immigration adjudication from the APA's formal-hearing requirements.[107] That Congress needed to act to maintain political control of immigration adjudication suggests that the APA's purpose of fair administrative process initially applied to immigration law generally and continues to apply to immigration law except as specifically exempted by Congress. In 1973, the D.C. District Court observed, "While the specific effect of *Wong Yang Sung* was overruled by subsequent legislation, there is no indication that the legislation was motivated in any way by Congressional intent to reassert a foreign affairs exemption. The theory of *Wong Yang Sung* remains valid . . . ."[108] Critics on both the right and the left have decried immigration law as "lawless"[109] and "unusually political."[110] Overreading the foreign affairs function exception would further politicize immigration law and would further erode Congress's intent that the APA would ensure fair administrative process.

While courts have often relied on a cramped reading of the APA's history, recent scholarship has provided a more expansive history of the foreign affairs function exception. Stephen Migala traces the foreign affairs function exception to 1937, when it first appeared in the draft of a bill to reform federal administrative processes.[111] He argues that the definition of "foreign affairs" in *United States v. Curtiss-Wright* fixed a definite meaning of the term in the minds of the framers of the APA and antecedent materials produced in anticipation of federal legislation on administrative procedure.[112] *Curtiss-Wright* defined "foreign affairs" in opposition to "domestic affairs," in part because the President, "not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries"; "[h]e has his confidential sources of information"; "[h]e has his agents in the form of diplomatic, consular and other officials"; and "[s]ecrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."[113] These reasons for treating foreign affairs differently are insufficient to justify categorizing immigration policy wholesale under foreign affairs. Providing further evidence that Congress did not intend immigration policy to be subsumed under the foreign affairs function exception are the 1941 hearings on administrative procedure bills. Responding to the objection

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of the Immigration Service that the agency should be excepted from the adjudication procedures, the bill's author, Carl McFarland, rather than pointing to the proposed bill's foreign affairs function exception, agreed to add a new section for "the admission or control of aliens."[114] With this response, Migala notes, "McFarland thereby indirectly stated that immigration laws (but not visa or passport laws),[115] were not thought to be excepted as foreign affairs functions."[116] The history of the foreign affairs function exception is incompatible with the claim that immigration policy is exempted from the procedural processes of the APA.

Minimizing the Foreign Affairs Function Exception

For immigration lawyers in circuits that rely on legislative history to interpret the APA, significant resources exist to minimize the foreign affairs function exception. The next subsection makes the straightforward argument that the legislative history of the APA precludes placing immigration into the foreign affairs function exception wholesale. Even Stephen Migala, however, who advocates using legislative history to understand the foreign affairs function exception, claims that visas and passports should remain within the exception.[117] This view is consistent with the 1947 Attorney General's Manual.[118] The second subsection contends that the legislative history is considerably less clear on this point than Migala claims. Moreover, we argue that this categorization of visas and passports rests on a misconception of the law. Visas and passports frequently have predominantly domestic consequences. Many of the cases include, for example, incidental domestic consequences, such as employment authorization documents.[119] Immigration law is too complicated for a rigid categorical approach to work. Even if most State Department rulemaking is exempt, the foreign affairs function exception does not exempt the State Department's primarily domestic rulemaking, and visa and passport rulemaking issues often fall into this category.

The Foreign Affairs Function Exception in the Immigration Context

Although there have been proposals to replace the foreign affairs function exception,[120] these efforts have proved unsuccessful. Courts continue to search for a way to determine the scope of the exception in the immigration context. Many courts have recognized that the current case law on the exception ill serves immigration cases. The inadequacy of the current test is made clear by the Second Circuit's suggestion that there should be a case-by-case examination in "areas of law like immigration that only indirectly implicate international relations."[121] Proposals for such an ad hoc fix illustrate the need for a more coherent understanding of the foreign affairs function exception.

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The historical record shows that the motivation for the foreign affairs function exception was closely linked to the need for non-public decision-making in military and intelligence matters. This exception was intended to be a narrow carveout to the APA's general purpose of promoting transparency. In the period before the enactment of the APA, the foreign affairs function exception was the subject of considerable debate. Prior versions of the bill that would become the APA revealed congressional wrestling with the nature of this exemption. On January 6, 1945, Senator Patrick McCarran introduced the bill that would ultimately become the APA as S. 7,[122] and Representative Hatton Sumners introduced the House version of S. 7 as H.R. 1203 on January 8.[123] S. 7 did not provide an exception as to adjudications, but it provided an exception to the public information section "to the extent that there is involved any military, naval, or diplomatic function of the United States requiring secrecy in the public interest. . . ."[124] Similarly, for the rulemaking section, S. 7 provided an exception "to the extent that there is involved any military, naval, or diplomatic function of the United States. . . ."[125] A June 1945 Senate Committee Print notes laconically that the exceptions to the public information section and the rulemaking requirements "are self-explanatory."[126] The legislators were debating administrative procedure in the shadow of a global war. The sparse nature of the legislative history in the Congressional Record reflected the legislators' shared understanding of the scope of the exceptions.

The APA's emphasis on transparency constitutes one of the statute's central purposes: keeping the public informed. This broad legislative desire for agency transparency applied even in the military context, where the government case for the necessity of secrecy is often strongest. In a discussion on the exception for war functions, the Senate Judiciary Committee Print explained:

> War agencies functions are exempted because it would take at least a year for any adequate proposal to be placed in operation . . . There seems to be no reason, however, why war agencies should not be required to publish the materials required by section 3, since the simple publication of the procedure and policies of war agencies, or as to war function, would undoubtedly aid in the prosecution of the war by informing the public.[127]

The discussion of transparency in the functions of war agencies highlights the narrow intended scope of the foreign affairs function exception. The drafters of the APA did not intend to seclude broad sections of the government from public view. Quite the opposite: even war agencies were expected to publish their procedures and policies to keep the public informed.

Despite interested agency maneuvering for exemptions, the record demonstrates Congress' intent to keep the foreign affairs function exception narrow. The Congressional Record evidences the narrow construction that Congress intended the foreign affairs function exception to rulemaking to have: "The exempted foreign affairs are those diplomatic functions of high importance

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which do not lend themselves to public procedures and with which the general public is ordinarily not directly concerned."[128] Stephen Migala traces the legal construction of "foreign affairs" back to 1936, drawing attention to the use of "foreign affairs" in *Curtiss-Wright*.[129] The APA exemption, however, is not a "foreign affairs exception," as courts often misname it;[130] it is a "foreign affairs function exception." As more attentive courts have recently made clear, "function" considerably narrows the scope of the exception beyond background understandings of what is covered by "foreign affairs."[131] Given the laconic wording of the APA, it is surprising the courts have often omitted this crucial element of the exception.

Both *Yassini* and *Mast*, two foundational cases that state competing tests for applying the exception, are based on incomplete understandings of the APA's legislative history. As courts have noted, *Yassini*'s definitely undesirable international consequences test is divorced from a sound reading of both the text and history of the APA.[132] *Mast*'s clearly and directly involved test is closer to the original congressional understanding because it emphasizes that the exception only covers heartland foreign affairs cases. In this way, "clearly and directly involved" narrows the exception in a similar way as "function" does in the text of the statute. Courts invoking *Mast*, however, have often displayed a shallow understanding of the APA's history, weakening the test's coherence. As Migala notes, when courts have rooted the definitely undesirable international consequences test in the legislative history, they have mistaken an illustrative example for a test.[133] Transforming clearly undesirable international consequences from an example to a test threatens to make the exception superfluous, because the good cause exception would apply.[134]

Visas and Passports

The legislative history is ambiguous as to whether decisions related to visas and passports fall under the foreign affairs function exception. Congress rejected efforts by the State Department to exempt all passport and visa issues. In 1939, an early version of the bill would have provided an exception for the "conduct of foreign affairs."[135] William Vallance, Assistant Legal Advisor to the State Department, expressed concerns that this exception might not include passports and visas. As he noted, "[T]he issuance of a passport to an American citizen might be said to be a domestic matter and not one relating to foreign affairs."[136] He also worried that "[t]here might be some information as to this prospective immigrant which was given to this Government in confidence and it might require the State Department to produce that confidential information.... Our officers would not get such information afterward. It would close these channels of information which are very valuable to us."[137] In response to these concerns, a subsequent version of the bill exempted the State Department and other enumerated agencies.[138] Ultimately, the foreign

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affairs function exception, as passed by Congress, is both broader and narrower than this proposal: broader, because it may apply to any agency; narrower, because it does not apply to any agency in its entirety.[139] As William Vallance recognized, many passport issues are primarily domestic, not foreign.[140] While some visa adjudications may fall under the foreign affairs function exception, the exemption does not apply to visas wholesale. The government may have foreign affairs reasons for wanting to keep the reasons for changes in visa rules nonpublic,[141] but the legislative history demonstrates that the drafters of the APA believed that keeping the public informed was of the utmost importance, and therefore intended exceptions to the APA's requirements to be narrowly construed.[142]

While the State Department continues to press for broad exemptions from oversight in visa and passport matters,[143] courts have continued to review visa and passport rules. Courts have frequently examined the applicability of the APA to visa and passport cases, often without a foreign affairs function exception challenge from the government.[144] In addition to the foreign affairs function exception, the State Department has tried to evade judicial oversight by invoking the consular nonreviewability doctrine. Recent cases, however, have narrowed the use of this doctrine and emphasized the importance of reviewing the visa issuance process. The D.C. District Court in *Al-Gharawy v. Department of Homeland Security* offers a good overview of the visa cases invoking the APA.[145] In that case, the court distinguished between visa determinations and visa timing.[146] The decision highlighted the transition in the consular nonreviewability doctrine's applicability to delay cases: "Twenty-three years ago in *Saavedra Bruno v. Albright*, the D.C. Circuit similarly explained that the 'doctrine holds that a consular official's decision to issue or *withhold* a visa is not subject to judicial review,' . . . [b]ut that case, notably, predates the long line of decisions from this Court that have held that the doctrine does not apply before a consular official has rendered a final decision with respect to a visa application."[147] The same reasoning applies to the interpretation of the foreign affairs function exception.

Excessive attention to the legislative history of the APA, however, risks obscuring the importance of seismic shifts in immigration law that have transformed the field in the decades after the APA's enactment. In 1965, Congress transformed immigration law with a new emphasis on family unity.[148] The modern immigration scheme, with new visa categories such as T (trafficking) and U (victims of crimes) visas, differs dramatically from the state of immigration law at the time that legislators debated the APA's foreign affairs function exception. As family unity, rather than national quotas, became a guiding force in American immigration policy, immigration law became less directly connected to foreign relations than it was before 1965, when discriminatory quotas created embarrassing foreign policy headaches.[149] The case for excluding immigration rulemaking from the APA's requirements on the basis of the foreign affairs function exception is even weaker now than it

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was when Congress was debating the APA. Whether based in the legislative history of the APA or a text-based analysis, a test that categorically excludes passports and visas from the APA's requirements as "quintessential foreign affairs functions"[150] cannot account for the complexity of immigration law.

Conclusion

Courts have sown confusion in immigration law with their unpredictable and inconsistent interpretations of the foreign affairs function exception. Without imposing definite limits to the exception, it threatens to swallow up immigration law, frustrating the core purposes of the APA: to ensure fair administrative process and to protect the rule of law. Immigration rulemaking must not become a lawless island, free from any meaningful oversight. The D.C. Circuit, rejecting legislative history, has taken an emphatically textualist approach, firmly confining the foreign affairs function exception to its proper borders. The majority of circuits that still rely on legislative history to interpret the APA have misconstrued that history. Some circuits have erroneously derived a definitely undesirable international consequences test from a misreading of the legislative history. The legislative history of the APA evinces Congress's intent that the foreign affairs function exception be construed narrowly. Immigration lawyers practicing in circuits that rely on legislative history should make use of a more accurate reading of the record to bring coherence to the foreign affairs function exception and to minimize the government's use of the exception to evade the APA's requirements.

Notes

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1. 5 U.S.C. § 554(a)(4).

2. 5 U.S.C. § 553(a)(1).

3. *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950); Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 Yale L.J. 1769, 1786 (2023) ("Over the past several decades, adjudication has receded from the foreground of administrative law and, thus, from accounts of the administrative state."); Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 Chi.-Kent L. Rev. 7, 23 (2022) ("In the modern era . . . as agencies began shifting their policymaking from adjudication toward rulemaking, courts responded by using APA interpretation to bring about new safeguards within the rulemaking process . . . .").

4. Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., 70 F.4th 582, 598 (D.C. Cir. 2023) ("'[L]egislative history is not the law.' The reason is obvious; as any

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high school Civics student should know, legislators vote on and the president signs bills, not their legislative history." (first quoting *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018); and then citing U.S. Const. Art. I, § 7, cl. 2)).

5. E.B. v. United States Dep't of State, 583 F. Supp. 3d 58, 64 (D.D.C. 2022) (declining to adopt the "definitely undesirable international consequences test," because, *inter alia*, the "test is unmoored from the legislative text; it is lifted from the House Report relating to the APA"). *But see* Ctr. for Biological Diversity v. Regan, 597 F. Supp. 3d 173, 201 (D.D.C. 2022) (citing the APA's legislative history).

6. *See, e.g.*, City of New York v. Permanent Mission of India, 618 F.3d 172, 201 (2nd Cir. 2010) (citing the APA's legislative history in support of the "definitely undesirable international consequences" test); Comm'r of Internal Revenue v. Neal, 557 F.3d 1262, 1275 (11th Cir. 2009) ("The legislative history of the APA contains a clear intent to exempt the Tax Court.").

7. *See* Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 Notre Dame L. Rev. 1963, 1977 (2023) ("APA textualists start (and often end) with the text of the statute, focusing closely on the text, employing the various canons of statutory interpretation, and considering structural arguments.").

8. *See* Reuel Schiller, *A Trip to the Border: Legal History and APA Originalism*, 97 Chi.-Kent L. Rev. 53, 55 (2022) ("A form of APA originalism is emerging, in which advocates of contemporary administrative reform deploy historical materials that justify their preferred reading of the APA.").

9. Gillian E. Metzger, *Embracing Administrative Common Law*, 80 Geo. Wash. L. Rev. 1293,1296 (2012) ("This Foreword argues for explicit judicial recognition and acceptance of administrative common law. Administrative common law serves an important function in our separation of powers system, a system that makes it difficult for Congress or the President to oust the courts as developers of administrative law.").

10. Exxon Mobil Corp. v. Allapattah Servs. Inc., 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history . . . ."); Epic Sys. Corp. v. Lewis, 584 U.S. 497, 523 (2018) ("[L]egislative history is not the law.").

11. E.B. v. U.S. Dep't of State, 583 F. Supp. 3d 58, 65 (D.D.C. 2022) ("[A]t least under the law of this Circuit, the foreign affairs function exception covers heartland cases in which the rule itself directly involves the conduct of foreign affairs.").

12. *Id.* at 65 ("In fact, that is the only circumstance to which the D.C. Circuit has applied [the foreign affairs function exception]." (citing *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478 (D.C. Cir. 1994))).

13. *See* Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp. v. United States, 751 F.2d 1239, 1249 (Fed. Cir. 1985); Rajah v. Mukasey, 544 F.3d 427, 437 (2d Cir. 2008); Yassini v. Crosland, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980).

14. Stephen Migala, *The Lost History of the APA's Foreign Affairs Exception*, 31 Geo. Mason L. Rev. 119 (2024).

15. *E.B.*, 583 F. Supp. 3d at 63 ("There is sparse case law in—or outside—this Circuit construing [the foreign affairs function] exception.").

16. *Id.* at 67 (quoting *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010)). *See also* Roe v. Mayorkas, No. 22-CV-10808-ADB, 2023 WL 3466327, at *16 (D. Mass. May 12, 2023) ("Courts have specifically warned of the 'dangers of an expansive reading of the foreign affairs exception'

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in the immigration context." (quoting City of New York v. Permanent Mission of India to the United Nations, 618 F.3d 172, 202 (2d Cir. 2010))).

17. City of New York v. Permanent Mission of India, 618 F.3d 172, 202 (2d Cir. 2010).

18. Yassini v. Crosland, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980).

19. Migala, *supra* note 14, at 164, 171-72.

20. Attorney General's Manual on the Administrative Procedure Act 27 (1947) [hereinafter AG's Manual on the APA] ("In the light of this legislative history, it would seem clear that the [foreign affairs function] exception must be construed as applicable to most functions of the State Department and to the foreign affairs functions of any other agency.").

21. 339 U.S. 33 (1950).

22. Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 Yale L.J. 266, 266 (2013) ("[T]his Article reveals that judicial use of legislative history became routine quite suddenly, in about 1940. The key player in pushing legislative history on the judiciary was the newly expanded New Deal administrative state.").

23. *Wong Yang Sung*, 339 U.S. at 35.

24. *Id.* at 46.

25. *Id.*

26. 8 U.S.C. § 1252(a).

27. *See* Hou Ching Chow v. Attorney Gen., 362 F. Supp. 1288, 1290 (D.D.C. 1973); Pamela A. Baker, Ogburn-Matthews v. Loblolly Partners*: Procedural Due Process and an Individual's Right to an Adjudicatory Hearing*, 51 S.C. L. Rev. 699, 717-18 (2000) ("[T]he Court's analysis regarding deportation hearings compelled by the Constitution has not been directly overruled.").

28. 362 F. Supp. 1288 (D.D.C. 1973).

29. *Id.* at 1290 (quoting S. Rep. No. 752, 79th Cong. 1st Sess. (1946)).

30. *Id.* (discussing *Wong Yang Sung*, 339 U.S.).

31. 618 F.2d 1356 (9th Cir. 1980).

32. 596 F. Supp. 1567 (Ct. Int'l Trade 1984).

33. Migala, *supra* note 14, at 130-31.

34. Hou Ching Chow v. Attorney Gen., 362 F. Supp. 1288, 1290 (D.D.C. 1973) (quoting S. Rep. No. 752, 79th Cong. 1st Sess. (1945)).

35. *Yassini*, 618 F.2d at 1360 n.4 (citing S. Rep. No. 752, 79th Cong. 1st Sess. (1945)).

36. *Id.* at 1358, 1360 n.4.

37. *Mast Indus.*, 596 F. Supp. at 1581 (quoting H.R. Rep. No. 79-1980, at 257 (May 3, 1946); S. Rep. No. 79-572, at 199 (Nov. 19, 1945)).

38. *Id.*

39. *Id.* at 1582 (quoting AG's Manual on the APA, *supra* note 20, at 27.

40. Migala, *supra* note 14, at 129 ("[The] Court of International Trade first used the clearly and directly involved test.").

41. *Mast Indus.*, 596 F. Supp. at 1582 (quoting H.R. Rep. No. 79-1980, at 23 (May 3, 1946)).

42. No. 22-CV-10808-ADB, 2023 WL 3466327 (D. Mass. May 12, 2023).

43. *Id.* at *16.

44. *Id.*

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45. *Id.*

46. *Id.* at *17.

47. 618 F.3d 172 (2d Cir. 2010).

48. *Roe*, No. 22-CV-10808-ADB, 2023 WL 3466327, at 16 (citing City of New York v. Permanent Mission of India, 618 F.3d 172, 202 (2d Cir. 2010)).

49. City of New York v. Permanent Mission of India, 618 F.3d 172, 202 (2d Cir. 2010).

50. 544 F.3d 427, 436 (2d Cir. 2008) (holding that the exception applied to deportation orders issues following a call-in registration program).

51. *Id.* at 437 (finding that the foreign affairs function exception applied because "at least three definitely undesirable international consequences that would follow from notice and comment rulemaking").

52. Saavedra Estrada v. Mayorkas, No. CV 23-2110, 2023 WL 8096897, at *5 (E.D. Pa. Nov. 21, 2023) (citing *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229-34 (2020).

53. 653 F.2d 113 (4th Cir. 1981).

54. *Id.* at 116.

55. *Id.* (quoting 45 Fed. Reg. 27,916 (Apr. 25, 1980)).

56. 416 F. Supp. 3d 452, 510 (D. Md. 2019).

57. *Id.* at 509-10 (first citing *Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008); and then citing *Nademi v. INS*, 679 F.2d 811, 814 (10th Cir. 1982); *Yassini v. Crosland*, 618 F.2d 1356, 1360 (9th Cir. 1980); *Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981)).

58. *Id.* at 510 (quoting *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 776 (9th Cir. 2018)).

59. 603 F. Supp. 3d 406 (W.D. La. 2022).

60. *Id.* at 437.

61. *Id.* at 438.

62. *Id.* at 437.

63. E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 776 (9th Cir. 2018) (quoting *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010)).

64. *Id.* at 776-77.

65. Ghalambor v. Blinken, No. CV239377MWFBFMX, 2024 WL 653377, at *2 (C.D. Cal. Feb. 1, 2024).

66. Nademi v. INS, 679 F.2d 811, 814 (10th Cir. 1982) (citing *Malek-Marzban v. INS*, 653 F.2d 113, 115-16 (4th Cir. 1981)).

67. Mayor and City Council of Baltimore v. Trump, 416 F. Supp. 3d 452, 509-10 (D. Md. 2019).

68. 711 F.2d 1455 (11th Cir. 1983), *vacated on other grounds*, 727 F.2d 957, 962 (11th Cir. 1984) (en banc) ("Because the government is no longer detaining any class members except pursuant to the new regulations, the APA issue as originally presented has been rendered moot.").

69. *Id.* at 1477.

70. *Id.*

71. *Id.* at 1478.

72. *Id.*

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73. Invenergy Renewables LLC v. United States, 422 F. Supp. 3d 1255, 1289 (Ct. Int'l Trade 2019) (quoting *Mast Industries v. Regan*, 596 F. Supp. 1567, 1582 (Ct. Int'l Trade 1984)).

74. *In re* Section 301 Cases, 570 F. Supp. 3d 1306, 1335 (Ct. Int'l Trade 2022) (quoting *Mast Industries v. Regan*, 596 F. Supp. 1567, 1582 (Ct. Int'l Trade 1984)).

75. 583 F. Supp. 3d 58, 64 (D.D.C. 2022).

76. 471 F. Supp. 3d 25, 51-57 (D.D.C. 2020).

77. *E.B.*, 583 F. Supp. 3d at 65.

78. *Id.* at 63-64 (quoting Webster's New International Dictionary 988, 1019 (2d ed. 1945)).

79. *Id.* at 64.

80. *Id.*

81. *Id.* at 65.

82. *Id.* at 66.

83. *CAIR*, 471 F. Supp. 3d at 55.

84. Migala, *supra* note 14, at 124.

85. *Id.* at 130, n.52.

86. *E.B.*, 583 F. Supp. 3d at 64.

87. *Id.* at 65 (citing *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478 (D.C. Cir. 1994)).

88. Schiller, *supra* note 8, at 54.

89. *Id.*

90. *Id.*

91. *Id.* at 55; Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 Admin. L. Rev. 807 (2018).

92. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

93. NLRB v. Robbins Tire & Rubber Co., 161 F.2d 798, 799 & n.1 (5th Cir. 1947).

94. 5 U.S.C. §§ 551-559.

95. Bandimere v. SEC, 855 F.3d 1128, 1129 (11th Cir. 2017) (quoting Pat McCarran, *Foreword* to Administrative Procedure Act: Legislative History, at iii (1946)).

96. 92 Cong. Rec. 2160 (1946) (statement of Sen. Johnson) (quoting Allen Moore, *The Proposed Administrative Procedure Act*, 22 Dicta 1, 3 (1945)).

97. *Id.* (quoting Moore, *supra* note 96, at 3).

98. *Id.* at 2,163 (quoting Moore, *supra* note 96, at 16).

99. *Federal Administrative Procedure: Hearing on H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602 Before the H. Comm. on the Judiciary*, 79th Cong. 22 (1945).

100. Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 Geo. Mason L. Rev. 573 (2021).

101. Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950).

102. Cox & Kaufman, *supra* note 3, at 1786.

103. *Wong Yang Sung*, 339 U.S. at 50-53.

104. *See* 83 Fed. Reg. 55,934, 55,950 (Nov. 9, 2018) ("[T]he Departments may forgo notice-and-comment procedures and a delay in the effective date because this rule involves a 'foreign affairs function of the United States'.... Presidential proclamations invoking section 212(f) or 215(a)(1) of the INA at the southern border necessarily

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implicate our relations with Mexico and the President's foreign policy, including sensitive and ongoing negotiations with Mexico about how to manage our shared border.").

105. S. Rep. No. 79-572, at 13 (Nov. 19, 1945).

106. Yassini v. Crosland, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980).

107. 8 U.S.C. § 1252(a).

108. Hou Ching Chow v. Attorney Gen., 362 F. Supp. 1288, 1290-91 (D.D.C. 1973) (footnotes omitted).

109. *The Trump Administration's Immigration Agenda Protects American Workers, Taxpayers, and Sovereignty*, Nat'l Archives (Feb. 4, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/trump-administrations-immigration-agenda-protects-american-workers-taxpayers-sovereignty/ (calling on Congress to pass "critical legislation enabl[ing] victims of open borders to sue the radical and lawless jurisdictions responsible for the harm inflicted."); Paul Gowder, *Immigration, Government Terror, and the Rule of Law*, 107 Iowa L. Rev. Online 94, 95 (2022) ("[T]he American immigration regime descends from both slavery and the forced resettlement of Native Americans and shares the fundamentally arbitrary and lawless—and thus terrorizing—character of those two great perversions of American legality.").

110. Cox & Kaufman, *supra* note 3, at 1799.

111. Migala, *supra* note 14, at 143-49.

112. *Id.* at 140-43.

113. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320-21 (1936).

114. *Administrative Procedure: Hearings on S. 674, S. 675, and S. 918 Before a Subcomm. of the S. Comm. on the Judiciary*, 77th Cong. 1349 (1941).

115. We disagree with Migala's assertion about visas and passports. *See* the Visas and Passports subsection below.

116. Migala, *supra* note 14, at 164.

117. *Id.*

118. AG's Manual on the APA, *supra* note 20, at 27.

119. *See, e.g.*, Uranga v. USCIS, 490 F. Supp. 3d 86 (D.D.C. 2020).

120. *See, e.g.*, Admin. Conference of the U.S., *Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements*, 1 C.F.R. § 305.73-5 (1975) (urging the replacement of the military or foreign affairs function exception with an exemption "for rulemaking involving matters specifically required by Executive order to be kept secret in the interests of national defense or foreign policy.").

121. Permanent Mission, 618 F.3d at 202.

122. S. 7, 79th Cong. (as introduced on Jan. 6, 1945); Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946).

123. H.R. 1203, 79th Cong. (as introduced Jan. 8, 1945).

124. S. 7, 79th Cong. § 3 (as introduced on Jan. 6, 1945).

125. *Id.* § 4.

126. Staff of the S. Comm. on the Judiciary, 79th Cong. S. 7, at 15, 17 (Comm. Print June 1945), https://www.justice.gov/sites/default/files/jmd/legacy/2014/02/28/comprint-june-1945.pdf [https://perma.cc/4N5S-VPUE].

127. *Id.* at 43.

128. 92 Cong. Rec. 5,650 (1946).

129. Migala, *supra* note 14, at 140-43; United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320-21 (1936).

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130. *See, e.g.*, City of New York v. Permanent Mission of India, 618 F.3d 172, 202 (2d Cir. 2010); E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 775 (9th Cir. 2018).

131. *See* E.B. v. United States Dep't of State, 583 F. Supp. 3d 58, 64 (D.D.C. 2022) ("'Function' thus appears to narrow the exception further; to be covered, a rule must involve activities or actions that are especially characteristic of foreign affairs.").

132. *Id.* at 64 (asserting that the definitely undesirable international consequences "test is unmoored from the legislative text.").

133. Migala, *supra* note 14, at 176 ("[S]ome have mistaken the 'definitely undesirable international consequences' language as an integrated and required test to qualify for the function. But that is clearly not so. It was merely one non-exclusive example of what would 'so' (i.e., more than incidentally) affect relations with other governments; and we know that by the text in the commentary that says: 'for example.'" (footnote omitted)).

134. *See* Mast Indus. v. Regan, 596 F. Supp. 1567, 1581 (Ct. Int'l Trade 1984) ([A] requirement of ... finding [definitely undesirable international consequences] would render the 'military or foreign affairs function' superfluous since the 'good cause' exception, § 553(b)(B), would apply.").

135. *Report of Administrative Law Committee and Draft of Proposed Bill*, 25 A.B.A. J. 113, 118 (1939).

136. *Administrative Law: Hearings on H.R. 4236, H.R. 6198, and H.R. 6234 Before the Subcomm. No. 4 of the H. Comm. on the Judiciary*, 76th Cong. 50 (1939), https://play.google.com/books/reader?id=TWSX7QjDaPAC&pg=GBS.PA50&hl=en [https://perma.cc/N8YZ-GLJB].

137. *Id.*

138. Migala, *supra* note 14, at 152.

139. *Id.* at 152-56.

140. *See supra* notes 135-138 and accompanying text.

141. *See* Migala, *supra* note 14, at 126 ("[I]f underlying reasons for shifts in visa rules are made public, or if they become subject to public opinion referenda via public comments, it could impact diplomatic relations with those countries, even incrementally.").

142. *See supra* notes 126 and 127 and accompanying text.

143. *See* Migala, *supra* note 14, at 128 n.34 (noting "a long-standing practice of the State Department invoking the exception for visa rules—220 times since 1946"); E.B. v. U.S. Dep't of State, No. CV 19-2856 (TJK), 2023 WL 6141673, at *4 (D.D.C. Sept. 20, 2023) (noting "the State Department's routine, long-standing reliance on [the foreign affairs function exception] in the administration of visas").

144. *See, e.g.*, Alzokari v. Pompeo, 394 F. Supp. 3d 250 (E.D.N.Y. 2019); Awad v. Kerry, 257 F. Supp. 3d 1016 (N.D. Ill. 2016); Martinez v. Pompeo, 977 F. 3d 457 (5th Cir. 2020); Tate v. Pompeo, 513 F. Supp. 3d 132, 149 (D.D.C. 2021).

145. 617 F. Supp. 3d 1 (D.D.C. 2022).

146. *Id.* at 10 ("Control over a consular officer's visa *determinations*—that is, her decisions to 'grant[], deny[,] [or] revok[e] ... immigrant and nonimmigrant visas,' ...—is not the same as control over the *timing* by which the consular officer considers the applications presented to her." (citation omitted)).

147. *Id.* at 15 (quoting *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999)).

148. Immigration and Nationality Act of 1965 (Hart-Cellar Act), Pub. L. 89-236, 79 Stat. 911 (1965); Albertina Antognini, *Family Unity Revisited: Divorce, Separation, and Death in Immigration Law*, 66 S.C. L. Rev. 1, 4 (2014) ("In 1965, the Immigration

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and Nationality Act, otherwise known as the Hart-Celler Act, established the family unit as the central means of gaining entry into the United States—in so doing, it replaced national origins quotas with a system that relied heavily on family-based visa classifications." (footnote omitted)).

149. *See, e.g.*, Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 273, 287-97 (1996) (discussing the foreign policy problems that restrictions on Asian immigration created for the United States).

150. City of New York v. Permanent Mission of India, 618 F.3d 172, 202 (2d Cir. 2010) (describing "diplomatic relations and the regulation of foreign missions"—as opposed to "areas of law like immigration"—as "quintessential foreign affairs functions").

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Can the Law Still Protect Access to Asylum?

A Comparative Look at the Fight to Preserve Access to Asylum in the United States and the United Kingdom

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Abstract: The Refugee Convention and Protocol protect refugees and asylum seekers only once they are under a state's legal jurisdiction. States of asylum have increasingly resorted to a range of measures to block access to asylum in order to avoid triggering jurisdiction over asylum claims. Among such measures are bars to asylum on the basis that asylum seekers could receive protection in another "safe country"—whether a "first country of asylum," or a "safe third country" where they could be sent. The paper looks at recent litigation challenging the denial of refugee or asylum protection on "safe country" grounds in the United Kingdom and the United States. The paper assesses whether there are common elements on which courts on both sides of the Atlantic agree in analyzing whether a first or third country is "safe" that correlate to fundamental norms of asylum and refugee law.

Introduction

There is a recognized gap in refugee protection between the right to seek and enjoy asylum, enshrined in the UDHR, and the lack of a corresponding right to access a country of asylum. The Refugee Convention and Protocol protect refugees (and, by necessary implication, asylum seekers) only once they are under a state's legal jurisdiction. Over the past several decades, states of asylum have implemented a range of measures that operate to prevent that jurisdiction from arising. These include physical interceptions and pushbacks;[1] carrier sanctions, visa regimes, and other forms of pre-departure screening designed to prevent people at risk of persecution from leaving their own countries;[2] pre-arrival application procedures, which may be illusory;[3] the creation of extra-legal border zones;[4] and escalating criminalization of the act of seeking asylum or assisting asylum seekers at risk.[5] The lawfulness of many of these tactics has been challenged through litigation, with varying success.[6]

More recently, some states of asylum have also sought to avoid offering protection to refugees and asylum seekers who are within their jurisdiction

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by arguing that protection is available elsewhere, in another "safe country." There are three distinct ways in which the "safe country" concept is applied. Under the "first country of asylum" concept, refugees and asylum seekers can be returned to countries where they have enjoyed or could have reasonably sought protection; the most prominent example of such a policy is the European "Dublin system."[7] Under "safe third country" policies, asylum seekers and refugees are transferred from the state where they are seeking protection to a "safe" third country for the consideration of their asylum claim. If found to be refugees, they may be readmitted to the country in which they initially sought asylum (as in the Trump administration's Remain in Mexico policy), resettled in a third country (as in the Australian Pacific Solution program), or offered protection in the country that has processed their claim (as in the UK-Rwanda Migration and Economic Development Partnership). Finally, in a new policy recently introduced by the United Kingdom, asylum seekers who have passed through a first "safe country" are permanently excluded from protection in the host state, even if protection is not available elsewhere. The previous opportunity to have avoided persecution elsewhere becomes, in essence, a new ground of exclusion.

This paper will look at recent litigation challenging the denial of refugee protection on "safe country" grounds in the United Kingdom and in the United States. The aim is to identify issues where that litigation has succeeded, and where it has failed. It will argue that the litigation has succeeded in reaffirming the fundamental importance of non-refoulement, including chain refoulement. It has not yet been able to vindicate a right of access to a form of effective protection that would, in the words of the preamble to the Refugee Convention, ensure refugees the widest possible exercise of fundamental rights and freedoms.

The History of Inadmissibility in the United Kingdom

From the late 1990s until December 31, 2020, the United Kingdom participated in the Common European Asylum System. Within that system, responsibility for asylum claims could in theory be determined according to a series of "Dublin" regulations agreed between member states of the European Union, Iceland, Liechtenstein, Norway, and Switzerland. Although the best interests of children and family reunification are important pillars of the "Dublin system," first safe country principles also play a significant role, and asylum seekers can in certain circumstances be returned to states that had issued them a visa or residence permit, or where they had initially entered a member state irregularly.[8] The United Kingdom also participated in the EU Procedures Directive, which allowed states to enact domestic laws treating an asylum claim as inadmissible if another country that was not a member state was considered a "first country of asylum" or a "safe third country."[9] Although

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the United Kingdom incorporated these principles into its asylum rules, they were almost never used in practice.[10]

For the two decades that the United Kingdom was part of the Dublin system, litigation challenging exclusion from the UK's asylum system on "safe first country" grounds therefore focused almost exclusively on transfers pursuant to the Dublin system. These drew on three distinct but overlapping bodies of law: UK domestic law (including common law); the European Convention on Human Rights (ECHR), as interpreted both by the European Court of Human Rights and (following the incorporation of the European Convention on Human Rights into UK law by the Human Rights Act 1998) by domestic courts; and the EU Procedures Directive, as interpreted by the Court of Justice of the European Union. As has been argued elsewhere, several key principles emerged:

1. Although membership of the European Union and adoption of international and human rights treaties could raise a presumption that another country was generally "safe" for asylum seekers and refugees, that presumption must always be rebuttable.
2. Individuals must have the right to show that a country that is in general safe is not safe for them, especially due to their particular vulnerabilities. There is no need to show that the asylum or reception system in the receiving country is "systemically" unfair or unsafe.
3. Challenges to transfers succeeded primarily on one of two grounds: that reception conditions were inhuman or degrading, or that there was a risk of chain refoulement. Lack of effective access to the positive rights associated with refugee status—such as the right to work, access to housing and public relief, or family reunion—was not clearly recognized as sufficient to prevent a Dublin transfer.[11]

EU law ceased to apply in the United Kingdom at the end of the post-Brexit "transition period" on December 31, 2020. Since then, the United Kingdom has enacted a series of new measures aimed at deterring asylum seekers from coming to the United Kingdom, pursuant to a program the government calls the New Plan for Immigration. The aim of the New Plan for Immigration is said to be threefold: "to increase the fairness and efficacy of our system so that we can better protect and support those in genuine need of asylum"; "to deter illegal entry into the UK, thereby breaking the business model of people smuggling networks and protecting the lives of those they endanger"; and "to remove more easily from the UK those with no right to be here."[12] Among the many changes that have been enacted pursuant to this "plan" are a higher standard of proof for refugee claims, restrictions on rights of appeal, the criminalization of formerly lawful routes to claiming asylum in

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the United Kingdom, increased criminal penalties for immigration offenses (including assisting asylum seekers to come to the United Kingdom) and the removal of protections for victims of trafficking. There is also a commitment to greater integration support for refugees in the United Kingdom and more "safe and legal routes" for those "genuinely" in need of protection, but these have not yet been introduced.[13]

The measures preventing access to the asylum system in the United Kingdom have taken three forms:

1. administrative rules on inadmissibility and transfers to safe third countries, which apply to claims made between January 1, 2021 and June 27, 2022;
2. legislative inadmissibility and safe third-country provisions, set out in the Nationality and Borders Act (NABA) 2022, which for the most part came into effect on June 28, 2022; and
3. the Illegal Migration Act 2023, which prohibits the consideration of an asylum or "human rights claim" or the grant of leave to enter or remain or British nationality for anyone who comes to the United Kingdom irregularly, unless they come "directly from a country where their life or liberty was threatened" on a Refugee Convention ground. The prohibition on the grant of British nationality is already in effect for anyone who arrived on or after March 7, 2023, but the Home Secretary has delayed implementing the prohibitions on considering an asylum or human rights claim and on granting leave to remain.

The New Inadmissibility Rules

The inadmissibility rules of December 31, 2020, and the inadmissibility provisions of the NABA 2022 combined first safe country and safe third country concepts. They provide that an asylum claim may be treated as inadmissible and not considered in the United Kingdom if an applicant:

1. has been recognized as a refugee or otherwise enjoyed "protection" in a safe third country; or
2. they[14] "could enjoy" protection in a safe third country because they either had made an application for protection there, or previously had a reasonable opportunity to claim protection there, or "they have a connection to that country, such that it would be reasonable for them to go there to obtain protection."

Unlike under the EU Procedures Directive, the claim is treated as inadmissible even if the person cannot be sent to the safe country with which they have a connection. It is sufficient that they will be admitted to "any other safe country."

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There were several different definitions of what made a country "safe,"[15] but the common requirements were that the person would not be subject to persecution for a Convention Reason or violations of article 3 ECHR there, and that they would not be refouled from there.[16]

With its departure from the Dublin System on December 31, 2020, the United Kingdom lost the ability to return asylum seekers and refugees to the European Union, except under limited circumstances. Between January 1, 2021 and December 31, 2023, the UK authorities "identified" 77,304 asylum seekers "for consideration on inadmissibility grounds." Twenty-five have been removed on those grounds, to Belgium, Bulgaria, Denmark, France, Germany, Ireland, Italy, Slovenia, Spain, Sweden, and Switzerland.[17]

With return to a first safe country effectively foreclosed, the United Kingdom decided to pursue removals to a safe third country. On April 14, 2022, the United Kingdom and Rwanda announced that they had entered into a "Migration and Economic Development Partnership" (MEDP). This included memoranda of understanding between the two countries according to which people who sought asylum in the United Kingdom would be transferred to Rwanda. Their asylum claims would then be determined in Rwanda, in accordance with Rwandan law and within Rwanda's existing refugee status determination (RSD) system. Those found to be refugees would be offered refugee status in Rwanda. What would happen to those found not to be refugees was not entirely clear.[18]

This announcement was followed by the release of "Country Policy and Information Notes" concluding that Rwanda was safe for asylum seekers,[19] and by publication of a revised "inadmissibility policy."[20] The latter set out two criteria for being sent to Rwanda, in addition to the general inadmissibility criteria summarized above. These were that the person had arrived in the United Kingdom after January 1, 2022, and that their "journey to the UK can be described as having been dangerous."

The Rwanda Litigation

The Home Office began preparations to send asylum seekers to Rwanda almost immediately after the MEDP was announced, with the first flight scheduled to depart on June 14, 2022. In early June, more than 20 legal challenges were lodged by individuals resisting their removal. In some of these, the individuals were joined by NGOs[21] and the union representing Home Office employees,[22] who challenged the lawfulness of the policy as a whole. UNHCR intervened as a friend of the court in one of the challenges, in accordance with its mandate under Article 35 of the Refugee Convention, and because of its expertise in the legal interpretation of the Refugee Convention and in the operation of the asylum system in Rwanda.

By the time the first charter flight to Rwanda was scheduled to take off, many individuals had succeeded in having their removal directions cancelled,

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and there were only seven remaining passengers. Applications for a preliminary injunction preventing removal were refused by all relevant courts in the United Kingdom, but one application to the European Court of Human Rights (ECtHR) was successful, and the flight was cancelled.[23] Over the next few months, many of the legal challenges both to individual removals and to the policy were joined in a single linked case, *AAA (Syria) v. the Secretary of State for the Home Department*.[24]

The challenges to removal to Rwanda proceeded on multiple grounds. The ones most relevant here[25] were that:

1. the scheme violated the prohibition on refoulement, because the inadequacies of the Rwandan asylum system meant that there was a risk of onward or chain refoulement from Rwanda;
2. the scheme violated the prohibition on refoulement because there was a real risk of inhuman and degrading treatment in violation of article 3 of the ECHR in Rwanda itself;
3. the scheme violated article 31 of the Refugee Convention, because it was a penalty for unlawful entry; and
4. the procedure within the United Kingdom for deciding whether to remove specific individuals to Rwanda was procedurally unfair.

The Secretary of State for the Home Department (SSHD) prevailed in the Divisional Court (the court of first instance) but lost before both the Court of Appeal and the Supreme Court. The issues were narrowed at each stage. For practitioners looking for lessons about which arguments succeeded and which failed, it is important to look at all three decisions, and not simply the final decision of the Supreme Court.

From a U.S. perspective, it may be important to note that much of the litigation arose out of the prohibition on inhuman and degrading treatment or punishment under article 3 of the ECHR, which has long been interpreted as prohibiting removal to a country where there is a real risk of such treatment.[26] This principle assumed a unique importance because the EHCR has been incorporated into domestic law by the Human Rights Act 1998, and therefore the courts' jurisdiction is not in dispute. However, as the Supreme Court set out at some length in its unanimous decision, the prohibition on refoulement is found in multiple international treaties, including not only the Refugee Convention but also the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (UNCAT).[27] The Supreme Court also noted that the UK government has previously recognized that non-refoulement is part of customary international law.[28] This provides a basis for arguing that the reasoning of the Rwanda decision should not be confined to cases brought within states that are parties to the ECHR but should apply wherever there is a risk of refoulement.

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How "Safety" Should Be Assessed

The first legal question about whether Rwanda was a safe country was who had the right or obligation to assess this. The Divisional Court had acknowledged in one paragraph that a court will "usually" assess the issue for itself,[29] but elsewhere considered whether the SSHD was "entitled" to decide that Rwanda was safe and whether there was sufficient "compelling evidence" to allow the court to "go behind" that decision.[30] The Supreme Court unequivocally confirmed that courts should not defer to the executive's judgment about the risk of refoulement but must decide the question for themselves.[31] This was a long-established understanding of the courts' role in human rights cases, but the Supreme Court articulated two distinct justifications for it. The first was that courts have the relevant "expertise and experience: weighing competing bodies of evidence, and assessing whether there are grounds for apprehending a risk [. . .] are familiar judicial functions." The second was that courts, too, are state institutions and bound by a state's obligations under international law; as summarized by the Supreme Court, in *Ilias and Ahmed v. Hungary*[32] the ECtHR had held that where a state seeks to remove an asylum seeker to a third country without assessing the claim,

> it is the duty of the removing state to examine thoroughly the question whether or not there is a real risk of the asylum-seeker being denied access, in the receiving country, to an adequate asylum procedure, protecting him or her against refoulement ... The same duty also applies to the courts, as an organ of the state, when the issue is raised before them.[33]

The next question was what evidence the court should take into account in making that assessment. The Court of Appeal and the Supreme Court held that UNHCR's evidence should be given particular weight, based on its mandate under article 35 of the Refugee Convention and its experience and expertise.[34] There is no requirement to defer to the executive. The weight to give its views will depend on the experience and evidence they are based on:

> Of course, the court will attach weight to the government's view of assurances given by another country, particularly where its view reflects the advice of officials with relevant experience and expertise [. . . but] the government is not necessarily the only or the most reliable source of evidence about matters which may affect the risk of refoulement [. . .][35]

Finally, the Court held that a receiving state's past behavior and current capacities needed to be taken into account, and it would be wrong to rely solely on the state's assurances about the future.[36]

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What Makes a Country "Unsafe"

A number of the claimants argued that Rwanda itself was unsafe. They pointed to the suppression of political dissent,[37] and in particular the shootings, arrests, and prosecutions of refugees involved in protests against cuts to their rations in 2018.[38] Ultimately, however, the Supreme Court based its decision on the risk of onward refoulement from Rwanda, rather than on risks in Rwanda itself.

The Supreme Court did not set out a justification for failing to engage with risks of ill treatment in Rwanda itself beyond noting that the issue had not received much attention below or in argument before them.[39] One reason for this narrow focus may have been that the Court of Appeal and the Supreme Court put considerable weight on the evidence of UNHCR, and UNHCR did not express a view about any political or human rights issues except the accessibility and fairness of the asylum system.[40] Another is that the issue of refoulement is a broad one, and would—if resolved against the SSHD—prevent anyone's removal to Rwanda. Claims based on the risks to asylum seekers of particular profiles, by contrast, would only succeed in preventing the removal of others similarly situated, and only following an individualized fact-finding process. The limits of such claims were reflected in the Divisional Court's dismissal of evidence of political persecution in Rwanda. None of the claimants, the court noted, at present held political views in opposition to the Rwandan government, even if one of them had been a political activist in his home country.[41]

The litigation was therefore a missed opportunity for challenging the presumption embodied in UK domestic litigation that it is lawful to transfer asylum seekers to any country where they will not be persecuted or refouled, without taking into account the obligation under the Refugee Convention to promote refugees' widest possible exercise of fundamental rights and freedoms.

It is important to recognize, however, that another reason that the litigation focused on political persecution and refoulement was that the MEDP did, in theory, set reasonable standards for accommodation, welfare, and even integration. The Memoranda of Understanding between the United Kingdom and Rwanda contained assurances that people removed from the United Kingdom would be provided with accommodation and support "that is adequate to ensure the health, security and wellbeing of the Relocated Individual" and that they would enjoy freedom of movement within the country. This was followed by a Note Verbale covering everything from prescription drug expenses and meals in accordance with "cultural and religious needs" to vocational training and "integration programmes."

Many refugees and NGOs also pointed out that Rwanda would be unlikely to be a safe destination for LGBTQI+ refugees and asylum seekers,[42] but the Home Office's own guidance acknowledged some concerns in this regard already,[43] making removal of LGBTQI+ asylum seekers in practice

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less likely, at least in the early phases of the scheme. In other words, it would have been difficult to challenge removal to Rwanda as a threat to rights other than political expression.

Asylum Standards

The focus on onward refoulement did not mean, however, that the Supreme Court decision failed to advance the rights of refugees and asylum seekers. The Supreme Court both reaffirmed a number of existing legal protections for asylum seekers and refugees and arguably articulated a challengingly high standard for the kind of RSD system that would be required in order for international transfer agreements to be lawful.[44]

Among the established principles that the Supreme Court reaffirmed were that:

1. A transferring state cannot presume that a receiving state is safe based on the text of its laws and the international agreements to which it is a party, but must instead investigate its human rights record in practice.[45] This is a long-established principle,[46] but one that has been questioned by states, including Hungary[47] and the United Kingdom. At the time of writing, the UK government has introduced legislation to disapply this principle, with regard to Rwanda specifically.[48]
2. The principle of non-refoulement prohibits not just direct return to a country of origin, but also putting someone at risk of indirect return, for example, by removing them to a third country where they do not have a right to reside.[49] This would also appear to be a long-established principle, but it is one that the government of Rwanda did not consistently recognise.[50]
3. Asylum seekers are not required to claim asylum immediately upon arrival, and cannot be expelled for failing to do so.[51]
4. Asylum seekers cannot be lawfully expelled merely because they have travelled on false documents.[52]

Where the judgment arguably broke new ground was in setting out a series of procedural safeguards that it treated as essential to the effective prevention of refoulement. As the Refugee Convention itself is silent on procedural standards, this judgment can potentially provide a useful benchmark for the lawfulness of asylum procedures in host countries and proposed third countries alike. It is important to recognize that the Supreme Court specifically found in a separate part of the judgment that the EU Procedures Directive no longer applied within the United Kingdom,[53] such that the minimum procedural standards they identify can fairly be said to be extrapolated from

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the principle of non-refoulement, rather than rooted in narrower domestic or regional legal principles.

The most detailed analysis of the procedural defects of the Rwandan asylum system was set out by Lord Justice Underhill in the Court of Appeal, in a judgment that the Supreme Court described as "particularly impressive."[54] Underhill described the Rwandan asylum procedure step-by-step,[55] and noted specific procedural flaws at each stage. These can be usefully condensed into a series of basic requirements, without which there may be a real risk of refoulement:

1. People who are not allowed to register an asylum claim must be given a written record that they were turned away, and of the reasons for this, to allow them to challenge the decision.[56]
2. Interviews must be long enough to "allow the claimant to explain their asylum claim and answer questions about it"; 30 minutes would be "clearly inadequate" in "many cases," particularly where interpreters are used. [57]
3. Asylum seekers must be given copies of the documents related to the assessment of their claim, to allow them an effective opportunity to correct errors and respond to adverse points. These should include transcripts of any interviews, internal assessments on which a decision may be based, and the country background evidence relied on.[58]
4. Asylum seekers must be permitted to be accompanied by a lawyer at their asylum interview,[59] and the lawyer must be permitted to make submissions during the proceedings.[60] There must be accessible legal *representation* (meaning advocacy), as well as legal assistance.[61]
5. Decision makers must have access to good quality, up-to-date country information, which should be disclosed to the claimant.[62]
6. Refusal decisions must be accompanied by detailed and individualized statements of written reasons, which "address the particular factual case advanced by the individual claimant and identify the legal basis for the decision."[63]
7. Asylum decision makers must have specialist training; "this is fundamental."[64]
8. There must be a right of appeal to an independent tribunal;[65] here, the general human rights situation in the country is directly relevant, because if the judiciary is not sufficiently independent of the executive, they cannot be relied on to overturn executive decisions refusing international protection.[66]

Underhill also expressed concern that in asylum interviews, claimants were questioned about why they had not claimed asylum closer to home, and that government ministers had made similar comments in other settings. He

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speculated that this attitude could be linked to the high rates of refusal of claims from known conflict zones in the Middle East, which were otherwise hard to explain.[67]

The Failure of Challenges to Third Country Transfers *Per Se*

The Rwanda litigation thus succeeded in temporarily preventing removal to Rwanda on the grounds of the real risk of onward refoulement. Where it failed is in establishing that states have a general obligation to determine asylum claims that are made within their jurisdiction, or in challenging the lawfulness of third country transfers *per se*. Some of the claimants had argued that "there is an implied obligation on a receiving state, inherent in the basic structure of the Convention, to process a claim for asylum made by a refugee physically present in its territory." This was said to be inferable from:

> a combination of the declaratory nature of refugee status (which requires investigation of the individual's circumstances and the nature of his claim) and Convention provisions, including the prohibition on refoulement (Article 33), the prohibition on penalties for illegal entry or presence (Article 31), the duty to afford refugees the same treatment as "aliens" (Article 7), the prohibition on discrimination on grounds of country of origin and the right of access to courts (Article 16). Even Article 9, which permits provisional measures against an individual where "essential to national security," does so only "pending a determination by the Contracting State that that person is in fact a refugee."[68]

This argument was only pursued by one claimant, and ran directly counter to UNHCR's position, which was that "States may make arrangements with other States to ensure international protection," as long as they are subject to a series of clear safeguards (which in its opinion were not present in this case).[69] Lord Justice Underhill, with whom Sir Geoffrey Vos agreed, found that it was "settled law that the Refugee Convention does not prohibit a receiving state from declining to entertain an asylum claim where it can and will remove the claimant to another non-persecutory state."[70] In reaching this conclusion, he looked at the practice of the Dublin system, previous UK jurisprudence, academic commentary, and the *travaux préparatoires* to the Refugee Convention.[71] Thus, although "[i]t is UNHCR's position that asylum-seekers and refugees should ordinarily be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them,"[72] the Rwanda litigation makes a clear statement that there is nothing in international law that requires this.

Several claimants made a distinct but related argument, that the removal of an asylum seeker to Rwanda was a "penalty" under Article 31 of the Refugee

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Convention, and therefore could not be imposed on at least some of those whom the United Kingdom intended to remove there.[73] There were two distinct arguments here: that in general removal to Rwanda was a penalty because of the "significantly inferior processes and human rights protections" there,[74] and that it might be a penalty in a particular case, such as if it involved "separation from family members or a supportive community."[75] Here, Underhill (with whom Vos agreed) accepted that "penalty" should be given a "broad and purposive" interpretation. He also endorsed the finding of the Supreme Court of Canada in *B010 v. Canada* [2015] 3 SCR 704[76] that "[t]he generally accepted view is that denying a person access to the refugee claim process on account of his illegal entry, or for aiding others to enter illegally in their collective flight to safety, is a 'penalty' within the meaning of art. 31(1)." However, he noted that this view referred to denial of access to the RSD process for asylum-seekers who remained in the country (and who therefore would have no effective access to any RSD procedure anywhere). It was "not concerned" with expulsion, "as to which [. . .] the Convention imposes no restrictions save for the duty of non-refoulement imposed by article 33."[77]

Permission to appeal was not granted on these issues, such that the findings of the majority of the Court of Appeal stand.

The History of Inadmissibility to the United States for Asylum Seekers

The U.S. asylum system bifurcates the process of seeking refuge in the United States through its separate overseas refugee resettlement program and domestic asylum procedures, although both are ostensibly governed by the U.S.' international treaty commitments under the 1951 Refugee Convention/1967 Refugee Protocol. This article addresses barriers to the latter, although the United States has placed multiple bars to accessing both refugee resettlement and asylum since first granting these forms of relief from persecution in 1948.[78] As has been persuasively argued elsewhere, the United States has treated both refugee and asylum as "exceptional" forms of admission and has instituted multiple forms of both internal and external barriers to ensure few can qualify for either.[79]

In recent years, the United States has focused on externalizing its obligations to provide asylum through both bilateral agreements with other states and domestic laws and policies that penalize individuals for failing to apply for asylum in transit countries. Some of these policies have not explicitly required second states to offer or grant asylum to individuals who travel through their territories *en route* to the United States, but have instead used incentives and disincentives to pressure such countries to prevent asylum seekers from arriving at the U.S. border. The U.S. agreements with Mexico such as the *Merida* Initiative and *Programa Frontera Sur* are prime examples, requiring Mexico

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to tighten its border with Guatemala and heighten its own internal migration enforcement policies on behalf of the United States.[80] The best known of these was the U.S. agreement with Haiti, introduced under the Reagan administration in 1981, which authorized the interdiction of Haitian vessels on the high seas, preventing Haitian asylum seekers from entering U.S. waters and returning them to Haiti.[81] In a highly precedential decision interpreting U.S. asylum obligations under the Refugee Protocol, the U.S. Supreme Court gave its sanction to the interdiction program, and upheld the U.S. government's use of extraterritorial policies to prevent access to asylum.[82]

Since the U.S. Supreme Court's decision in *Sale v. Haitian Centers Council*, every U.S. administration has instituted policies that require individuals to first seek asylum in other countries before their claims can be considered in the United States, or take failure to do so into consideration in assessing their claims. These exclusionary policies expressly state or assume that asylum seekers can safely remain permanently in prior countries of transit or stay. After a summary review of some of the earlier consequential "safe country" policies, this section will describe the Trump and Biden policies that have had the most important effect on access to asylum in the United States. The section will end with an analysis of the most recent litigation challenging the denial of refugee/asylum protection on "safe country" grounds in the United States to determine whether there are common principles in the U.S. and UK approaches in determining when another country is "safe." One major difference between U.S. judicial approaches and their European counterparts is that U.S. courts almost never refer to international treaty or customary international law standards as guiding refugee or asylum law obligations. As in the United Kingdom, U.S. courts have affirmed the centrality of non-refoulement—though less so chain refoulement. However, U.S. courts have grounded the non-refoulement obligation primarily in domestic statute rather than international norm. Beyond the re-affirmation of non-refoulement, however, U.S. courts have inconsistently examined the wider scope of effective protection that would ensure refugees their full panoply of fundamental rights in another country before deciding they are precluded from a grant of asylum in the United States.

Recent and Current U.S. Law on "Safe Country" of Asylum

U.S. Law on Firm Resettlement and First Country of Asylum

Current U.S. law on "safe" first or third countries of asylum is based on two main sources: the firm resettlement bar and the "safe third country" bar, both codified in the Immigration and Nationality Act (INA), as well as subsequent immigration regulations.[83] The firm resettlement statutory bar was based on a provision in the Refugee Relief Act of 1953, which included in its definition of "refugee" a person "who has not been firmly resettled."[84] This provision was removed from the law, but firm resettlement has remained as either a

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discretionary or mandatory factor for denying asylum. The first Supreme Court case on firm resettlement, *Rosenberg v. Yee Chien Woo*, confirmed firm resettlement as a discretionary factor in asylum cases.[85] In 1980, the then-Immigration and Naturalization Service (INS) issued Interim Regulations instituting firm resettlement as a mandatory bar to asylum.[86] The Interim Regulations included a list of factors to be taken into account in deciding whether the individual was firmly resettled, including access to adequate housing and employment, the ability to obtain or own property, and access to other "rights and privileges" available to other long-term residents of the state. The Regulations also listed other benefits an adjudicator should consider, such as whether the individual could obtain travel documents, access education, or apply for public relief and naturalization.[87]

Subsequently, the Board of Immigration Appeals (BIA) determined in *Matter of Soleimani* that firm resettlement was a matter of discretion.[88] The BIA placed the burden of proof on the government, not the alien, to prove that under the foreign country's laws and policies the individual was firmly resettled prior to arriving in the United States.[89] The mandatory/discretionary ping-pong continued over time; the Regulations were again amended in 1990 to make firm resettlement a mandatory bar, which was then codified in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.[90] In another 2000 amendment, the Immigration Regulations provided that the government had to prove that the first country had formally offered the alien indefinite residence status before the individual could be considered firmly resettled.[91]

In interpreting the 2000 Regulations, the federal courts took a number of different approaches to determine what constituted an offer of "indefinite residence status." In *Matter of A–G–G–*, the BIA (Board of Immigration Appeals) reviewed the federal cases on the issue and categorized two different judicial approaches. In the "direct offer" approach, the courts required the government to prove through direct evidence that the individual had received some form of permanent residence such as an asylum grant, a residence permit, a passport, or a travel document.[92] In the "totality of the circumstances" approach, the courts accepted indirect evidence that could include permanent (or semi-permanent) residence under the country's citizenship or residence laws, the individual's length of stay, social and economic ties, and whether the individual had had an intent to remain in the country. Under the second approach, a "direct offer" was just one of any number of factors that courts could assess.[93]

In *Matter of A–G–G–*, the BIA established a framework that reconciled the common factors in the two approaches, and set out what immigration adjudicators must consider in applying the firm resettlement regulations in all jurisdictions. Under its *prima facie* burden of proof, the Department of Homeland Security (DHS) must present evidence of the individual's status in the first "safe" country—a passport, travel document, proof of refugee status, or

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other proof of permanent residence. If such direct evidence is unavailable, the government could proffer indirect evidence sufficient to establish permanent status. The BIA listed such indirect factors as:

> the immigration laws or refugee process of the country of proposed resettlement; the length of the alien's stay . . . the alien's intent to settle in the country; family ties and business or property connections; the extent of social and economic ties developed by the alien in the country; the receipt of government benefits or assistance, such as assistance for rent, food and transportation; and whether the alien had legal rights normally given to people who have some official status, such as the right to work and enter and exit the country.[94]

In other words, the BIA's assessment of firm resettlement took into account whether the individual would have access to basic human, economic, and social rights in addition to the prospect of permanent legal status. *Matter of A–G–G–* was the law on firm resettlement until the issuance of the 2019 Interim Rule, discussed below, on both first country of asylum and third country transit or stay as bars to asylum. After the termination of both the Trump 2018 and 2019 Interim Rules, the 2000 Regulations and *Matter of A–G–G–*'s interpretations should again be governing law.[95]

U.S. Law on Safe Third Country of Asylum

The safe third country bar was also codified in the IIRIRA changes to the INA.[96] The bar provides that an alien's application for asylum should be pretermitted if he or she could be removed to another country in accordance with a bilateral or multilateral agreement, where his or her life would not be threatened, and where he or she would be able to access a fair asylum procedure or another form of temporary protection. This law has been activated through four safe third country agreements (STCAs) or asylum cooperative agreements (ACAs). The first STCA was with Canada in 2002, prohibiting non-Canadian nationals arriving at U.S. ports of entry from Canada from applying for asylum, and requiring DHS to return them to Canada to seek protection. In tandem, the agreement prohibited Canada from processing asylum claims of non-U.S. nationals arriving in Canada from the United States and required Canadian authorities to send such individuals back to the United States to seek asylum instead. In 2023, the DHS and Department of Justice (DOJ) issued a final rule implementing this agreement.[97]

In 2019, the Trump administration entered into three additional ACAs with Guatemala, Honduras, and El Salvador.[98] Only the Guatemala ACA was implemented before the Biden administration suspended—but did not terminate—it in 2021.[99] The United States removed hundreds of migrants from El Salvador and Honduras to Guatemala, and none of them received

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asylum in Guatemala, according to a U.S. Congressional inquiry.[100] On the Canadian side, the U.S.-Canada ACA precipitated several rounds of litigation by Canadian refugee organizations on the issue of whether the United States was a safe country. Two lower court decisions found that the United States was not a safe country, both of which were overturned on appeal, and the U.S.-Canada agreement remains intact.[101]

Trump Administration Measures on First and Third Country Considerations

In July 2019 the Trump administration also issued an Interim Final Rule that combined first and third safe country regulations. The 2019 Rule, called the Transit Country Asylum Ban, stated:

> Notwithstanding [the firm resettlement regulation], any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien's country of citizenship, nationality, or last habitual residence en route to the United States shall be found ineligible for asylum . . .[102]

The Rule was immediately challenged by immigrant advocacy organizations, as discussed further below. However, in rapid succession, in 2018-2019, the Trump administration issued a series of measures placing additional barriers on access to asylum that presumed individuals could be returned or sent to another "safe" country without access to a full asylum procedure in the United States.[103] In January 2019, the Trump administration instituted the Remain in Mexico program, also known as the Migrant Protection Protocols (MPP), requiring the return of any alien to Mexico whose claim for asylum or other benefits was pending in the United States. Immigration advocacy organizations immediately challenged the MPP's presumption that Mexico was safe for asylum seekers, as discussed further below. Before the Biden administration suspended the MPP in 2021, over 70,000 non-Mexican asylum seekers had been returned to Mexico to await court hearings, many suffering serious harm in the process.

In March 2020, President Trump issued an executive order popularly known as Title 42, which purported to use the health regulations in response to the COVID-19 pandemic to expel all aliens entering the United States unlawfully, either to Mexico or to their countries of origin. Both the Trump and Biden administrations renewed the Title 42 order until May 11, 2023. The effect of Title 42 was to simply bar all aliens trying to seek asylum at the U.S. border who did not have authorization to enter, forcing them back to Mexico or onward from Mexico if they could not remain in Mexico. Title

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42 effectively prevented access to asylum because individuals can only apply for asylum once they have entered U.S. territory. Title 42 expulsions were also challenged, and finally terminated due to court orders and Biden policy changes.[104] However, Title 42 was the basis for expelling almost 2.8 million individuals over the 38 months it was in effect.[105]

Biden Administration Measures on First and Third Country Considerations

On April 27, 2023, the Department of State and DHS announced the Biden administration's new measures to "reduce unlawful migration across the Western Hemisphere, significantly expand lawful pathways for protection, and facilitate safe, orderly and human processing of migrants." The new measures included an end to Title 42 and the Central American ACAs, enhanced use of expedited removal of individuals arriving without authorization, increased use of detention, and shorter credible fear interview time frames for asylum seekers.[106] Two measures rely on "safe" country presumptions: the Circumvention of Lawful Pathways Rule through the "CBP One" mobile application, and the Final Asylum Rule.

The CBP One mobile application was rolled out on January 12, 2023, initially as a discretionary option for aliens to schedule an appointment for admission to the United States from Central or Northern Mexico, and to submit biographical information. Since then, use of the app has become mandatory through the "Circumvention of Lawful Pathways" Final Rule, and individuals are required to stay in Mexico until the date of their pre-approved appointments. The Biden administration's Asylum Rule, which became final in May 2023, ties the ability to apply for asylum to pre-registration for inspection through the CBP One app, or providing proof of having applied for and been denied asylum or protection in another country before arriving in the United States.[107] The Rule imposes a rebuttable presumption of asylum ineligibility on any noncitizen who has not applied through a "lawful, safe and orderly pathway to the United States" or has not sought protection in a country through which he or she has travelled. The Rule describes the exceptions to the ineligibility presumption as:

1. the individual has been authorized for admission to the United States under a parole process, such as the CHNV program;
2. the individual entered on a pre-scheduled appointment through the CBP One app, unless he or she can show using the app was impossible for significant reasons; or
3. the individual applied for asylum or another form of protection in any country of transit and received a final order of denial of the claim.

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The presumption is also rebuttable upon proof of extreme medical emergencies, threats to life or safety, or imminent risk of being subjected to human trafficking. The exceptions and evidence rebutting the asylum ineligibility presumption are assessed by asylum officers in expedited proceedings using the heightened credible fear standard.[108] The Rule applies to all aliens seeking to enter from Mexico at the southwest or adjacent U.S. borders between May 11, 2023, and May 11, 2025. In essence, all asylum seekers are required to wait in Mexico until notified of their appointment through the app. After May 11, 2025, the Rule is scheduled for review.

Litigation on "Safe" Country Principles in the Trump and Biden Measures

Both the Trump and Biden border and expulsion policies have been and are being litigated in courts around the country. The main cases challenging the policies are discussed below.

Challenges to the MPP

The MPP policy was challenged in multiple cases. In the first action, *Innovation Law Lab v. Nielsen*, the plaintiffs argued that the MPP violated the principle of non-refoulement, and were ultra vires in that they exceeded DHS' authority under the statute. The District Court in California issued a nationwide injunction against implementation of the MPP, finding for the plaintiffs on the grounds that the policy violated the Administrative Procedures Act (APA).[109] Two Ninth Circuit panels heard government appeals in the case, one staying the injunction and the second reinstating it. Before the case could be heard at the Supreme Court, the Biden administration terminated the MPP and withdrew the petition for certiorari.[110]

In the second Ninth Circuit appeal, the panel examined the Refugee Protocol obligations in significant depth, discussing the obligations to prevent both refoulement and chain refoulement. The Court stated: "[B]ased on the record in the district court, we conclude that plaintiffs have shown a likelihood of success on the merits of their claim that the MPP does not comply with the United States' anti-refoulement obligations under Sec. 1231(b) . . . Uncontested evidence in the record establishes that non-Mexicans returned to Mexico under the MPP risk substantial harm, even death, while they await adjudication of their applications for asylum."[111]

In the second action, *EOHC v. Department of Homeland Security*, the Third Circuit reversed the District Court of Pennsylvania's dismissal of the case on jurisdictional grounds, finding that individuals must be admitted to the United States in order to pursue their asylum claims; there would be no possibility of judicial review of protection claims if individuals had to wait in Mexico for their cases to be adjudicated in the United States.[112] In a related

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class action, *Doe v. Wolf*, the Southern District Court of California ordered that individuals must be provided access to counsel to ensure they could fully make their claims of persecution.[113]

Challenges to the 2019 Rule, the "Transit Country Asylum Ban"

As with the MPP, court challenges to the Trump Interim Rule, the Transit Country Asylum Ban, were swift. In *East Bay Sanctuary Covenant v. Barr*, the District Court for the Northern District of California granted a preliminary injunction against its implementation in four border states.[114] The Ninth Circuit affirmed the injunction on statutory grounds, rejecting the government's position that the Rule was implementing existing safe third country and firm resettlement bars. According to the court, the Rule's requirements that Central Americans "must apply for and be finally denied asylum by Mexico, Guatemala, or another country through which they travelled" does not ensure that any of those countries is a safe option.[115] The court distinguished the firm resettlement bars in the INA, concluding that they were based on an assessment that the individual would be safe in the third country. In contrast, the Rule had no such requirement, and the court determined that the Rule was "arbitrary and capricious" because evidence contradicted the conclusion that aliens have safe options in Mexico:

> First, evidence in the record contradicts the agencies' conclusion that aliens barred by the rule have safe options in Mexico. Second, the agencies have not justified the Rule's assumption that an alien who has failed to apply for asylum in a third country is, for that reason, not likely to have a meritorious asylum claim.[116]

On September 11, 2019, the Supreme Court entered an order staying the Ninth Circuit's preliminary injunction pending the government's appeal.[117] The transit ban was in effect for nearly a year after the Supreme Court's stay, and operated as an almost total ban on asylum. The government reported that 98.3 percent of the over 25,000 asylum seekers to whom the ban applied did not qualify for any of the exceptions and had no access to asylum.[118]

In addition to the California case, two other actions were filed in the District of Columbia challenging the 2019 Rule. The cases were consolidated in the District Court in the District of Columbia as *Capital Area Immigrants' Rights Coalition v. Trump*.[119] The District Court found that the Rule's issuance violated the requirement of notice and comment, and vacated it in full. The court did not address the remaining plaintiffs' claims of statutory and due process violations, or address the safe first/safe third country bars on their merits.[120] The Biden Circumvention of Lawful Pathways Rule rescinded the Trump administration's transit and entry bans, but substituted new asylum restrictions, which were subsequently challenged as well.[121]

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Challenges to the ACAs

Refugee advocacy organizations in Canada filed several challenges to the U.S.-Canada STCA. However, since no challenges to the STCA have been made in the United States, these will not be discussed here.[122] In January of 2020, a number of immigration and refugee organizations sued against implementation of the ACAs with Guatemala, Honduras, and El Salvador on the grounds that they violated the INA, the APA, and U.S. asylum law.[123] On March 15, 2021, in *U.T. v. Barr*, the District of Columbia District Court ordered the case held in abeyance, on notice from the Biden administration that it was reviewing whether to terminate the ACAs.[124] The Biden administration then suspended all the ACAs with Central American states.[125]

Challenges to the Circumvention of Lawful Pathways Rule

As with the prior administration's regulations restricting access to asylum, the Biden administration's latest iteration, the "Circumvention of Lawful Pathways" Final Rule was also challenged in the courts. When the Circumvention of Lawful Pathways Rule was published for comment on February 23, 2023, the plaintiffs in the *East Bay Sanctuary* litigation revised their pleadings to challenge the latest version of the asylum rule. Their complaint claimed that:

> The Rule expressly rescinds and supersedes the enjoined asylum entry and transit bans ... Like those bans, however, the new Rule would dramatically curtail the availability of asylum in the United States. While the Rule purports to provide three "options" to preserve asylum eligibility, nearly all covered asylum seekers will be unable to satisfy two of these conditions, and only a limited number will be able to utilize the third: securing scarce appointments booked using CBP One. The Rule will eviscerate the asylum system that Congress created.[126]

The complaint alleged that there were so many problems with the CBP One app that for many, if not most, it was simply not functional, and left asylum seekers "stranded in Mexico" where they faced dangerous conditions.[127] The complaint alleged that the Rule violated the right to apply for asylum in the United States under the INA[128] and the firm resettlement bar criteria under existing law;[129] violated the non-refoulement provision in the INA;[130] and placed additional restrictions on the statutory right to asylum inconsistent with the INA. Finally, the complaint also alleged the Rule violated the Administrative Procedures Act and was ultra vires the asylum statute.[131] Judge Jon S. Tigar in the Northern District of California issued an order vacating the Rule and granted summary judgment to the plaintiffs.[132] The Court's reasoning was that the Rule was not significantly different from the Trump asylum rules that it had previously struck down, and made similar findings as in its prior decisions:

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1. That the Rule "conditioning asylum eligibility on presenting at a port of entry or having been denied protection in transit conflicts with the unambiguous intent of Congress as expressed in Section 1158." The Court affirmed that Sec. 1158(a) allows noncitizens the right to apply for asylum regardless of the manner or location of entry.
2. That the Rule conflicted with the "safe third-country and firm-resettlement bars" under existing law, which "specifically address the circumstances in which an alien who has traveled through, or stayed in, a third country can be deemed sufficiently safe in that country to warrant a denial of asylum in the United States."
3. That the Rule was arbitrary and capricious because (1) it "relies on the availability of other pathways for migration to the United States, which Congress did not intend the agencies to consider in promulgating additional conditions for asylum eligibility"; and (2) "it explains the scope of each exception by reference to the availability of the other exceptions, although the record shows that each exception will be unavailable to many noncitizens subject to the Rule."[133]

The Court extensively reviewed the evidence on whether forcing individuals to seek protection in a transit country was safe or feasible. The Court assessed both safety considerations and access to asylum or other protection status in Belize, Colombia, Costa Rica, Ecuador, and Mexico—countries the government had presented as viable options for asylum seekers to seek protection in or to which they could be returned. The Court concluded that the evidence did not support a finding that any of these countries were "viable, safe options for many asylum seekers."[134] In particular, it recited State Department reports noting serious human rights concerns in Mexico, including gender-based violence against migrants, torture of migrants, and armed groups operating in Mexico that were kidnapping, extorting, and killing migrants.[135] The plaintiffs did not raise, nor did the Court discuss, violations of non-refoulement, or chain refoulement as violations of international law under the Refugee Convention or Protocol. However, the Court's extensive analysis of whether prior countries could be presumed to be safe clearly involved the evidentiary determinations that would be required under an international legal assessment of whether a safe first or third country return would violate non-refoulement. The viability assessment also examined whether the Rule was consistent with existing firm resettlement law, applying factors similar to (though not in this case as extensive as) those established in *Matter of A–G–G–*.

The Ninth Circuit, on appeal, stayed the District Court's decision, but not because it disagreed with the decision on the injunction and vacatur, but because the Biden administration indicated it would be filing certiorari to the

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Supreme Court on the case. In fact, in his dissent to the stay, Judge Vandyke indicated as such:

> The Biden Administration's "Pathway Rule" before us in this appeal is not meaningfully different from the prior administration's rules that were backhanded by my two colleagues. This new rule looks like the Trump administration's Port of Entry Rule and Transit Rule got together, had a baby, and then dolled it up in a stylish modern outfit, complete with a phone app. Relying on this court's rationales in our prior decisions rejecting the Trump administration's rules, Judge Tigar concluded that this new rule is indistinguishable from those rules in any way that matters. He's right.[136]

With the ruling, the Ninth Circuit has kept the Rule in place until the Supreme Court grants or denies cert, which means the CBP One and safe first- and third-country provisions remain in effect for now.

Some Conclusions on "First" and "Third" Safe Country Measures and Access to Asylum

The United States has a long history of welcoming refugees and asylum seekers and providing asylum to millions of people fleeing persecution. However, as armed conflicts, climate change, and other drivers force unprecedented numbers of people to the Americas, and cross U.S. borders, the welcome mat is becoming threadbare. The last two administration's policies to block admission and bar asylum that have been reviewed here have faced challenge after challenge by advocates seeking to protect access to, and the right to receive, asylum. Still, with almost 2.5 million border crossers at the U.S.-Mexico border in 2023, and a backlog of over 2 million asylum applications, the Biden administration has reversed its promises on progressive immigration policies and found new ways to bar asylum through "safe" first- and third-country measures. U.S. courts have not been consistent in their rulings on which policies pass non-refoulement scrutiny and which have not, but their analyses are only with regard to compliance with domestic law.

The United States has an ambivalent relationship with international law. Whether a treaty, such as the Refugee Protocol, can be enforced in domestic law depends on how courts apply the self-execution doctrine. U.S. courts have found that the Refugee Protocol is not self-executing, and therefore confers no rights beyond those granted in implementing domestic legislation.[137] Nor does the United States accept obligations under the Inter-American human rights instruments or mechanisms. This sets the United States apart from the binding human rights norms that govern adjudications in the United Kingdom and EU states with regard to refugee and migrants' rights. With this in mind,

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the decisions on the safe first- and third-country rules and provisions by the various U.S. courts are first and foremost decisions on the interpretation of U.S. immigration law and regulations. As noted earlier, they rarely reference international normative standards from the Refugee Convention and Protocol.

Still, non-refoulement is at the heart of the provisions on asylum in the INA, and the Trump and Biden administrations attempts to circumvent that bedrock principle through the policies and regulations reviewed above have been blocked fairly consistently by the courts. In the most important cases from the District of Columbia and California, the courts have suspended or terminated the first and third "safe" country rules, but their injunctions have been reversed pending Supreme Court adjudications. The California District Court and Ninth Circuit, in particular, have reviewed individualized evidence to determine for themselves whether countries in Central or South America are safe or viable for an asylum seeker to return or to seek asylum in, rather than deferring to the U.S. government claims. This approach is in line with UK and ECtHR jurisprudence, which requires courts to decide for themselves whether "safe" countries are in fact safe.

In the United States, however, the test is compliance with the INA provisions, with Congressional intent underlying the statutory provisions, and with whether regulations comply with the APA in how they were promulgated. What advocates have effectively argued in the cases on safe first- and third-country issues is that non-refoulement *is* U.S. domestic law; that it requires an individualized, case-by-case assessment about risk of harm that includes both physical and mental harm in each country under examination before return. Chain refoulement has not been raised as extensively as it could be, though the same underlying principles apply. Here, the EU and UK jurisprudence emphasizing the fundamental importance of chain refoulement—in *AAA (Syria)*, in direct rejection of the position taken by the government of Rwanda—is a useful reminder of the importance of this concept.

Other than identifying those arguments that succeeded and those that failed, what can we learn from this recent history of litigation over access to asylum?

One key lesson, we would argue, is that it is important to recognize the limitations of litigation as a tool for achieving practical change.

In many ways, the Rwanda litigation can be seen as successful in preserving access to asylum in the United Kingdom. At least temporarily, it stopped the removal of asylum seekers to a country where they would have been at risk not only of refoulement but also, given the country's general human rights record, other significant human rights violations. It set high minimum standards for RSD procedures and access to the courts to challenge refusal of protection, which may prove useful in challenging deficiencies in domestic asylum systems as well as transfers to third countries. It failed to establish that third-country transfers were unlawful *per se*, but this was always unlikely, given the position of UNHCR, existing UK jurisprudence, and the academic commentary.

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What happened next, however, demonstrates the limitations of even the most successful litigation. Immediately after the Supreme Court judgment, the Prime Minister announced that he would introduce "emergency legislation" so that removals to Rwanda could still go ahead. The Safety of Rwanda (Immigration and Asylum Act) followed three weeks later.

In the absence of a written constitution, the British Parliament is widely recognized to have "the right to make or unmake any law whatever."[138] It is therefore useful to consider what the British Government chose not do. It did not seek to create exclusions from the principle of non-refoulement (for example, on the grounds that this was necessary to deter dangerous journeys across the Channel, or because those who have travelled through a "safe country" have forfeited the protections of the Refugee Convention). Nor did it seek to challenge the high procedural standards for RSD systems in "safe" third countries as going beyond what international law requires.

Instead, the Safety of Rwanda (Immigration and Asylum) Bill implicitly accepts that Rwanda could not be considered a safe country if there were a real risk of refoulement, but asserts that in light of a new treaty agreed between the United Kingdom and Rwanda, that risk has been eliminated.[139] The treaty reflects many of the procedural standards demanded by the Court of Appeal. It contains an "Annex B—Claims Process" that addresses the training of asylum decision-makers, procedural fairness, access to legal advice and representation, and a full merits review on both fact and law. It also creates a "fresh claim" process in Rwanda, which appears to respond to a concern raised in UNHCR's evidence.[140] As UNHCR commented, "the detailed, legally-binding commitments now set out in the treaty, [. . .] if enacted in law and fully implemented in practice, would address certain key deficiencies in the Rwandan asylum system identified by the Supreme Court."[141]

Moreover, in spite of the litigation's focus on refoulement, the treaty goes significantly beyond the definition of a safe country set out in UK domestic law to promise not just non-refoulement but also recognition of all of the rights set out in the Refugee Convention:

> 13.1 At all times, Rwanda shall ensure that each Relocated Individual who is deemed a refugee shall benefit from the rights set out in, and shall be treated in accordance with, the Refugee Convention, such as in relation to employment and self-employment; public relief; labour legislation and social security; and administrative assistance.

As if, finally, to acknowledge that the RSD standards it promised might not be achieved, it in some ways made that process irrelevant. Everyone relocated from the United Kingdom is protected against removal, except by way of return to the United Kingdom, and promised the full range of rights set out above, regardless of whether they are recognized as refugees.[142] It could be argued that the demands on both the sending and receiving countries are now so great that the system, even if it becomes operational, is not sustainable and that there will not be any attempt to replicate such a scheme with another country.

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In a significant departure from existing legal principles, however, the legislation removes the question of whether Rwanda is, in general, safe for asylum seekers from the jurisdiction of the courts. Instead, that is now a question for Parliament. At the heart of the Bill is the simple requirement:

> Every decision-maker must conclusively treat the Republic of Rwanda as a safe country.[143]

By requiring courts to accept Parliament's decision that Rwanda is safe, the Safety of Rwanda Bill is not only overturning an adverse court decision. It expressly affirms Parliament's right to operate inconsistently with international law,[144] disregards domestic human rights laws,[145] and withdraws domestic courts' power to exercise what all sides—including the SSHD—recognized in the Rwanda litigation was a fundamentally judicial function: weighing competing bodies of evidence and making findings of fact. Thus, the ultimate result of the legal victory in *AAA (Syria)* has been legislation expressly constraining judicial authority.[146]

Similarly, litigation in the United States has stopped one asylum ban after another put forward by first the Trump and the Biden administrations, only to see them revised and reintroduced. In terms of firm resettlement, after the Trump-Biden regulation ping-pong, advocates should now be arguing again that it is the 2000 firm resettlement regulation that governs, that *Matter of A–G–G–* interpreting it is good law, and all the factors the BIA laid out in that case must be thoroughly examined before an individual can be returned to any country through which he or she transited on the basis that full protection was available to him or her there. These factors compare well with the international norms set out by UNHCR, including the country's immigration, asylum, or refugee laws that must be accessible to the individual; how long the individual was in the country and whether he intended to remain; the individual's cultural, family, and business ties; social and economic ties; what benefits and services were available, including housing, food, and transportation; and legal and employment rights on par with long-term residents; and freedom of movement. Policies that presumptively assume that transit through any first country or return to a third country is safe or viable as a prerequisite to asylum cannot measure up to these criteria. Nor can policies pursuant to third-country agreements that avoid such individualized factor determinations stand up under U.S. law. On these factors, there may be convergence between the approaches from a U.S. domestic law standpoint and international norms.

Notes

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1. *See, e.g.*, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), https://supreme.justia.com/cases/federal/us/509/155/; *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights (Feb. 23, 2012), https://www.refworld.org/jurisprudence/caselaw/echr/2012/en/85456; *WS and Other v. Frontex*, Case T-600/21 (Sept. 6, 2023), https://curia.europa.eu/juris/document/document.jsf?text=&docid=277021&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2115778; *Safi and Others v. Greece* (Case no. 5418/15) (July 7, 2022), https://hudoc.echr.coe.int/eng#%20}; for the long series of litigation against Hungary for violent border pushbacks, see the website of the Hungarian Helsinki Committee, https://helsinki.hu/en/akta/cases-of-strasbourg/. The UK government's plans to use jet skis to turn around dinghies in the Channel were abandoned in the midst of litigation. *The Guardian*, "Priti Patel's Refugee Pushback Policy Withdrawn Days Before Legal Review" (Apr. 25, 2022), https://www.theguardian.com/uk-news/2022/apr/25/uk-refugee-pushback-policy-withdrawn-judicial-review-priti-patel.

2. *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport* [2004] UKHL 55 (Dec. 9, 2004), https://www.refworld.org/jurisprudence/caselaw/gbrhl/2004/en/18974 (finding pre-departure screening of Roma passengers at Prague airport was unlawful on racial discrimination but not Refugee Convention grounds); Statement of Changes in Immigration Rules, Statement made on July 19, 2023 (announcing the imposition of visa requirements on nationals of Honduras and Namibia because "there has been a sustained and significant increase in the number of UK asylum applications being made by these nationals."), https://www.gov.uk/government/publications/statement-of-changes-to-the-immigration-rules-hc-1715-19-july-2023.

3. *Case of S.S. and Others v. Hungary* (Applications nos. 56417/19 and 44245/20) (Oct. 12, 2023), describing the removal of asylum seekers who sought asylum at Budapest Airport to Serbia, on the pretence that they could then apply for asylum at the Hungarian/Serbian land border; *European Commission v. Hungary*, Case C-823/21 (June 22, 2023) (finding that Hungary's laws requiring asylum seekers to apply for a visa in an embassy in a third country before travelling to Hungary was inconsistent with EU law protecting the right to make an application for international protection), https://curia.europa.eu/juris/document/document.jsf?text=&docid=274870&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=544952.

4. *Case of Z.A. and Others v. Russia* (Applications nos. 61411/15, 61420/15, 61427/15, and 3028/16) (Nov. 21, 2019), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-198811%22]}; for one of many cases finding the treatment of asylum seekers in Hungary's "transit zones" unlawful, see Case *R.R. and Others v. Hungary* (no. 36037/17) (Mar. 2, 2021), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-208406%22]}.

5. *R v. Khedeir Idris Mohamed*, Preliminary Rulings (Dec. 21, 2022), https://www.judiciary.uk/wp-content/uploads/2022/12/Preparatory-hearing-Small-Boats-cases-rulings-21Dec22-final-v.pdf.

6. See cases listed above.

7. For the EU's current description of the Dublin System, see European Commission, Migration and Home Affairs, *Country Responsible for Asylum Application (Dublin Regulation)*, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/country-responsible-asylum-application-dublin-regulation_en.

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8. The Dublin Agreement was entered into in 1990 and first came into force in 1997. *Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities*, Aug. 19, 1997, 1997 O.J. (C 254) 1. It is now governed by the third of a series of regulations, known as "Dublin III." *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, Commission Regulation 604/2013, 2013 O.J. (L 180) 31.

9. The United Kingdom participated in the first version of the Procedures Directive, *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32005L0085, but not the amended ("recast") version that came into force in 2015, *Council Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013L0032.

10. See the evidence of Tyson Hepple, Director General, Immigration Enforcement, Home Office, to the House of Commons Home Affairs Committee on September 3, 2020, recorded in *Oral evidence: Channel crossings, migration and asylum-seeking routes through the EU, HC 705*, Q 110, https://committees.parliament.uk/oralevidence/793/default/.

11. Susan M. Akram & Elizabeth Ruddick, A Comparative Perspective on Safe Third and First Country of Asylum Policies in the United Kingdom and North America: Legal Norms, Principles and Lessons Learned, in 40 Boston University International Law Journal 79 (2022), https://scholarship.law.bu.edu/faculty_scholarship/3281.

12. The New Plan for Immigration was launched on March 24, 2021, https://assets.publishing.service.gov.uk/media/605b039ce90e0724c0df468d/CCS207_CCS0820091708-001_Sovereign_Borders_FULL_v13__1_.pdf.

13. The government position is that the country's capacity to welcome refugees is exhausted by the accommodation of Ukrainians and certain Afghans, who are accepted as legitimately in need of protection in the United Kingdom, and "illegal migrants" who either do not need international protection at all or could have found it elsewhere. Only once the numbers in the last group have declined will there be capacity to open additional "safe and legal routes." *See, e.g.*, UK Home Office, *Policy Paper: Safe and Legal Routes*, July 20, 2023, https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/safe-and-legal-routes.

14. It is now customary in UK legislation and policy to use "they" as a gender-neutral third person singular pronoun.

15. The first definition was at para. 345B of the Immigration Rules, for the purpose of deciding whether a person had a link to a safe country and what countries they could be removed to. The second was in legislation that allowed the SSHD to override the general prohibition on removing asylum seekers from the United Kingdom while their asylum claims were pending. This provision had been introduced by a Labour government in 2004 but never used, except in the context of Dublin removals. Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004, https://www.legislation.gov.uk/ukpga/2004/19/schedule/3. A third definition was relevant to whether the person should be able to appeal against their removal on the grounds that

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it breached the UK's obligations under the ECHR, https://www.legislation.gov.uk/ukpga/2002/41/section/94.

16. For further discussion of whether these definitions are consistent with the Refugee Convention, see UN High Commissioner for Refugees (UNHCR), *UNHCR Updated Observations on the Nationality and Borders Bill, as amended, January 2022*, paras. 140-145 and 193, https://www.refworld.org/legal/natlegcomments/unhcr/2022/en/123993.

17. UK Home Office, *How Many People Do We Grant Protection To?* (Feb. 29, 2024), https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-december-2023/how-many-people-do-we-grant-protection-to#asylum-claims-considered-inadmissible.

18. https://www.gov.uk/government/publications/memorandum-of-under standing-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r. This was then supplemented by a series of *Notes Verbales* between the two countries. https://www.gov.uk/government/publications/migration-and-economic-development-partnership-asylum-process and https://www .gov.uk/government/publications/migration-and-economic-development-partnership-reception-and-accommodation.

19. https://www.gov.uk/government/publications/rwanda-country-policy-and-information-notes.

20. This guidance was first published on May 9, 2022. The current version is available at https://assets.publishing.service.gov.uk/media/62b1ab86e90e0765d7559bd7/Inadmissibility.pdf. There are no relevant differences between the two versions. *AAA v. Secretary of State for the Home Department (Rwanda)* [2022] EWHC 3230 (Admin) (Dec. 19, 2022), para. 15, http://www.bailii.org/ew/cases/EWHC/Admin/2022/3230 .html.

21. Normally called "charities" in the United Kingdom. These were Care4Calais (https://care4calais.org/), Detention Action (https://detentionaction.org.uk/), and Asylum Aid (https://www.asylumaid.org.uk/).

22. The Public and Commercial Services Union.

23. https://www.bbc.co.uk/news/uk-61806383.

24. https://www.judiciary.uk/wp-content/uploads/2022/12/AAA-v-SSHD-Rwan da-judgment.pdf.

25. Other grounds that are probably of less interest to AILA members were that (1) the SSHD had unlawfully evaded Parliamentary scrutiny in the process she used to designate Rwanda as "safe," (2) the scheme breached UK data protection laws because of the way data about individuals was shared with the government of Rwanda, and (3) the scheme was not permissible under EU asylum law, because it involved transferring individuals to a "safe" country with which they had no prior connection (this was not disputed), and the relevant EU laws had not yet been repealed in the United Kingdom. Another important issue was whether the union and two of the NGOs had standing in the litigation; the Divisional Court found that they did not, and this decision was not successfully challenged.

26. *Soering v. United Kingdom*, 14038/88 [1989] ECHR 14.

27. *AAA (Syria)* [2023] UKSC 42 para. 21.

28. *Id.* para. 25.

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29. This is the only paragraph in which the Supreme Court identified the Divisional Court as properly recognizing its duty to conduct its own assessment. *AAA (Syria)* [2023] UKSC 42 para. 40.

30. *See, e.g.*, *id.* paras. 62 and 70.

31. The SSHD did not try to defend the Divisional Court's deference, arguing instead that the Court's reasoning had been misunderstood. As summarized by the Court of Appeal, the SSHD's submission was that "it would be remarkable if such an experienced Divisional Court had, in fact, addressed the wrong question." *AAA (Syria) & Ors, R (on the application of) v. The Secretary of State for the Home Department* (Rev1) [2023] EWCA Civ 745 (June 29, 2023), para. 73, https://www.bailii.org/ew/cases/EWCA/Civ/2023/745.html.

32. 47287/15 (2020) 71 EHRR 6, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-198760%22]}.

33. *AAA (Syria)* [2023] UKSC 42 para. 63. In *Arturas (child's best interests: NI appeals)* [2021] UKUT 00237 (IAC), the Upper Tribunal (Immigration and Asylum Chamber), took a similar approach with regard to the duty to have regard to the best interests of the child.

34. *AAA (Syria)* [2023] UKSC 42 para 65-68.

35. *Id.* paras 52-55.

36. *Id.* para. 103.

37. https://www.theguardian.com/uk-news/2023/oct/09/rwanda-deportation-plan-uk-supreme-court.

38. *AAA (Syria)* EWCA Civ 745, para. 103.

39. *AAA (Syria)* [2023] UKSC 42, para. 106; *AAA (Syria)* [2023] EWCA Civ 745, para. 126.

40. As UNHCR explained in its evidence to the court, "As a general rule, UNHCR's refugee protection responsibilities are delivered in partnership with states. Maintaining productive relations with the governments of those states, especially those hosting large numbers of refugees, is key to securing and maintaining access to protection for refugees. In addition to this consideration, UNHCR always needs to ensure the safety of its staff and associate organisations and the asylum seekers and refugees whom it serves on the ground." The UK Home Office has since published UNHCR's evidence in Country Information Note, *Rwanda: Annex 2 (UNHCR evidence)*, Version 1.0 (December 2023), p. 100, https://assets.publishing.service.gov.uk/media/65a15c7b74ae660014738a48/CIN_RWA_UNHCR_evidence.pdf.

41. *AAA* [2022] EWHC 3230 (Admin), paras. 75-77.

42. *See, e.g.*, https://www.rainbowmigration.org.uk/news/rwanda-is-not-safe-for-lgbtqi-people/.

43. https://assets.publishing.service.gov.uk/media/657719360959870000d95dded/RWA+CPIN+Review+of+asylum+processing+-+human+rights+information.pdf.

44. The Court of Appeal also raised serious concerns about issues that may be considered more specific to Rwanda, such as the refusal to accept asylum claims from a citizens of a country with which it had "particularly close relations" [para. 151] and a general prejudice against asylum seekers from the Middle East. [para. 156]. Although important for showing that Rwanda specifically is not a safe country for asylum seekers, they are arguably less useful as a source of transferrable principles.

45. *AAA (Syria)* [2023] UKSC 42, para 78.

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46. *M.S.S. v. Belgium and Greece*—30696/09, 31 BHRC 313, [2011] INLR 533, [2011] ECHR 108, (2011) 53 EHRR 2, para. 353, https://www.bailii.org/eu/cases/ECHR/2011/108.html.

47. *See Ilias and Ahmed*, para. 112 ("Hungary regarded Serbia, an EU candidate country, as a safe third country since it had agreed to be bound by all the relevant international treaties and EU requirements and benefited from EU support for reforms and upgraded asylum facilities.").

48. On December 7, 2023, the government introduced the Safety of Rwanda (Asylum and Immigration) Bill, https://bills.parliament.uk/bills/3540. This will require all decision-makers, including courts, to "conclusively treat the Republic of Rwanda as a safe country," Section 2(1). The introduction to the Bill sets out what Rwanda and the United Kingdom had agreed in a treaty signed two days before. It is this treaty, according to the government, that largely ensures that Rwanda is safe, in spite of the findings of the Supreme Court three weeks earlier. *Safety of Rwanda (Asylum and Immigration) Bill: Explanatory Notes*, December 7, 2023, https://publications.parliament.uk/pa/bills/cbill/58-04/0038/en/230038en.pdf.

49. *See, e.g.*, *MSS v. Belgium and Greece*, para. 347.

50. *See UNHCR Evidence*, p. 49, para. 27.2.

51. *AAA (Syria)* [2023] UKSC 42, para. 91.

52. *Id.*

53. *Id.* paras. 129-140.

54. *Id.* para. 64.

55. "(1) A claim for asylum must be made in writing and registered with the Directorate General of Immigration and Emigration ("DGIE"), which is an entity within the National Intelligence and Security Service. DGIE will interview the claimant following receipt of the written claim and should within fifteen days forward the file, including a record of the interview, to the Refugee Status Determination Committee ("the RSDC"), which operates under the auspices of the Ministry in Charge of Emergency Management ("MINEMA"). It should also issue a temporary residence permit; (2) Before a case is considered by the RSDC it is reviewed by a MINEMA "Eligibility Officer." There is some uncertainty about the nature and extent of their responsibility; but in broad terms it is to see that the case is in a fit state to be determined by the RSDC. This may involve obtaining additional information, including by conducting a further interview with the claimant. (3) The RSDC is the primary decision-maker. It comprises eleven members, being senior officials (at Director or Director General level) from the Prime Minister's Office, the ministries in charge of refugees (i.e. MINEMA itself), foreign affairs, local government, justice, defence forces, natural resources, internal security, and health, the National Intelligence and Security Service and the National Commission for Human Rights. Membership goes with a particular post in each body and changes when that individual changes jobs. Membership is not a full-time role: members will have other time-consuming responsibilities. It is not therefore a specialist body, though some of the members may have some relevant expertise from their other roles. It determines claims at regular meetings, their frequency depending on how many claims require determination: many claims may be determined at each meeting. There is a quorum of seven. The committee may decide the case on the basis of the file alone or ask the asylum-seeker to attend to be questioned, referred to as an "interview": there is an issue as to whether RIs will in all cases have an interview and if so what its nature is. (4) There is a right

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of appeal to the MINEMA Minister. (5)A further appeal lies from the Minister to the High Court of Rwanda." *AAA (Syria)* [2023] EWCA Civ 745, para. 134.

56. *Id.* para. 158.

57. *Id.* paras. 166, 168, and 186.

58. *Id.* para. 185.

59. *Id.*

60. The inability of a lawyer to make submissions was described as a "serious defect in the process." *Id.* para. 189.

61. *Id.* paras. 227-233.

62. *Id.* paras. 175, 190

63. *Id.* para. 191.

64. *Id.* para. 206.

65. *Id.* para. 210.

66. *Id.* para. 221.

67. *Id.* para. 200. This concern sits oddly with the UK's own asylum laws, which specifically require decision-makers to consider making an adverse credibility finding if an asylum-seeker has not sought protection in other safe countries *en route* to the United Kingdom. *See* Section 8 of Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, https://www.legislation.gov.uk/ukpga/2004/19/section/8.

68. *AAA (Syria)* [2023] EWCA Civ 745, paras. 309-310.

69. UN High Commissioner for Refugees (UNHCR), *UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum Seekers Under the UK-Rwanda Arrangement*, June 8, 2022, para. 8, https://www.unhcr.org/uk/media/unhcr-analysis-legality-and-appropriateness-transfer-asylum-seekers-under-uk-rwanda.

70. *AAA (Syria)* [2023] EWCA Civ 745, para. 316.

71. *Id.* paras. 312-313 and 316-321.

72. *UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum Seekers Under the UK-Rwanda arrangement*, para. 4.

73. The court did not deal with the factual issue of how many asylum-seekers potentially covered by the Rwanda scheme would in fact meet the "coming directly" requirement of Article 31, given that the scheme was primarily targeted at people who enter the United Kingdom after having been in the European Union.

74. *AAA (Syria)* [2023] EWCA Civ 745, para. 324.

75. *AAA (Syria)* [2023] EWCA Civ 745, para. 325.

76. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15647/index.do.

77. *AAA (Syria)* [2023] EWCA Civ 745, para. 327.

78. Displaced Persons Act of 1948, Pub. L. No. 80-774, §§ 2(c)-4, 62 Stat. 1009, 1011 (1948).

79. *See* Denise Gilman, *Making Protection Unexceptional: A Reconceptualization of the U.S. Asylum System*, 55 Loy. L. J. 1 (2023).

80. *See* U.S. Embassy & Consulates in Mex., *The Merida Initiative* (Sept. 7, 2021), https://mx.usembassy.gov/the-merida-initiative/.

81. Agreement to Stop Clandestine Migration of Residents of Haiti to the United States, Haiti-U.S., Sept. 23, 1981, 33 U.S.T. 2559. Ironically, this agreement was entered into just a year after the United States passed the 1980 Refugee Act, which was intended to codify U.S. treaty obligations under the 1967 Protocol into domestic law and implement non-discriminatory asylum procedures to any and all individuals who entered U.S. territory seeking relief from persecution.

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82. *See Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993).

83. 8 U.S.C. §§ 1158(a)(2)(A) and 1158(b)(2)(A) (detailing the safe third country exception to asylum and the requirement that asylum-seekers not be firmly resettled in another country before arriving to the United States, respectively).

84. Refugee Relief Act of 1953, § 2(a), Pub. L. No. 83-203, 67 Stat. 400 (1953) (amended 1954 and 1957). The Refugee Convention states in Art. 1 that an individual is excluded from being, or ceases to be a refugee if he has "acquired a new nationality and enjoys the protection of the country of his new nationality," or "is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country." Convention Relating to the Status of Refugees, art. 1 §§ (C) and (E), July 28, 1951, 189 U.N.T.S. 137.

85. *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 50-52 (1971).

86. *See* Asylum Procedure, 8 C.F.R. § 208.8(f)(1)(ii) (1981). Firm resettlement was established under the Regulations when: (1) an individual had been offered "resident status, citizenship, or some other type of permanent resettlement" in another country through which he or she had travelled "as a consequence of his flight from persecution," unless (2) the individual faced significant and deliberate restrictions to residence in the country that prevented a finding of resettlement. *See id.*

87. *See id.* at § 208.14. The factors in the Interim Regulations of 1981 compared favorably with the factors UNHCR has stated should be taken into account in deciding what "effective protection" entails in deciding whether a refugee could be transferred to a "first country of asylum." *See* UNHCR, *A Guide to International Refugee Protection and Building State Asylum Systems*, Refworld 163 (2017), https://www.refworld.org/reference/manuals/unhcr/2017/en/120593.

88. *Matter of Soleimani*, 20 I&N Dec. 99, 104 (BIA 1989).

89. *See id.* at 106.

90. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, div. C § 306, Pub. L. No. 104-208, 110 Stat. 3009-546; 8 C.F.R. § 1208.13 (2023).

91. 8 C.F.R. § 1208.13(c)(1), (2)(i)(B) (2001).

92. *Matter of A–G–G–*, 25 I&N Dec. 486 (B.I.A. 2011). For this approach, see *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001); *Diallo v. Ashcroft*, 381 F.3d 687 (7th Cir. 2004); *Maharaj v. Gonzales*, 450 F.3d 961 (9th Cir. 2006).

93. *Matter of A–G–G–* at 495-96. For this approach, see *Sall v. Gonzales*, 437 F.3d 229, 233 (2d Cir. 2006); *Mussie v. INS*, 172, F.3d 329, 331 (4th Cir. 1999).

94. *Matter of A–G–G–*, 25 I&N Dec. 486, 502 (B.I.A. 2011).

95. 8 C.F.R. § 208.13(b)(3) (2023) (providing factors adjudicators should consider when determining asylum eligibility, including "whether the applicant would face other serious harm in the place of relocation; ongoing civil strife in the country; administrative, economic, or judicial infrastructure; geographic limitations; and social and cultural constraints such as age, gender, health, and social and family ties"). *Matter of A–G–G–* is included in the USCIS training manual as good law until today. *See* U.S. Citizenship & Immigr. Servs., *RAIO Directorate-Officer Training* 8, 29-30 (Dec. 20, 2019), https://www.uscis.gov/sites/default/files/document/foia/Firm_Resettlement_LP_RAIO.pdf. For additional examples of the *Matter of A–G–G–* framework being applied, see *Matter of K–S–E–*, 27 I&N Dec. 818 (B.I.A. 2020); *Matter of D–X– & Y–Z–*, 25 I&N Dec. 664 (B.I.A. 2012).

96. *See* 8 U.S.C. § 1158(a)(2)(A).

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97. *See* Implementation of the 2022 Additional Protocol to the 2002 U.S.-Canada Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, 88 Fed. Reg. 18239 (Mar. 28, 2023) (to be codified at 8 C.F.R. § 208).

98. Agreement on Cooperation Regarding the Examination of Protection Claims, Guat.-U.S., July 26, 2019, T.I.A.S. No. 19-1115; Agreement on Asylum Cooperation, Hond.-U.S., Sept. 25, 2019, T.I.A.S. No. 20-325; Agreement for Cooperation in the Examination of Protection Claims, El Sal.-U.S., Sept. 20, 2019, T.I.A.S. No. 20-1210.

99. *See* Press Release, Anthony J. Blinken, Sec'y of State, Suspending and Terminating the Asylum Cooperative Agreements with the Governments of El Salvador, Guatemala, and Honduras (Feb. 6, 2021), https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/#:~:text=The%20United%20States%20has%20suspended,laid%20out%20by%20President%20Biden.

100. *See* Democratic Staff of S. Foreign Rels. Comm., Cruelty, Coercion and Legal Contortions: The Trump Administration's Unsafe Asylum Cooperative Agreements with Guatemala, Honduras and El Salvador (Jan. 18, 2021).

101. *See* Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., Dec. 5, 2002, T.I.A.S. No. 04-1229. *See also* Can. Council for Refugees v. Can., [2007] F.C. 1262 (Can. Fed. Ct.); Can. Council for Refugees v. Can., [2020] F.C. 770 (Can. Fed. Ct.).

102. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33843 (Jan. 19, 2021) (codified at 8 C.F.R. §§ 208, 1003, 1208).

103. The Trump administration instituted a number of other immigration and border control measures that did not specifically relate to first or third country bars. These included "Metering," under which daily numerical limits were placed on individuals seeking asylum at the border; the Humanitarian Asylum Review Program (HARP) and the Prompt Asylum Case Review (PACR) programs. These imposed expedited processing of asylum and other forms of relief to within 10 days, applied a heightened standard of proof for asylum, and swift removal of individuals whose cases were denied. Under these programs, asylum seekers were detained in CBP custody while their proceedings were pending. HARP applied to Mexican nationals, while PACR applied to non-Mexicans, but under the same rules. For an excellent review of the policies of the Trump administration, see Muzaffar Chishti and Jessica Bolter, *Interlocking Set of Trump Administration Policies at the US-Mexico Border Bars Virtually All from Asylum*, Migration Pol'y Inst. (Feb. 27, 2021), https://www.migrationpolicy.org/article/interlocking-set-policies-us-mexico-border-bars-virtually-all-asylum. Most but not all of these policies have been terminated by the Biden administration.

104. *See Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022) (affirming decision striking down Title 42, on grounds that the policy was arbitrary and capricious; the policy was ended by the Biden administration in May 2022).

105. U.S. Customs & Border Patrol, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics.

106. IIRIRA established a new adjudication process known as "expedited removal" that authorized officials to rapidly remove individuals who entered without valid or fraudulent entry documents without a hearing before an immigration judge. *See* Illegal Immigration Reform and Immigration Responsibility Act, § 212(a)(6)(c). Expedited

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removal bars an individual from re-entering the United States for five years, and violation is a criminal offense. *See id.* Both Trump and Biden administrations expanded the use of expedited removal under their policies before the Biden administration discontinued the most expansive use instituted by the prior administration, in 2022. *See* Katie Wermus, *Biden Admin Ends Trump-Era Rule Expediting Removal of Some Migrants*, Newsweek (Mar. 18, 2022, 11:49 a.m.), https://www.newsweek.com/biden-rescinds-title-42-trump-era-rule-expedited-removal-migrants-1689515. Additional new policies announced by the Biden administration but not precisely relevant for safe country principles include the Cuban, Haitian, Nicaraguan, and Venezuelan (CHNV) parole programs; the establishment of Regional Processing Centers in several countries to process individuals seeking admission to the United States; and the imposition of stiffer penalties on aliens failing to seek lawful entry to the United States. *See* Dept. Homeland Sec., *Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration* (Apr. 27, 2023), https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration.

107. *See* Circumvention of Lawful Pathways, 88 Fed. Reg. 31449 (May 16, 2023) (codified at 8 C.F.R. § 208).

108. *See Credible Fear: A Screening Mechanism in Expedited Removal*, Hum. Rts. First (Feb. 2018), https://humanrightsfirst.org/wp-content/uploads/2022/10/Credible_Fear_Feb_2018.pdf (explaining that a "credible fear interview" involves an officer's determination of whether a "significant possibility" exists that a noncitizen will be able to demonstrate eligibility for asylum).

109. *Innovation L. Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019), *vacated*, *Innovation L. Lab v. Mayorkas*, 5 F.4th 1099 (9th Cir. 2021) (mem.).

110. *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021); *Innovation L. Lab v. Mayorkas*, 5 F.4th 1099 (9th Cir. 2021) (mem.).

111. *Innovation L. Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *vacated*, *Innovation L. Lab v. Mayorkas*, 5 F.4th 1099 (9th Cir. 2021) (mem.).

112. *E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec.*, 950 F.3d 177 (3d Cir. 2020).

113. *Doe v. Wolf*, 432 F. Supp. 3d 1200 (S.D. Cal. 2020).

114. *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 960 (N.D. Ca. 2019), *order reinstated*, 391 F. Supp. 3d 974 (N.D. Cal. 2019).

115. *E. Bay Sanctuary Covenant v. Barr*, 946 F.3d 832, 857-58 (9th Cir. 2020), *amended and superseded on denial of rehearing en banc sub nom.*, 994 F.3d 962 (9th Circ. 2020). The injunction was lifted against all states but California. *See Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019).

116. *E. Bay Sanctuary Covenant*, 946 F.3d at 849-50.

117. *See Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019).

118. For a thorough review of the litigation against the Trump and Biden asylum policies, see E. Bay Sanctuary Covenant v. Biden Amended and Supplemental Complaint for Declaratory and Injunctive Relief, U.S. Dist. Ct. N.D. Ca., Case No. 18-cv-06810 JST.

119. *Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020).

120. *See id.* at 32, 35-36, 58-60.

121. Circumvention of Lawful Pathways, 88 Fed. Reg. 31449 (May 16, 2023) (codified at 8 C.F.R. § 208).

122. *See* Press Release, Can. Council for Refugees, The U.S. Is Less Safe Than Ever for Refugees, Evidence Filed in Court Challenge Shows (July 4, 2018), https://

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ccrweb.ca/en/media/safe-third-court-challenge-july-2018; *see also* Libr. of Parliament Hill studies, Overview of the Canada-United States Safe Third Country Agreement (Sept. 1, 2023), https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/202070E (detailing challenges to the constitutionality of the Safe Third Country Agreement in Canada).

123. Complaint at 44-48, *U.T. v. Barr*, No. 1:20-cv-00116-EGS (D.D.C. filed Jan. 15, 2020) (Court Listener), ECF No. 3.

124. *See* Min. Order, *U.T. v. Barr*, No. 1:20-cv-00116-EGS (D.D.C. ordered Mar. 15, 2021).

125. *See* Press Release, Anthony J. Blinken, U.S. Sec'y of State, Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras (Feb. 6, 2021), https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/.

126. *See* Amended and Supplemented Complaint at para. 77, E. Bay Sanctuary Covenant v. Barr, 964 F.3d 832 (9th Cir. 2019) (Nos. 19-16487 19-16773).

127. *Id.* at paras. 112-124.

128. *See id.* at para. 223.

129. *See id.* at para. 224.

130. *See id.* at para. 225.

131. *See* Amended and Supplemented Complaint at paras. 226-229, E. Bay Sanctuary Covenant v. Barr, 964 F.3d 832 (9th Cir. 2019) (Nos. 19-16487 19-16773) (*citing* 8 USC Sec. 1158(b)(2); 1158(d)(5)(B); 5 USC Sec. 706(2)(A)-(C)).

132. *See E. Bay Sanctuary Covenant v. Biden*, 2023 U.S. Dist. LEXIS 128360 (N.D. Cal. Jul. 25, 2023).

133. *Id.* at *16-20.

134. *Id.* at *25-28.

135. *See id.* at *51 (citing a report documenting violent crimes against 13,480 migrants in Mexico between Jan. 2021 and Dec. 2022).

136. Order, E. Bay Sanctuary Covenant v. Biden, 2023 U.S. Dist. LEXIS 128360 (N.D. Cal. Jul. 25, 2023) (No. 4:18-cv-06810-JST) (granting motion to stay the district court's order and judgment).

137. Immigr. & Naturalization Serv. v. Stevic, 467 U.S. 407, 428 n. 22 (1984). *See also* Haitian Refugee Ctr. v. Christopher, 43 F.3d 1431 (11th Cir. 1995) (affirming an order denying Haitian migrants' efforts to enjoin the government's repatriation of Haitian migrants from safe haven outside the physical borders of the United States).

138. A.V. Dicey, An Introduction to the Study of the Law of the Constitution 39-10 (10th ed. 1985).

139. *See* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership to Strengthen Shared International Commitments on the Protection of Refugees and Migrants, U.K.-Rwanda (May 12, 2023), https://treaties.fcdo.gov.uk/awweb/pdfopener?md=1&did=82390.

140. *See Country Information Note Rwanda: Annex 2 (UNHCR Evidence)* at 33, 48 (Dec. 11, 2023), https://assets.publishing.service.gov.uk/media/65a15c7b74ae660014738a48/CIN_RWA_UNHCR_evidence.pdf.

141. UNHCR, *UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers Under the UK-Rwanda Arrangement: An Update* (Jan. 15, 2024) at

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para. 19, https://www.unhcr.org/uk/media/unhcr-analysis-legality-and-appropriateness-transfer-asylum-seekers-under-uk-rwanda-1. However, UNHCR expressed considerable doubt that genuine change could be achieved quickly, and without "long-term and fundamental engagement and changes in institutional culture." *Id.* at para. 20.

142. This tacit sidelining of RSD also caused UNHCR concern, which remarked, "the integrity of the global asylum system requires processes that differentiate between refugees and those not in need of international protection. This is essential to public confidence, and to ensuring that effective international protection and local integration opportunities will be accorded to those in need." *Id.* at para. 22.

143. Safety of Rwanda (Asylum and Immigration) Bill 2023-24, H.L. Bill [51] cl. 2(1) (UK).

144. *Id.* at cl. 1(4).

145. *Id.* at cl. 3.

146. *See Safety of Rwanda Bill Corrodes the Rule of Law and Access to Justice*, The L. Soc'y (Jan. 29, 2024), https://www.lawsociety.org.uk/topics/immigration/our-view-on-safety-of-rwanda-bill.

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Shaping Immigration Policy Through Federal Courts

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Abstract: It is often assumed that federal courts have very little role in shaping immigration policy. Jurisdictional provisions in the Immigration and Nationality Act purport to eliminate judicial review of discretionary decisions, and where the *Chevron* or *Kisor* doctrines are applied, courts tend to defer broadly to the agency's decision. This article argues that to the contrary, federal courts have an important role in shaping immigration policy. Courts can and should review discretionary agency decisions under the arbitrary and capricious standard, which calls for a careful review of the agency's decision. Under this standard, although courts cannot properly make the policy decisions themselves, they have broad authority to ensure that in the implementation of immigration laws, the agency fairly considers and reasonably protects the individual rights and interests at stake.

Immigration policy at the administrative level is developed primarily through two agencies: the Department of Homeland Security (DHS) (acting under the direction of the secretary of DHS) and the Executive Office for Immigration Review (EOIR) (acting under the authority of the U.S. attorney general).[1] DHS typically adopts policies either through executive action; that is, through notice and comment rulemaking or by issuing agency guidelines or memos. EOIR, although it uses rulemaking at times, more often than not adopts policies in the context of adjudication; that is, through the Board of Immigration Appeals' (BIA) issuance of precedent decisions that interpret immigration statutes.[2] In either case, when agency policies are challenged the government typically argues that courts should not interfere. It is often assumed that jurisdiction-stripping provisions enacted in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[3] eliminate judicial review of a broad range of discretionary decisions. If the court does have jurisdiction, then given the agency's broad authority (or "plenary power") to interpret and implement immigration laws, the government argues that courts should defer to the agency. In terms of *Chevron*/*Auer* deference, the view is that if a statute or regulation is ambiguous, then—in terms of courts shaping immigration policy—the game is (almost always) over: courts should simply defer to the agency interpretation.[4] I believe this understanding of the role of federal courts is inaccurate. Although in the past there may have been a judicial tendency to give special deference to the executive branch on immigration issues, times are changing. Even given the limitations on judicial review in

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IIRIRA and the policy of *Chevron*/*Auer* deference, whether policies are adopted through executive action or through adjudication, courts do have a significant role in shaping immigration policy and in ensuring that immigration laws are implemented in a fair manner sensitive to the individual rights at stake.[5]

Judicial Review of Constitutional Claims and Questions of Law

In 1996 Congress enacted an array of jurisdiction-stripping provisions that purport to limit or eliminate judicial review of immigration policies.[6] It has been said that the theme of these provisions is to eliminate judicial review of discretionary decisions made by the executive branch.[7] The provision most relevant for our purposes, 8 U.S.C. § 1252(a)(2)(B), explicitly purports to eliminate judicial review of discretionary decisions. It states:

> [N]o court shall have jurisdiction to review—
> (i) any judgment regarding the granting of relief [for certain listed discretionary immigration benefits], or
> (ii) any other decision or action . . . the authority for which is specified [in the INA] to be in the discretion of the Attorney General or the Secretary of Homeland Security. . . .

Thus, it may initially appear that there is no role for courts to play in reviewing or shaping the immigration policies adopted by the agency as a matter of discretion; review of discretionary policy decisions is precluded by IIRIRA's jurisdiction-stripping provisions.

That view, however, is not accurate. First, there is a strong general presumption that executive actions are reviewable.[8] Courts have interpreted § 1252(a)(2)(B) narrowly. In *St. Cyr*, the Supreme Court limited the reach of IIRIRA's jurisdiction-stripping provisions, stating that "[a] construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."[9] Following *St. Cyr*, several lower courts held that § 1252(a)(2)(B) does not preclude review of constitutional claims or questions of law.[10] And in enacting the REAL ID Act[11] in May 2005, Congress accepted this view and added amendments to § 1252 making it clear that—at least in the context of judicial review of orders of removal—§ 1252(a)(2)(B) does not prevent a court from reviewing constitutional claims or questions of law. According to § 1252(a)(2)(D), "Nothing in [§ 1252(a)(2)(B)] . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals" in accordance with § 1252. Thus, in spite of IIRIRA's jurisdiction-stripping provisions, there is still room for judicial review of constitutional claims and questions of law.[12]

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Review for Arbitrary and Capricious Decisions

It is well established that a court cannot substitute its policy judgment for that of the agency; where an agency has discretion under a statute, the court must defer to the agency's decision regarding the best policy.[13] However, what is important for our purposes here is that the manner in which the agency exercises its discretion is reviewable as a question of law. Decisions made by federal agencies are generally reviewable under the Administrative Procedure Act (APA), which "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts."[14] The APA requires agencies to engage in "reasoned decisionmaking."[15] Agency actions that are "arbitrary" or "capricious" are to be "held unlawful and set aside."[16] In this context, the court is required to assess whether, when the agency adopts a policy, its decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment."[17]

Immigration policies adopted through executive action (that is, by notice-and-comment rulemaking or by executive memorandum or guidelines, not in the context of removal proceeding adjudication) are generally not subject to the jurisdiction-stripping provisions in § 1252.[18] Section 1252(a)(2)(B) in particular does not preclude challenges to the agency's regulations, orders, or directives adopting policies. Subsection (a)(2)(B)(i) applies to the adjudication of applications for certain types of benefits, not to agency action adopting general policies. And although subsection (a)(2)(B)(ii) is potentially relevant in that it bars review of "any other [discretionary] decision," it precludes review only if the authority for such decisions is specified by statute to be in the discretion of the agency, which is normally not the case for immigration policies adopted through executive action outside of removal proceedings.[19] Thus, challenges to agency decisions adopting policies outside the removal context are filed in the district court and are generally subject to review under the APA's "arbitrary and capricious" standard.[20]

Immigration policies adopted through adjudication by the BIA are subject to different considerations. Judicial review of those decisions is more complicated because the jurisdiction-stripping provisions in § 1252 apply. Nevertheless, important aspects of the BIA's decisions are reviewable under an "arbitrary and capricious" standard similar to that under APA § 706(2)(A).[21]

Consider, for example, the case of *Patel v. Garland*.[22] Patel's application for adjustment of status was denied by an immigration judge based on a finding that Patel had made a false claim to U.S. citizenship and therefore was ineligible under 8 U.S.C. § 1182(a)(6)(C)(ii). In adjudicating the application, the immigration judge was called on to do a variety of things, including the following:

1. decide whether an immigrant visa was immediately available for Patel,

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2. decide how § 1182(a)(6)(C)(ii) should be interpreted,[23]
3. determine the relevant findings of fact,
4. apply the interpretation of § 1182(a)(6)(C)(ii) to the findings of fact to determine whether Patel was inadmissible for having made a false claim to U.S. citizenship,
5. determine whether there is a waiver available of the ground of inadmissibility, and
6. finally (assuming eligibility for adjustment of status), decide whether the application should be granted as a matter of discretion.

Section 1252(a)(2)(B)(i) clearly prohibits judicial review of the ultimate decision whether to approve adjustment of status as a matter of discretion. It says that no court has jurisdiction to review any judgment regarding the granting of an application for adjustment of status. In *Patel*, the Supreme Court held further that § 1252(a)(2)(B)(i) prohibits federal court review of the agency's findings of fact.[24] But importantly, the Court also noted that § 1252(a)(2)(D) restores review of constitutional claims and questions of law.[25] This includes review to ensure that procedural requirements have been complied with[26] and review to ensure that discretion is exercised in a lawful manner.[27] Moreover, just recently the Supreme Court held that courts have jurisdiction to review the agency's application of law to facts (called "mixed questions").[28]

For purposes of this article, we will focus on the second item of the list above: the proper interpretation of the relevant statutory provisions and, relatedly, the proper interpretation of any relevant regulations. In many cases, the BIA must interpret an "open statute" or "open regulation"; that is, a statute or regulation that is indeterminate or ambiguous in that it can reasonably be interpreted in different ways. For the most part, the interpretation of these open provisions does not occur through notice-and-comment regulations or agency guidelines, but instead through adjudication by the BIA, and in particular through the issuance of precedent decisions.[29]

Courts review the BIA's interpretation of the statute as a question of law under the familiar *Chevron* doctrine.[30] Under this doctrine, the initial question (*Chevron* step one) is whether there actually are "gaps" or "ambiguities" in the statute that need to be resolved. That is a question for the courts to answer; "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[31] If the court determines that the statute is clear and unambiguous, then that meaning must be given effect; the court gives no deference to the agency's interpretation. If, on the other hand, the statute is ambiguous, then (*Chevron* step two) the court presumes that Congress intends for the agency to resolve the ambiguity and determines whether the agency's interpretation is reasonable.[32] The analysis at this step is "the same . . . in substance" as "arbitrary and capricious" analysis under § 706(2)(A) of the APA, according to which a "reviewing court shall . . . hold unlawful and set aside agency action, findings,

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and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[33]

Similarly, courts review the BIA's interpretation of regulations as a question of law under the *Auer* doctrine. Before *Auer* deference comes into play, however, there is an initial *Chevron* question: Does the governing statute have any ambiguity that allows for regulatory interpretation? For *Auer* deference to apply, the *Chevron* prerequisites relating to the governing statute must first be met. That is, if the governing statute is not ambiguous, that is the end of the matter. There is no room for the agency to adopt a regulation that is inconsistent with the statute—either via a regulation that is clear and unambiguous or via a regulation that is ambiguous and might otherwise be eligible for *Auer* deference.

Assuming that the statute is "open" and allows for interpretation, the court considers whether the agency's interpretation of its regulation deserves *Auer* deference. In *Kisor v. Wilkie*,[34] the Supreme Court explained how *Auer* deference is to be applied. Here, the analysis involves "the same approach" as *Chevron*.[35] At the first step, the court reviews the regulation to determine whether it is in fact ambiguous. A court cannot "wave the ambiguity flag" just because the regulation might on a first read seem susceptible of different interpretations;[36] rather, the court must use "all the traditional tools of construction" and "carefully consider[ ] the text, structure, history, and purpose of a regulation."[37] If, after this careful analysis, the court determines that the regulation is not ambiguous, then the court orders the regulation to be applied as written.

On the other hand, if there is ambiguity in the regulation, then the court considers whether the agency's interpretation is reasonable. At this step, there are "some especially important markers for identifying when *Auer* deference is and is not appropriate."[38] First, the interpretation of the regulation must be the "authoritative" or "official position" of the agency countenanced by the head of the agency. The court does not give *Auer* deference to an agency's unofficial or ad hoc interpretation.[39] Second, the agency's interpretation must "in some way implicate administrative "knowledge and expertise"; for example, where the interpretation "implicate[s] policy expertise" or involves "weighing the costs and benefits" of taking a certain action.[40] Finally, an agency must exercise "fair and considered judgment." *Auer* deference is not given to the agency's "convenient litigating position" or "post hoc rationalizatio[n]" advanced to defend past agency action. Nor is *Auer* deference given to an interpretation that has failed to consider the costs or hardships imposed on a party.[41] As in the context of ambiguous statutes, the analysis at this stage is essentially "arbitrary and capricious" review of the agency's interpretation.[42]

Thus, when immigration policies are developed—whether through executive action by DHS or through adjudication of individual cases by the BIA—federal courts can review the agency decisions to ensure that they are not "arbitrary or capricious." In this way, the court "has maintained a strong judicial role in interpreting rules."[43]

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Agency's Duty to Give Fair Consideration to All Individual Interests

In the nonimmigration context, if a court after employing all of the "traditional tools of statutory interpretation" determines that the statute is "open" (i.e., the statute is indeterminate in that it can reasonably be implemented in different ways) it is assumed that the agency has some level of discretion in determining how to implement the statute. However, the exercise of that discretion is reviewed by the courts. And courts—in reviewing under the "arbitrary and capricious" standard—have a significant role in shaping the exercise of agency discretion. The "arbitrary and capricious" standard requires careful judicial review of the agency's decision. At this stage, when an agency decides how to implement an "open" statute, it is not supposed to engage in statutory analysis to determine which policy to adopt. Rather, the agency in effect acts as a substitute for the legislature and decides what particular rule should be adopted as a matter of policy; the agency must consider the various competing legislative purposes, weigh the advantages and disadvantages of the different possible policy options, and decide based on its expertise which policy to adopt.[44]

When an agency implements an open statute, it has discretion, but that discretion is not unbounded. The agency's choice must have a reasonable connection to the statute[45] and the agency must provide a reasonable explanation for the choice it has made. As long as the agency has carefully considered the relevant competing interests at stake and reasonably balanced those interests, courts will defer to the agency's decision. That is because "the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated."[46]

Although the agency has discretion in interpreting an open statute, courts have an important role in ensuring that agencies in fact provide a fair review of all the competing interests involved.[47] The Supreme Court has provided the following guidance:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[48]

Thus, the agency's decision must reflect an awareness of the competing interests at stake and an understanding of the burdens that may be imposed on various parties.[49] If the agency fails to recognize the competing interests at stake

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or does not give adequate consideration to the competing interests, then its decision is arbitrary and capricious.

For example, in *Michigan v. EPA*,[50] the Supreme Court overturned the EPA's implementation of the Clean Air Act for failure to consider "all the relevant factors."[51] In particular, in adopting an environmental regulation the agency failed to consider the costs that would be imposed on power plants subject to the regulation. The Clean Air Act authorizes the Environmental Protection Agency (EPA) to regulate pollution from power plants as long as the regulations are determined to be "appropriate and necessary" after a study of the public health hazards. The Court held that although the term "appropriate and necessary" is ambiguous and the agency is entitled *Chevron* deference if its interpretation is reasonable, the EPA had "strayed far beyond the bounds [of reasonable interpretation]" because it had failed to give adequate consideration to the costs imposed on the regulated power plants.[52] Burdens on regulated parties must be considered, even if that is not specifically required by the governing statute, because "[n]o regulation is 'appropriate' if it does significantly more harm than good."[53] According to the Court:

> Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions. . . . Against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether "regulation is appropriate and necessary" as an invitation to ignore cost.[54]

Justice Elena Kagan, although dissenting on the merits, agreed: "[S]ensible regulation requires careful scrutiny of the burdens that potential rules impose."[55] Where an agency fails to consider carefully the burdens imposed on regulated parties, its decision is arbitrary and capricious.[56]

Encino Motorcars LLC v. Navarro[57] involved a dispute about whether auto dealers were required to make overtime payments to their auto service advisors under the Fair Labor Standards Act. The relevant question was whether those advisors were included in the statutory term "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles," a group exempt from overtime rules. Since 1978, the Department of Labor (DOL) had taken the position that auto service advisors were included in this group and thus exempt from overtime payments. In 2011, however, DOL adopted a new policy (via notice-and-comment rulemaking) reversing its position. The Ninth Circuit upheld the agency's policy, finding that the statutory language is ambiguous and stating at *Chevron* step two that "where there are two reasonable ways to read the statutory text, and the agency has chosen one interpretation, we must defer to that choice."[58] The Supreme Court, applying arbitrary-and-capricious review, rejected that analysis as too superficial. The Court noted that, given DOL's prior policy, the auto dealers involved had

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"significant reliance interests" at stake. DOL, however, said "almost nothing" explaining why the interests of the auto service advisors should override those competing interests.[59] Because "the agency has failed to provide even that minimal level of analysis," the Court held that its interpretation of the statute was "arbitrary and capricious."[60]

In *Christopher v. SmithKline Beecham Corp.*,[61] the Supreme Court refused to give *Auer* deference to DOL's interpretation of ambiguous regulations under the Fair Labor Standards Act. Under that act, persons working as an "outside salesman" are not protected by minimum wage and maximum hour rules. Congress did not define who should be considered an "outside salesman," but it stated that the term was to be "defined and delimited from time to time by regulations of the Secretary."[62] DOL adopted regulations interpreting the term, but the regulation was ambiguous as to whether pharmaceutical representatives fell under the definition. DOL initially interpreted the regulations to include pharmaceutical representatives under the definition, but changed that interpretation in 2009, resulting in significant liability on employers for back pay; according to the Court, there was "potentially massive liability" on employers for conduct that occurred before DOL's interpretation was announced.[63] Giving deference to DOL's interpretation would, the Court said, constitute an "unfair surprise" for the employer and thus *Auer* deference was improper. Instead of deferring to the agency's interpretation under *Auer*, the Court applied *Skidmore* analysis.[64] Under *Skidmore*, the appropriate "measure of deference" to an agency decision is "proportional to the 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'"[65] Finding that DOL's interpretation "lacks the hallmarks of thorough consideration,"[66] the Court refused to defer to the agency interpretation.

The Supreme Court's decisions in *Michigan*, *Encino Motorcars*, and *Christopher* indicate that *Chevron*/*Auer* deference as a doctrine of facile judicial deference to the agency is overrated.[67] Following those cases, the D.C. Circuit refused to give *Chevron* deference to the Department of Interior's interpretation of an ambiguous provision in the Endangered Species Act. In *Humane Society v. Zinke*,[68] the plaintiffs challenged a Department of Interior decision to end protection for a certain subpopulation of the gray wolf. Although the gray wolf had been on the endangered species list for many years, the agency designated a "distinct population segment" consisting of wolves in the Western Great Lakes region and then took that subgroup off the endangered species list. The D.C. Circuit held that the statute was ambiguous as to whether a "distinct population segment" of a protected species could be designated for delisting. Because the agency's decision appeared reasonable, it might have seemed that the court should defer to the agency under *Chevron*. The court held, however, that the agency's decision must be reviewed under the arbitrary-and-capricious standard. And the agency failed. In making the decision to delist the Western Great Lakes wolves, the agency looked at the impact on the designated subgroup but ignored the impact on the remaining group.[69]

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According to the court, the agency "cannot call it quits" after considering the impact of its decision only on one affected subgroup.[70] The decision was arbitrary and capricious because it failed to consider the impact of its decision on all of the groups affected. An agency must "look at the whole picture . . . , not just a segment of it."[71]

"Looking at the whole picture" means that constitutional rights that are potentially at stake cannot be overlooked. In *AFL-CIO v. FEC*,[72] the union challenged the Federal Election Commission's (FEC) policy of releasing to the public files it compiled during the course of an investigation into possible election law violations. After an investigation against the AFL-CIO was closed with no finding of a violation, the FEC intended—in accordance with its postcompletion policy—to release thousands of pages of documents it had obtained from the union, including confidential documents reflecting polling data, training programs, and state-by-state strategy discussions. The union claimed that the release of those documents would reveal its political discussions and strategies to political opponents and thereby frustrate its future ability to pursue their political goals effectively. The union argued further that the FEC's release policy was prohibited by the statute, which provides that "any . . . investigation made under this section shall not be made public . . . without the written consent" of the persons investigated. In response, the FEC argued that it interpreted the statute to prohibit making public the fact of an ongoing investigation, but not the release of the files it compiled during the course of an investigation after the investigation was completed. The court found the statute ambiguous and thus proceeded to consider whether the agency's release policy should be given *Chevron* deference. The court noted that the union had First Amendment interests at stake and the disclosure of its confidential information and confidential discussions would intrude on the union's privacy rights of association.[73] However, in adopting its release policy the agency made no attempt to take those First Amendment interests into account. According to the court, "the constitutional issues raised by the Commission's disclosure policy are properly addressed at *Chevron* step two" and the Commission must tailor its disclosure policy "to avoid unnecessarily infringing on [those] interests."[74] Because the agency "fails to undertake this tailoring, . . . the regulation is impermissible."[75]

Thus, at least in the nonimmigration context, the agency must carefully consider all of the competing interests that are at stake, including individual interests, and give a "reasoned explanation" why it gives one set of interests greater weight than other interests.[76]

Fair Review of Individual Interests in the Immigration Context

In the immigration context courts have traditionally downplayed the importance of individual rights and up-played the government's plenary

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power. Under this view, the legislative and executive branches of government have full power to control immigration policies and are entitled to great deference. Individual interests can be ignored. The doctrine has its roots in late nineteenth-century Supreme Court case law. In *Chae Chan Ping v. United States*,[77] for example, the Court stated:

> If . . . the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, . . . its determination is conclusive upon the judiciary.[78]

Sixty years later the Court reiterated the view:

> Any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.[79]

The doctrine is sometimes expressed in an especially virulent form as the view that the legislative and executive branches have "complete and absolute power"—unreviewable by the courts—over the admission and exclusion of noncitizens.[80] In any event, under the plenary power doctrine courts have generally given broad deference to immigration policies adopted by the political branches without giving consideration to the interests of the individuals affected.[81]

The "plenary power" doctrine, however, has lost much of its force, at least with respect to deference to the executive branch. Recently, the Supreme Court has repeatedly reviewed immigration policies without giving any hint that special deference to the government's interpretation is due.[82] As currently practiced, the plenary power doctrine is not an absolute rule eliminating or substantially limiting the role of the courts. Rather, it is a rule that requires some deference to the political branches when foreign affairs or national security is at issue, but does not require any special deference to the interests of the government.[83]

For example, in *Negusie v. Holder*,[84] the Supreme Court, without indicating that any special "plenary power deference" is owed to the BIA, invalidated its interpretation of the "persecutor bar," a provision in the Refugee Act of 1980 that disqualifies individuals from refugee status if they have assisted or otherwise participated in the persecution of others.[85] The BIA held that there was only one proper way to interpret the statute, namely as requiring the application of the "persecutor bar" even if the applicant's assistance or participation was coerced or the product of duress. The Supreme Court rejected

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that interpretation, holding that the statute is ambiguous.[86] And although the BIA has leeway in interpreting an ambiguous statute and is potentially eligible for *Chevron* deference, nevertheless the Court found that it was premature to consider whether to give *Chevron* deference because the BIA did not properly exercise its *Chevron* step two policymaking discretion. The BIA did not "evaluate the evidence" and "bring its expertise to bear upon the matter" under the correct statutory framework.[87] According to the Court, "[i]f an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see."[88] At that point, after the BIA has exercised its policymaking discretion, courts may review the decision at *Chevron* step two under the arbitrary-and-capricious standard.[89]

In *Judulang v. Holder*,[90] the Supreme Court applied the APA's "arbitrary and capricious" standard and found the BIA's interpretation of the statute to be invalid because it failed to consider and evaluate the relevant individual interests at stake. Section 212(c) of the INA creates a waiver for certain grounds of inadmissibility and deportation. The issue in *Judulang* was whether this waiver is available for certain lawful permanent residents who have not traveled outside the United States. The Court held that the BIA's interpretation was arbitrary and capricious because it treated the issue as one of legal analysis—statutory interpretation divorced from a consideration of the underlying human interests at stake—rather than as a policy choice involving the balancing of competing interests. The BIA's decision was "a clear error of judgment" because it was not "based on a consideration of the relevant factors."[91] Specifically, the BIA ignored the human interests at stake; when the BIA makes a policy choice, it is required to consider "the high stakes for an alien who has long resided in this country."[92]

In *Department of Homeland Security v. Regents of the University of California*,[93] the Supreme Court (citing *Encino*) applied APA § 706(2) and rejected as arbitrary and capricious DHS's decision to rescind the Deferred Action for Childhood Arrivals (DACA) program, without suggesting that the agency's decision merited any type of special deference. The Court noted that DACA recipients had developed "serious reliance interests" that were at stake.[94] Rescinding the program would put DACA beneficiaries at risk of being deported from the United States. Not only would that affect the interests of the noncitizens themselves, who had enrolled in colleges, embarked on careers, and purchased homes, but the consequences would "radiate outward" to their families, including U.S. citizen spouses and children, and to employers who had invested time and money in training them for jobs.[95] These important individual interests "must be taken into account."[96] In particular, the agency was "required to assess [these] interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[97] "Making that difficult decision was the agency's job."[98] Because the agency failed take these important individual interests into account and balance them

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against the competing interests in ending the program, the agency's decision was arbitrary and capricious.

Thus, recent developments make it clear that when interpreting open immigration statutes, special deference to the agency simply because the matter involves immigration is not appropriate. Immigration agencies—like other agencies—must take into account all of the competing interests at stake, including the interests of the individuals affected. If the agency fails to consider all competing interests and come to a reasonable accommodation of the interests, its policy must be overturned because its decision is arbitrary and capricious.

Protection of Constitutional Rights

The implementation of immigration policies has the potential to and at times actually does interfere with important constitutional rights. Perhaps most obvious, the enforcement of deportation laws entails the arrest, detention, and involuntary removal of individuals from their homes and families. Liberty interests are at stake.[99] Rights to family integrity—arguably protected by the Constitution[100]—are also at stake.[101] And in at least some cases, the enforcement of immigration laws result in penalties that are out of touch with and have no rational connection to the underlying legislative purposes, at least arguably violating substantive due process.[102] These constitutional interests are often at stake and, as the cases discussed above make clear, when the agency interprets and implements the statute, it should take these interests into account.[103]

However, in interpreting statutes and implementing immigration policies, DHS and the BIA generally fail to consider the constitutional rights that are implicated.[104] A representative example is *Matter of Rojas*,[105] which involved the interpretation of the "when released" language in 8 U.S.C. § 1226(c), which requires mandatory detention of certain individuals who have committed certain listed criminal offenses.[106] The BIA found that the statute is ambiguous as to whether mandatory detention applies (1) only to individuals who are taken into Immigration and Customs Enforcement (ICE) custody "when released" from serving a sentence to imprisonment, or (2) to all noncitizens who have ever committed a listed criminal offense regardless of when they were released from criminal custody and regardless of whether they are a danger to the community or a flight risk.[107] Extending the statute to cover all such individuals regardless of when they were released from the underlying offense (including individuals who were released from custody 20 years ago or even longer) clearly raises significant due process concerns. In construing the ambiguity in the statute, one might expect the BIA to take those concerns into account and attempt to balance the "competing policy concerns." However, the BIA failed to do so. Instead, the BIA focused solely on enforcement priorities. According to the BIA:

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> Congress was not simply concerned with detaining and removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens.... [W]e discern that the statute as a whole is focused on the removal of criminal aliens in general, not just those coming into Service custody "when ... released" from criminal incarceration. The objectives and design of the statute as a whole are therefore not consistent with reading the "when released" clause as being part of the meaning of "an alien described in paragraph (1)."[108]

That is all the BIA said. Even though the BIA regarded the statute as ambiguous, calling for a balancing of competing interests, the BIA gave no consideration at all to the constitutional rights of the noncitizens that are at stake.[109] That constitutes a failure to properly exercise policymaking discretion at *Chevron* step two. The D.C. Circuit Court has put it this way:

> *Chevron* step 2 deference is reserved for those instances when an agency recognizes that the Congress's intent is not plain from the statute's face. In precisely those kinds of cases, it is incumbent upon the agency not to rest simply on its parsing of the statutory language—it must bring its experience and expertise to bear in light of competing interests at stake.[110]

The rationale for the BIA's refusal to consider constitutional rights is that an agency is not authorized to second guess Congress and hold that a governing statute is unconstitutional. Rather, the agency is obligated to follow the statute written by Congress. According to the BIA:

> [I]t is not within the province of this Board to pass on the constitutionality of the statutes which we administer. We accept the legislative mandates given us, and we believe that it is within the power and capacity only of the United States courts to declare them unconstitutional.[111]

The rationale for an agency refusing to consider the constitutionality of its enabling act has similarly been explained by the D.C. Circuit as follows:

> [The] consideration for the orderly, efficient functioning of the processes of government ... makes it impossible to recognize in administrative officers any inherent power to nullify legislative enactments because of personal belief that they contravene the constitution. Thus it is held that ministerial officers cannot question the constitutionality of the statute under which they operate. Likewise, it has been held that an administrative agency invested with discretion has no

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> jurisdiction to entertain constitutional questions where no provision has been made therefor.[112]

That rationale, however, has no force in the context of interpreting ambiguous statutes. There, when the agency takes into account constitutional interests at stake, the agency is not challenging the constitutionality of the statute written by Congress. The validity of the statute is assumed: Congress has (either explicitly or implicitly) authorized the agency to interpret the ambiguities in the statute and make the policy choices necessary for implementing the statute. In interpreting an ambiguous statute, the agency makes a policy choice about how best to apply the statute. In doing so, the agency has an obligation to consider the relevant competing interests, especially if constitutional interests are implicated. The various permissible policy choices may impact constitutional interests differently, sometimes to a greater extent and sometimes to a lesser extent. In the immigration context, it may be that the BIA can permissibly infringe on constitutional rights to some degree. But it cannot reasonably do so without considering the impact on the affected persons. Nonetheless, the BIA routinely refuses to consider the constitutional rights of noncitizens and their U.S. citizen family members that are at stake. Typically, the only considerations brought to bear are ones of administrative efficiency and the government's interest in enforcement.

Other agencies, in interpreting ambiguous statutes, consider the impact of their decisions on constitutional rights. For example, the Federal Communications Commission has a nuanced approach to consideration of constitutional claims. On the one hand, the agency recognizes that it "does not have authority to determine the constitutionality of the statutes it enforces"; instead, the agency is "created to enforce the law and effect the legislative mandate."[113] On the other hand, in the context of interpreting open statutes:

> the Commission has recognized that there may be persuasive reasons justifying consideration of constitutional issues by administrative agencies, arising out of both the obligation of each Commissioner to "support and defend the Constitution" and of the expertise of the agency in construing the statutes it enforces, as the result of which it may be in the best position to make the first assessment of their constitutionality. These considerations have led us to suggest that, where the underlying constitutionality of a statute is challenged, the best approach is that administrative agencies ought not blind themselves to constitutional considerations. . . .[114]

Thus, for example, where First Amendment interests are at stake, the agency follows the approach taken by the courts, namely "balancing the First Amendment interests of the commercial speaker against countervailing justifications for the regulation."[115] The enabling statute "does not in any sense

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remove the protected interest[s]" and it does not impose on the agency "an absolute prohibition" on protecting those interests; instead, it requires that those interests "be handled responsibly."[116]

Similarly, although the National Labor Relations Board (NLRB) does not claim authority to consider the constitutionality of the National Labor Relations Act (NLRA), it routinely considers the First Amendment rights that are at stake when it interprets ambiguous statutory provisions. For example, in the *Carpenters & Joiners* case,[117] the NLRB considered whether the union's displaying a large banner announcing a labor dispute and encouraging customers not to patronize the employer violated the NLRA. Section 8(b)(4)(ii)(B) of the NLRA states that it is an unfair labor practice for unions to "threaten, coerce, or restrain" others from doing business with another person. The agency described the key terms of the provision—"threaten, coerce, or restrain" —as "nonspecific, indeed vague," that is, ambiguous. The NLRB then observed that in light of the union's First Amendment rights at stake, these ambiguities in the statute "should be interpreted with 'caution' and not given a 'broad sweep.' . . . [A]dherence to this principle of interpretation reflect[s] concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment."[118]

When the Supreme Court rejected DHS's and the BIA's interpretations in *Negusie*, *Judulang*, and *Regents*, the Court gave no indication that immigration agencies have free reign to interpret the statute without giving fair consideration to constitutional rights at stake. To the contrary, these cases indicate that the agency is required to take into account all competing interests at stake, including constitutional rights that may be implicated, and provide a reasoned explanation for why it favors one set of interests over other competing interests.

Shaping Immigration Policy Through Federal Court Review

Thus, there is an important role for courts to play in shaping immigration policies. When agencies implement immigration statutes, the policies adopted are subject to arbitrary-and-capricious review.[119] Such review is not facile. At the first step, courts must review the statute carefully to determine whether there are any ambiguities in the statute for the agency to resolve. Here, the courts give no deference to the agency.[120] If the court determines that there are no ambiguities in the statute, then the policy adopted by Congress must be followed. If the agency strays from that policy, its actions must be reversed. If, on the other hand, the court determines that the statute is open—that is, there are open policy choices for the agency to make—then, again, the court does not automatically defer to the choice made by the agency. As an initial matter, the agency must actually exercise its policymaking authority; its decision is defective if it fails to do so.[121] Once the agency exercises that authority

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and makes the policy choice, the court reviews the agency's decision under the "arbitrary and capricious" standard. What that means, first, is that it is not enough for the agency action simply to be consistent with the statute;[122] the agency must recognize the different policy options that are available,[123] take into account *all* of the interests at stake,[124] and must specifically consider the impact of its decision on all individuals affected, including those indirectly affected.[125] Finally, it is especially important for the agency to recognize and take into account the constitutional interests at stake.[126] Courts shape immigration policy by ensuring that the agency implementing the immigration statute provides a fair review of the individual interests at stake. If the agency fails to do so, then its action is arbitrary and capricious and must be reversed.

Notes

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1. The Department of Homeland Security (DHS) includes U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE). 8 C.F.R § 1.1. The Executive Office for Immigration Review (EOIR) includes the Board of Immigration Appeals (BIA), immigration courts, and the Office of the Chief Administrative Hearing Officer, Office of Policy, and the Office of the General Counsel. 8 C.F.R. § 1003.0.

2. BIA precedent decisions "serve as precedents in all proceedings involving the same issue or issues" and "are binding on all officers and employees of DHS or immigration judges." 8 C.F.R. § 1003.1(g).

3. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009.

4. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (deference to agency interpretation of statutes); *Auer v. Robbins*, 519 U.S. 452 (1997) (deference to agency interpretation of regulations).

5. In recent years the *Chevron* doctrine has been under attack as giving courts too little role to play in overseeing agency policy decisions, resulting in an excessive concentration of power in agencies. *See, e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (then-Circuit Judge Gorsuch, concurring). Indeed, in light of these concerns, the Supreme Court is considering whether to overturn *Chevron*. *See Loper Bright Enters. v. Raimondo*, No. 22-451, *and Relentless, Inc. v. Dep't of Commerce*, No. 22-1219. For purposes of this article, I assume that *Chevron*'s general framework (the two-step analysis) remains in place.

6. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(B) (eliminating review of certain discretionary decisions); § 1252(a)(2)(C) (eliminating review of removal orders based on criminal offenses); § 1226(e) (eliminating review of decisions to detain noncitizens); § 1252(e) (restricting review of expedited removal policies and expedited removal orders); § 1252(f)(1) (limiting court's authority to issue injunctive relief); § 1252(g) (eliminating jurisdiction to review decisions to execute removal orders).

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7. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) ("*[M]any* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation." (emphasis in original)); *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1966 (2020) ("A major objective of IIRIRA was to protect the Executive's discretion from undue interference by the courts." (cleaned up)).

8. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (there is a "strong presumption in favor of judicial review of administrative action"); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (noting the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action").

9. *INS v. St. Cyr*, 533 U.S. at 300.

10. *See, e.g.*, *Sepulveda v. Gonzales*, 407 F.3d 59, 63 (2d Cir. 2005) ("§ 1252(a)(2)(B) does not bar judicial review of nondiscretionary, or purely legal, decisions"); *Succar v. Ashcroft*, 394 F.3d 8, 19 (1st Cir. 2005) (rejecting the government's argument that § 1252(a)(2)(B) eliminated review of "the legal question of interpretation of the statute as to whether an alien is eligible for consideration of relief"); *Morales-Morales v. Ashcroft*, 384 F.3d 418, 423 (7th Cir. 2004) (the "question of statutory interpretation" is a question of law and "[a]s such, it falls outside § 1252(a)(2)(B)'s jurisdiction-stripping rule"); *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1005 (9th Cir. 2003) ("§ 1252(a)(2)(B)(i) does not preclude our review of [petitioner's] constitutional claim"); *Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331, 1333 (11th Cir. 2003) ("§ 1252(a)(2)(B) allows review of substantial constitutional challenges to the INA").

11. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231.

12. There is an open question whether § 1252(a)(2)(B) applies to preclude review of discretionary decisions made outside the context of removal proceedings and if so, whether § 1252(a)(2)(D) restores review of constitutional claims and questions of law in that context. Although § 1252(a)(2)(B) appears in a section of the code entitled "Judicial Review of Orders of Removal," most courts have held that this provision applies more broadly and restricts review of discretionary decisions not only in the context of removal proceedings but also outside the removal context. *See, e.g.*, *Polfliet v. Cuccinelli*, 955 F.3d 377, 381-82 (4th Cir. 2020) (§ 1252(a)(2)(B)(ii) precludes jurisdiction to review USCIS decision to revoke a visa petition); *Mousavi v. USCIS*, 828 F. App'x 130, 133 (3d Cir. 2020) (no jurisdiction to review USCIS denial of national interest waiver); *Lee v. USCIS*, 592 F.3d 612, 620 (4th Cir. 2010) (§ 1252(a)(2)(B)(i) precludes jurisdiction to review USCIS's denial of adjustment of status; denial reviewable only in a petition for review if petitioner is placed in removal proceedings and application is denied); *Hassan v. Chertoff*, 543 F.3d 564, 566 (9th Cir. 2008) (no jurisdiction to review USCIS's denial of adjustment of status). Moreover, although § 1252(a)(2)(D) restores judicial review over constitutional claims and questions of law, that provision applies in "a petition for review filed with an appropriate court of appeals in accordance with [§ 1252]"). Thus, some courts have held that where § 1252(a)(2)(B) applies outside removal proceedings, courts do not have jurisdiction to review constitutional claims and questions of law. *See, e.g.*, *Shabaj v. Holder*, 718 F.3d 48, 51 (2d Cir. 2013) (§ 1252(a)(2)(D) does not restore jurisdiction for review of USCIS's denial of INA § 212(i) waiver); *Abuzeid v. Mayorkas*, 62 F.4th 578 (D.C. Cir. 2023) (constitutional questions and questions of law can be reviewed only after the noncitizen is put in removal proceedings and the BIA makes a final decision on the application for adjustment of status); *Britkovvy v. Mayorkas*, 60 F.4th 1024, 1031-32 (7th Cir. 2023) (for arriving noncitizen, review

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of constitutional claims and questions of law regarding USCIS's denial of adjustment of status not permitted). The Supreme Court has left this question open. *See Patel v. Garland*, 142 S. Ct. 11614, 1626-27 (2022).

13. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

14. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

15. *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

16. 5 U.S.C. § 706(2)(A).

17. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

18. *See, e.g.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (challenge to agency decision to terminate the DACA program not barred by § 1252(b)(9) because that provision is a "targeted" and "narrow" provision that is "certainly not a bar where … the parties are not challenging any removal proceedings"); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (§ 1252(g) limits review only of "three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'… It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings."); *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (§ 1252(g) does not "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General"); *Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019) (§ 1226(e) "applies only to 'discretionary' decisions about the 'application' of § 1226 to particular cases"; it does not block lawsuits challenging the agency's decision to adopt general policies). Section 1252(f)(1) is relevant, but it is a limitation on relief that can be granted in certain lawsuits, not a provision that limits jurisdiction.

19. *Kucana v. Holder*, 558 U.S. 233, 251 (2010) ("§ 1252(a)(2)(B)(ii) precludes judicial review only when the statute itself specifies the discretionary character of the Attorney General's authority"). *See also Musunuru v. Lynch*, 831 F.3d 880, 887-88 (7th Cir. 2016) (§ 1252(a)(2)(B)(ii) does not bar challenge to procedures used in making discretionary decisions); *Mantena v. Johnson*, 809 F.3d 721, 728 (2d Cir. 2015) (no authority to support the view that procedures used to make discretionary decisions are shielded from review); *Kurapati v. USCIS*, 775 F.3d 1255, 1262 (11th Cir. 2014) (§ 1252(a)(2)(B)(ii) does not apply to claim that USCIS failed to follow the correct procedure to revoke visa, which is "not within USCIS's discretion"); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 135 (D.D.C. 2018) ("While § 1252(a)(2)(B)(ii) undoubtedly bars judicial review of individual parole decisions, courts have declined to apply it to claims challenging the legality of policies and processes governing discretionary decisions under the INA."); *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 369 (S.D.N.Y. 2019) ("The plaintiffs do not seek to litigate individual claims but rather a policy the agency uses to adjudicate those claims."); *Doe 1 v. Mayorkas*, 530 F. Supp. 3d 893, 904 (N.D. Cal. 2021) (§ 1252(a)(2)(B)(ii) "applies to decisions made to individual applications," not to a "challenge of immigration policy").

20. *See, e.g.*, *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 630-31 (D.C. Cir. 2020).

21. As explained below, under *Chevron* step two, courts review the BIA's decision under a standard that is "in substance" the same as APA's "arbitrary or capricious" standard. *See Judulang v. Holder*, 565 U.S. 42, 52, n.7 (2011). According to APA § 706(2)(A), the reviewing court will set aside agency action that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

22. 142 S. Ct. 1614, 1626-27 (2022).

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23. Section 1182(a)(6)(C)(ii) makes inadmissible a person who "has falsely represented himself or herself to be a citizen of the United States for any purpose or benefit under this Act … or any other Federal or State law." The BIA gave its official interpretation to § 1182(a)(6)(C)(ii) in *Matter of Richmond*, 26 I&N Dec. 779, 786-87 (BIA 2016), which held that the provision applies when the applicant (1) makes a false representation of citizenship (2) that is material to a purpose or benefit under the law (3) with the subjective intent of obtaining the purpose or benefit.

24. *Patel v. Garland*, 142 S. Ct. at 1622.

25. *Id.* at 1623. *See also Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1067 (2020).

26. *See, e.g.*, *Alzainati v. Holder*, 568 F.3d 844, 851 (10th Cir. 2009) (jurisdiction under § 1252(a)(2)(D) to review alleged due process violation).

27. *See, e.g.*, *Ojo v. Garland*, 25 F.4th 152, 165 (2d Cir. 2022) (jurisdiction under § 1252(a)(2)(D) to review whether "the BIA's decision is based on the wrong legal standard for changed circumstances"); *Galeano-Romero v. Barr*, 968 F.3d 1176, 1176 (10th Cir. 2020) (under § 1252(a)(2)(D) the court retains jurisdiction over questions of law that arise from the BIA's interpretation of the hardship standard; thus, the court has jurisdiction to hear a claim that the BIA improperly required the petitioner to have more than one U.S. citizen child in order to qualify for hardship relief); *Alimbaev v. U.S. Att'y Gen.*, 872 F.3d 188 (3d Cir. 2017) (BIA misapplied the "clearly erroneous" standard when it reversed the immigration judge's favorable credibility determination and denied adjustment of status as a matter of discretion); *Arteaga-de Alvarez v. Holder*, 704 F.3d 730, 737 (9th Cir. 2012) (review of decision finding no exceptional and extremely unusual hardship; "we have jurisdiction to review whether the BIA made a hardship determination based on an erroneous legal standard"); *Champion v. Holder*, 626 F.3d 952, 956 (7th Cir. 2010) (petitioner's "allegation that the BIA ignored the evidence she presented concerning [her ex-husband's] potential deportation was a good faith claim of legal error that we may review").

28. *Wilkinson v. Garland*, 601 U.S. ___ (2024). *Wilkinson* is especially significant because the Court held that there is jurisdiction to review the hardship decision in cancellation of removal cases, reversing over 20 years of lower court cases holding to the contrary. *See, e.g.*, *Romero-Torres v. Ashcroft*, 327 F.3d 887, 891 (9th Cir. 2003); *Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331, 1332 (11th Cir. 2003).

29. *See* 8 C.F.R. § 1003.1(g). *See also* Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 Admin. L. Rev. 647, 670 (2008) ("[T]he BIA has overwhelmingly been the entity responsible for the development of immigration law via administrative adjudication…. The BIA has … regularly exercised its authority to make law via administrative adjudication, issuing an average of forty-eight precedential decisions a year.").

30. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

31. *Id.* at 843 n.9.

32. That presumption is a heavy and controversial lift. It is not at all clear that legislative ambiguity is *sub silentio* an expression of congressional intention to delegate authority to the agency. *See, e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (then circuit judge Gorsuch, concurring) ("*Chevron*'s claim about legislative intentions is no more than a fiction—and one that requires a pretty hefty suspension of disbelief at that"). It is, perhaps, this presumption that more than anything else occasions the concern that *Chevron* allows agencies to swallow up power—the power to interpret statutes—that should be left to the judiciary. In any event, the agency does not get a free pass just because there is some ambiguity on an initial superficial reading

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of the statute. *Chevron* states that courts must first exhaust the "traditional tools" of statutory interpretation and must carefully analyze the statutory text, its context in the overall legislative scheme, legislative history and prior judicial interpretations. *See, e.g.*, *Castaneda v. Souza*, 810 F.3d 15, 23 (1st Cir. 2015) (en banc) ("while *Chevron* is a famous doctrine, much precedent cautions us not to be so star-struck by it that we must defer to the agency at the first sign of uncertainty about the meaning of the words that Congress chose").

For a discussion of which canons of statutory construction should be regarded as "traditional tools," see *Arangure v. Whitaker*, 911 F.3d 333, 339-42 (6th Cir. 2018), concluding that "most canons are 'traditional tools' of statutory interpretation that should be deployed in *Chevron* step one."

33. *See Judulang v. Holder*, 565 U.S. 42, 52, n.7 (2011) (whether the court reviews the BIA's interpretation under § 706(a)(2) as a policy decision or under *Chevron* step two as a matter of statutory interpretation does not matter because in either event "our analysis would be the same"; "under *Chevron* step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance'"). *See also Nat'l Ass'n of Regulatory Util. Comm'rs v. Interstate Commerce Comm'n*, 41 F.3d 721, 726 (D.C. Cir. 1994) ("the inquiry at the second step of *Chevron* overlaps analytically with a court's task under the [APA] ... in determining whether agency action is arbitrary and capricious (unreasonable)"); *AFL-CIO v. Brock*, 835 F.2d 912, 913 (D.C. Cir. 1987) (at *Chevron* step two, "we will overturn an agency rule if the action is found to have been 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" citing APA § 706(2)(A) and *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-14 (1971)). *See also Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 476 (D.C. Cir. 2020) (noting that "[n]ew rules set through adjudication must meet the same standard of reasonableness as notice and comment rulemaking").

34. 139 S. Ct. 2400 (2019).

35. *Id.* at 2415.

36. *Id.*

37. *Id.*

38. *Id.* at 2416.

39. *Id.*

40. *Id.* at 2417.

41. *Id.* at 2417-18 (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012)).

42. *See, e.g.*, *Innova Sols., Inc. v. Baran*, 983 F.3d 428, 433 (9th Cir. 2020) ("USCIS's unreasonable reading of the regulatory language [regarding whether a bachelor's degree is "normally" required for a specialty occupation] is ... arbitrary and capricious."). *See also Nat'l Org. of Veterans' Advocates, Inc. v. Sec. of Veterans Affairs*, 48 F.4th 1307 (D.C. Cir. 2022) (VA's interpretation of ambiguous regulation found to be arbitrary and capricious); *Circus Circus Casinos*, 961 F.3d at 483 ("Courts do not defer to an agency's arbitrary and capricious interpretation of its own standard.").

43. *Kisor*, 139 S. Ct. at 2418.

44. The Supreme Court has described the "archetypal" *Chevron* step two question as a question "about how best to construe an ambiguous term in light of competing policy interests." *City of Arlington v. FCC*, 569 U.S. 290, 304 (2013). *See also Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285, 1293 (D.C. Cir. 1989) (the agency "is called upon to balance ... legislative policies" that may be "in tension");

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Valenzuela Gallardo v. Lynch, 818 F.3d 808, 818 (9th Cir. 2016) (at *Chevron* step one, "when a court construes a statute . . . it is not making a policy choice, it is making a legal choice"; at *Chevron* step two, "[t]he policy choice remains with the agency").

45. *See, e.g.*, *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014) ("The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice."); *Pub. Serv. Comm'n of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 342 (1983) (overturning the Federal Energy Regulatory Commission's interpretation of the Natural Gas Policy Act of 1978 because the interpretation was "contrary to the history, structure, and basic philosophy of the [Act]"); *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 44 (D.D.C. 2020) (USCIS policy requiring applicants to provide facts and supporting evidence for every element of the asylum claim at the initial credible fear interview "exceeded the reasonable boundaries of any ambiguity to be found in the statute and related regulations").

46. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). *See also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980, 1003 (2005) (filling the gaps in an ambiguous statute typically involves "difficult policy choices that agencies are better equipped to make than courts," and deference is appropriate if the agency "makes . . . use of its expert policy judgment to resolve these difficult questions"); *United States v. Shimer*, 367 U.S. 374, 383 (1961) (the agency is called on to make "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute").

47. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (the court must be "satisfied that the agency has taken a hard look at the issues with the use of reasons and standards"). *See generally* Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 Fordham L. Rev. 2359 (2018) (arguing that at *Chevron* step two courts should not be involved in scrutiny of the agency's legal reasoning interpreting the statute (which should take place at step one) but should give close scrutiny to the agency's policy reasoning under the "hard look" doctrine of *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).

48. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *See also Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (when determining whether an agency's policy choice is arbitrary, irrational, or not in accordance with the law, the court must "engage in a substantial inquiry, . . . a thorough, probing, in-depth review of [the] discretionary agency action").

49. *See, e.g.*, Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 Tex. L. Rev. 83, 129 (1994) ("In reviewing an agency's interpretation, courts should require the agency to identify the concerns that the statute addresses and explain how the agency's interpretation took those concerns into account. In addition, the agency should explain why it emphasized certain interests instead of others. . . . The agency should also respond to any likely contentions that its interpretation will have deleterious implications.").

50. 576 U.S. 743 (2015).

51. *Id.* at 750 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43, describing the "arbitrary and capricious" standard).

52. 576 U.S. at 751.

53. *Id.* at 752.

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54. *Id.* at 753.

55. *Id.* at 778.

56. *Id.* at 760.

57. 579 U.S. 211 (2016).

58. *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1277 (9th Cir. 2015) (citing *Chevron*, 467 U.S. at 844).

59. *Encino Motorcars LLC v. Navarro*, 579 U.S. at 223.

60. *Id.* at 221.

61. 567 U.S. 142 (2012).

62. 29 U.S.C. § 213(a)(1).

63. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. at 155.

64. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

65. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. at 159 (quoting *Skidmore*, 323 U.S. at 140).

66. *Id.* at 159.

67. *See* Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 Fordham L. Rev. 2359, 2368 (2018) (arguing that *Michigan v. EPA* and *Encino Motorcars* "signal a subtle yet momentous shift [in the *Chevron* deference doctrine] . . . . [It] augurs well for the incorporation of meaningful arbitrary and capricious review at [*Chevron*] Step Two.").

68. 865 F.3d 585 (D.C. Cir. 2017).

69. *Id.* at 602.

70. *Id.* at 601.

71. *Id. See also Animal Legal Defense Fund, Inc. v. Perdue*, 872 F.3d 602, 611, 619 (D.C. Cir. 2017) (citing *Michigan v. EPA* for the proposition that at *Chevron* step two the agency's exercise of its delegated authority is reviewed "under the traditional 'arbitrary and capricious' standard," and finding the agency's decision arbitrary and capricious because "its decision runs counter to the evidence allegedly before it"); *Suncor Energy, Inc. v. EPA*, 50 F.4th 1339, 1353-54, 1357-58 (10th Cir. 2022) (citing *Kisor*, finding the EPA's interpretation of the ambiguous term "refinery" not entitled to *Auer* deference; the interpretation was made by a lower-level agency official, had no precedential value for other parties, and was not the "fair and considered judgment" of the agency; the agency interpretation was rejected as arbitrary and capricious because the agency did not explain how the factors it considered were related to the purposes of the statute).

72. 333 F.3d 168 (D.C. Cir. 2003).

73. *Id.* at 177.

74. *Id.* at 179-80.

75. *Id.* at 179. *See also Animal Legal Defense Fund*, 872 F.3d at 619 ("Agency action may be consistent with the agency's authorizing statute and yet arbitrary and capricious under the APA."); *Rettig v. Pension Ben. Guaranty Corp.*, 744 F.2d 133, 152, 156 (D.C. Cir. 1984) (although the agency's interpretation of the statute was "not patently inconsistent with the statutory scheme," it was rejected because it had not "recognized legitimate competing considerations and evaluated them conscientiously").

76. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (an agency must "cogently explain why it has exercised its discretion in a given manner"); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 375 (1998) ("unreasoned decisionmaking . . . prevent[s] both consistent application of the [rule] by subordinate agency personnel . . . and effective review of the [rule] by the courts"); *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011) ("If

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an agency fails or refuses to deploy that expertise—for example, by simply picking a permissible interpretation out of a hat—it deserves no deference"); *CBS v. FCC*, 454 F.2d 1018, 1025 (D.C. Cir. 1971) ("Without such a requirement [of reasoned explanation], effective judicial review would be impractical if not impossible, and administrative litigants and the public generally would be set adrift on a potential sea of unconscious preference and irrelevant prejudice.").

77. 130 U.S. 581 (1889).

78. *Id.* at 606. *See also Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government.").

79. *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952).

80. *See, e.g.*, *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 343 (1909).

81. *See, e.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations,'" quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

82. *See, e.g.*, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (rejecting the BIA's interpretation of the term "illicit trafficking in a controlled substance" as a matter of statutory interpretation without considering whether any deference should be given to the BIA); *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (noting "the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country"); *Judulang v. Holder*, 565 U.S. 42 (2011) (rejecting the BIA's interpretation of eligibility for an INA § 212(c) waiver as arbitrary and capricious because it "neither focuses on nor relates to an alien's fitness to remain in the country"); *Vartelas v. Holder*, 566 U.S. 257, 267-68 (2012) (rejecting the government's retroactive application of an immigration statute in light of the fact that the petitioner faces "potential banishment," and recognizing "the severity of that sanction"; no mention of the government's plenary power over immigration); *Moncrieffe v. Holder*, 569 U.S. 184, 206 (2013) (rejecting without any mention of deference the BIA's interpretation of "illicit trafficking of a controlled substance" because "[its] approach defies 'the commonsense conception' of these terms"); *Mellouli v. Lynch*, 575 U.S. 798, 810 (2015) (rejecting the BIA's interpretation of the statute making a person "convicted of a violation of [a state law] relating to a controlled substance" deportable; "[b]ecause it makes scant sense, the BIA's interpretation, we hold, is owed no deference"); *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 391, 397 (2017) (interpreting the term "sexual abuse of a minor" using "the normal tools of statutory interpretation" and rejecting the government's argument that "ambiguities should be resolved by deferring to the Board's interpretation"); *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1485 (2021) (in the context of determining what the statute requires when a Notice to Appear is issued, rejecting the government's "retreat to policy arguments and pleas for deference").

83. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) ("The Government also looks for support to cases holding that Congress has 'plenary power' to create immigration law, and that the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in that area. But that power is subject to important constitutional limitations"). *See also Osorio-Martinez v. U.S. Att'y Gen.*, 893 F.3d 153, 175 (3d Cir.

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2018) ("the plenary-power doctrine—while affording Congress great discretion—'is subject to important constitutional limitations,' and it is the province of the courts to enforce those constraints"); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 123 (2d Cir. 2009) (plenary power is based on "prudential considerations, perhaps arising from separation of powers concerns, counsel against exercising normally available jurisdiction"). *See generally* Kevin R. Johnson, *Immigration in the Supreme Court, 2009-2013: A New Era of Immigration Law Unexceptionalism*, 68 Okla. L. Rev. 57, 64-65 (2015) (arguing that "without eliminating the doctrine, the Court has silently moved away from anything that might be characterized as immigration exceptionalism.... It therefore is difficult to convincingly contend that the Court consistently extends extreme, undue, or exceptional deference to the government's immigration decision-making"); *id.* at 111-16 (arguing that over the past decade the Supreme Court has been "mainstreaming" immigration law); David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 Okla. L. Rev. 29, 32 (2015) (noting in recent Supreme Court decisions "a de facto sparsity of judicial deference to the government").

84. 555 U.S. 511 (2009).

85. INA § 101(a)(42)(B).

86. The BIA was mistaken in its statutory analysis because its decision was based on case law under the Displaced Persons Act rather than under Refugee Act of 1980.

87. *Negusie*, 555 U.S. at 524.

88. *Id.* at 523 (quoting *Cajun Elec. Power Coop., Inc. v. Fed. Energy Regulatory Comm'n*, 924 F.2d 1132, 1136 (D.C. Cir. 1991)).

89. *See also Iavorski v. INS*, 232 F.3d 124, 133 (2d Cir. 2000) (the BIA's interpretation of 8 U.S.C. § 1229a(c)(6)(C)(i) as not allowing for equitable tolling of the 90-day deadline for filing a motion to reopen was arbitrary and capricious; the court held that the statute allows for equitable tolling, but "[e]ven if we were not satisfied that the intent of Congress was clear, the BIA failed to "articulate a logical basis for its judgment"; the BIA assumed without analysis that Congress intended that the 90-day deadline was jurisdictional and thus was not based on a consideration of the relevant factors).

90. 565 U.S. 42 (2011).

91. *Id.* at 53. In *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021), the Ninth Circuit considered a challenge to a new rule adopted by the Trump Administration that individuals who enter the United States without inspection are ineligible for asylum. The court rejected the rule as inconsistent with the statute but held that "even if the text of section 1158(a) were ambiguous, the Rule fails at the second step of *Chevron* because it is an arbitrary and capricious interpretation of that statutory provision." *Id.* at 671. Under 8 U.S.C. § 1158, eligibility for asylum requires the consideration of discretionary factors; the method of entry should be "carefully evaluated in light of the unusually harsh consequences which may befall an alien." Indeed, "the danger of persecution should generally outweigh all but the most egregious of adverse factors." *Id.* Because the rule focused only on efforts to control the border and failed to consider the "unusually harsh consequences" for individuals fleeing persecution, the policy choice was arbitrary and capricious.

92. *Judulang v. Holder*, 565 U.S. at 58. *Mellouli v. Lynch*, 575 U.S. 798 (2015), and *Moncrieffe v. Holder*, 569 U.S. 184 (2013), both of which involved the interpretation of ambiguous terms, are also relevant. In *Mellouli*, the petitioner had been convicted for possession of drug paraphernalia (a sock, used to conceal unnamed pills). The BIA held that the conviction for possession of the sock was a deportable offense "relating to a

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controlled substance," even though a conviction for possession of the pills would not have constituted deportable offense. That interpretation of the statute did not merit *Chevron* deference. In the words of the Supreme Court: "The incongruous upshot [of the BIA's interpretation] is that an alien is not removable for possessing a substance controlled only under Kansas law, but he is removable for using a sock to contain that substance." *Mellouli v. Lynch*, 575 U.S. at 810. In effect, the Court held that the BIA's interpretation was arbitrary and capricious because the penalty it sought to impose for possession of drug paraphernalia was excessively harsh. In *Moncrieffe*, without suggesting that any deference is due, the Court rejected the BIA's interpretation of the statute according to which sharing a small amount of marijuana for no remuneration constitutes "illicit trafficking" and thus an "aggravated felony." The BIA's interpretation subjects an individual to mandatory deportation "no matter how compelling his case," *Moncrieffe v. Holder*, 569 U.S. at 187, and "defies the 'commonsense conception' of these terms." *Id.* at 206.

93. 140 S. Ct. 1891 (2020).

94. *Id.* at 1913 (citing *Encino Motorcars*).

95. *Id.* at 1914.

96. *Id.* at 1913.

97. *Id.* at 1915.

98. *Id.* at 1914.

99. *See, e.g.*, *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.").

100. *See, e.g.*, *Munoz v. DOS*, 50 F.4th 906, 916 (9th Cir. 2022), *petition for cert granted*, 92 U.S.L.W. 3174 (2024) (the denial of an immigrant visa to a noncitizen spouse "is a direct restraint on the citizen's liberty interests protected under the Due Process Clause . . . because it conditions enjoyment of one fundamental right (marriage) on the sacrifice of another (residing in one's country of citizenship)"); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) (because "[f]reedom of personal choice in matters of marriage and family life is . . . one of the liberties protected by the Due Process Clause," U.S. citizen spouse has a protected liberty interest in the adjudication of the noncitizen's visa application). The Supreme Court has granted cert to determine whether a consular officer's refusal of a visa to a U.S. citizen's noncitizen spouse impinges upon a constitutionally protected interest of the citizen. *DOS v. Munoz*, 92 U.S.L.W. 3174 (2024).

101. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest at issue—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("[T]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("[T]he Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children."). *See also M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 120 (D.D.C. 2018) (recognizing that the enforcement of immigration laws may "substantially burden[]" the constitutional "right to family integrity").

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102. *See, e.g.*, *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) (rejecting the government's interpretation of the statute, noting that "[t]he hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme"); *DiPasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947) (immigration laws are designed to "rid ourselves of those who abuse our hospitality," but if pressed too far, deportation provisions will subject noncitizens to "meaningless and irrational hazards").

103. Whether the interests at stake are deemed to be "constitutional rights" is of no moment. These are clearly important interests held by individuals affected by immigration policies. *See, e.g.*, *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987) ("it is universally recognized that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the state'"); H.R. Rep. No. 1365, 82d Cong., 2d Sess., 29 (1952), *as reprinted in* 1952 U.S.C.C.A.N. 1653, 1680 (recognizing "the underlying intention of our immigration laws regarding the preservation of the family unit"); H.R. Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957), *as reprinted in* 1957 U.S.C.C.A.N. 2016, 2020 (legislative history of the INA reflects that "Congress … was concerned with the problem of keeping families of United States citizens and immigrants united"). These interests must be considered when the agency decides how to interpret an open statute.

104. *See, e.g.*, *Matter of Sanchez-Lopez*, 26 I&N Dec. 71, 74 n.3 (BIA 2012) ("neither the Board nor the Immigration Judges have the authority to rule on the constitutionality of the statutes that we administer").

105. 23 I&N Dec. 117 (BIA 2001).

106. *See* 8 U.S.C. § 1226(c)(1)(A)-(D), listing as subject to mandatory detention persons who have committed certain criminal offenses.

107. *Matter of Rojas*, 23 I&N Dec. at 120.

108. *Id.* at 122 (emphasis in original). It is clearly incorrect to state that Congress was concerned with detaining and removing "*all* criminal aliens." There are many criminal offenses that are not grounds for deportation or inadmissibility, and even where a criminal offense is a ground for deportation or inadmissibility, in many cases a waiver is available to protect the constitutional rights of noncitizens and their family members.

109. The Supreme Court has since adopted the BIA's interpretation as a matter of statutory analysis, holding that there is no ambiguity in the statute with respect to the "when released" provision. *See Nielsen v. Preap*, 139 S. Ct. 954 (2019). However, the Supreme Court recognized that this interpretation presents significant constitutional problems and remanded the case to the lower courts to consider whether the statute violates due process. *Id.* at 972.

110. *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (citation and internal quotation marks omitted). Three circuit courts upheld the BIA's decision in *Rojas* as a "permissible" construction of the ambiguities in the statute at *Chevron* step two. *See Hosh v. Lucero*, 680 F.3d 375, 380-81 (4th Cir. 2012); *Lora v. Shanahan*, 804 F.3d 601, 612 (2d Cir. 2015); *Olmos v. Holder*, 780 F.3d 1313, 1322 (10th Cir. 2015). None of those decisions, however, required the BIA to go beyond a parsing of the statutory language; in other words, none of the decisions required the BIA to evaluate the competing policies at stake and bring its expertise to bear in light of competing individual interests at stake. *See Negusie v. Holder*, 555 U.S. 511, 523 (2009) (BIA is not entitled to deference at step two if it "erroneously contends that Congress' intent has been clearly expressed and has rested on that ground" without weighing the competing policies at issue); *PDK Labs. v. U.S. Drug Enforcement Agency*,

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362 F.3d 786, 797-98 (D.C. Cir. 2004) ("In precisely those kinds of cases [where the statute is ambiguous], it is incumbent upon the agency not to rest simply on its parsing of the statutory language. It must bring its experience and expertise to bear in light of competing interests at stake.").

111. *Matter of L–*, 4 I&N Dec. 556, 557 (BIA 1951). *See also Matter of Sanchez-Lopez*, 26 I&N Dec. 71, 74 n.3 (BIA 2012) ("[N]either the Board nor the Immigration Judges have the authority to rule on the constitutionality of the statutes that we administer."); *Matter of U–M–*, 20 I&N Dec. 327, 334 (BIA 1991) ("It is not within the province of the Board to pass upon the constitutionality of the statutes it administers."); *Matter of Cenatice*, 16 I&N Dec. 162, 166 (BIA 1977) ("[I]t is not within the province of this Board to pass upon the constitutionality of the statutes it administers, but rather is solely within the power and capacity of the United States courts to declare them unconstitutional."); *Matter of Ramos*, 15 I&N Dec. 671, 675 (BIA 1976) ("[W]e do not entertain constitutional challenges to the statutes we administer."); *Matter of Chery & Hasan*, 15 I&N Dec. 380, 382 (BIA 1975) ("[N]either this Board nor the immigration judge may rule on the constitutionality of the statutes which we administer."); *Matter of Lennon*, 15 I&N Dec. 9, 25-26, 27 (BIA 1974) (noting that "[t]he term 'marihuana' is not defined in the Act, nor is the legislative history explicit as to the meaning to be given to the term," but then refusing to consider constitutional concerns in interpreting the term, stating "we have no power to consider a constitutional challenge to the statutes which we administer"). *See generally* Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. Rev. 485, 506 (2018) ("In dozens of decisions over the last sixty years, the BIA has held that it lacks the authority to consider the constitutionality of the statutory provisions it administers.").

112. *Panitz v. District of Columbia*, 112 F.2d 39, 42 (D.C. Cir. 1940). *See also Florida Gulf Coast Building & Construction Trades Council (Edward J. DeBartolo Corp.)*, 273 N.L.R.B. 1431, 1432 (1985) (the NLRB "will presume the constitutionality of the Act [it] administer[s]"); *Handy Andy, Inc.*, 228 N.L.R.B. 447, 452 (1977) (the NLRB lacks the authority "to determine the constitutionality of mandatory language in the Act"); *Johnson v. Robison*, 415 U.S. 361, 368 (1974) ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.").

113. *Howard Enterprises*, 1978 FTC LEXIS 538, *81 (FTC 1978).

114. *Id.* at *83.

115. *Id.* at *85.

116. *Id.*

117. *United Brotherhood of Carpenters & Joiners of America, Local Union No. 1506*, 355 N.L.R.B. 797 (2010).

118. 355 N.L.R.B. at 808. *See generally* Alina Das, *supra* note 111, at 527 (noting that some agencies routinely engage in constitutional analysis in administering and interpreting statutes).

119. Where the agency adopts policy through notice-and-comment rulemaking or by issuing executive guidelines, review is under APA § 706, which includes "arbitrary and capricious" review. *See, e.g.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914 (2020). If the agency adopts policy through adjudicative interpretation of a statute or regulation, then review occurs either under the *Chevron* doctrine (statutes) or *Auer* doctrine (regulations), which is "in substance" the same as APA's "arbitrary or capricious" standard. *See Judulang v. Holder*, 565 U.S. 42, 52, n.7 (2011).

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120. *See, e.g.*, *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) (courts must "exhaust 'all the textual and structural clues' bearing on [the] meaning [of the statute]"; once the court determines that meaning, "our 'sole function' is to apply the law as we find it, . . . not defer to some conflicting reading the government might advance").

121. *Negusie v. Holder*, 555 U.S. 511, 524 (2009) (the agency must consider the "difficult policy choices," "evaluate the evidence," and "bring its expertise to bear upon the matter").

122. *Michigan v. EPA*, 576 U.S. 743, 754 (2015) (an open statute "does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not"). *See also Animal Legal Defense Fund, Inc. v. Perdue*, 872 F.3d 602, 619 (D.C. Cir. 2017) ("Agency action may be consistent with the agency's authorizing statute and yet arbitrary and capricious under the APA.").

123. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency's decision is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem").

124. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 223 (2016) (agency decision is arbitrary and capricious where it says "almost nothing" to balance the competing interests at stake). *See also East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 672 (9th Cir. 2021) (new asylum policy arbitrary and capricious because it failed to take into account the harsh consequences imposed on asylum seekers and infringed on U.S. international law commitments); *UFW v. DOL*, 509 F. Supp. 3d 1225, 1242 (E.D. Cal. 2020) (wage decision that benefited some workers was arbitrary and capricious because the agency failed to consider impact of the decision on field and livestock workers).

125. *Regents*, 140 S. Ct. at 1914 (agency decision is arbitrary and capricious if it fails to consider the consequences that "radiate outward" and impact families and employers). *See also Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) (broad deference under *Auer* is "cabined . . . in varied and critical ways" and accordingly there is "a strong judicial role in interpreting rules"); *Humane Society v. Zinke*, 865 F.3d 585, 601 (D.C. Cir. 2017) (agency "cannot call it quits" after considering the impact of its decision on only one group, but rather must "look at the whole picture . . . , not just a segment of it").

126. Even if one takes the position that citizens and noncitizens do not have constitutional "rights" at stake in the immigration context, it cannot be denied that the interests have a constitutional dimension and are exceedingly important. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (what is at stake may be "all that makes life worth living"). *See also Hong v. Napolitano*, 772 F. Supp. 2d 1270, 1279 (D. Haw. 2011) (if the agency ignores the interests in family unity that are at stake, it has "entirely failed to consider an important aspect of the problem," quoting *Motor Vehicle*, 463 U.S. at 43).

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AILA Law Journal Symposium

Shaping Immigration Policy through the Federal Courts

March 21, 2024
Grand Hyatt Washington
Washington, D.C.
9:00 a.m.—1:00 p.m.

As Congress remains deadlocked and unable to enact sweeping immigration reform, the federal judiciary has become a crucial site for the evolution of immigration law. President Biden, like his predecessors, has relied on executive actions to reshape key elements of the immigration system. Many of the initiatives have been challenged in the courts with mixed results. To what extent do plaintiffs have standing to challenge f–ederal immigration policy? What does the future bode for Chevron deference? Each of the panels will discuss the current and future role of federal courts in shaping immigration policy in its various manifestations.

The topics being presented at today's symposium will be the subject of papers and transcripts collected in the Spring 2024 edition of the *AILA Law Journal*. In addition to papers by today's speakers, the symposium edition of the *Journal* authors will include articles by Robert Pauw on the role of courts in shaping immigration policy, and by Susan Akram on the fight to preserve access to asylum in the US, the UK, and Europe.

The AILA Law Journal

The *AILA Law Journal*, published under Fastcase's publishing arm Full Court Press, supports AILA's mission to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members. Articles range in topic, are timely, and encompass various dimensions of immigration law perspectives in the United States, from policy to pragmatic.

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Final Symposium Handout

PROCEEDINGS

9:00 a.m.–9:10 a.m.
Introductory Remarks
Cyrus D. Mehta
Editor-in-Chief, AILA Law Journal; Founder and Managing Partner, Cyrus D. Mehta & Partners, PLLC

9:10 a.m.–10:00 a.m.
Panel 1: Creating Pathways for STEM Workers Through Non-Legislative Means
William A. Stock, Moderator
Editorial Board Member, AILA Law Journal; Managing Partner, Klasko Immigration Law Partners, LLP

Simon T. Nakajima
Assistant Director for STEM Immigration
White House Office of Science and Technology

Diane Rish
Editorial Board Member, AILA Law Journal; Senior Manager, Immigration, Salesforce

Amy M. Nice
Distinguished Immigration Fellow and Visiting Scholar, Cornell Law School

10:05 a.m.–11:00 a.m.
Panel 2: DACA Litigation and the Opportunity for All Campaign
Kaitlyn A. Box, Moderator
Editorial Board Member, AILA Law Journal; Senior Associate, Cyrus D. Mehta & Partners, PLLC

Ahilan T. Arulanantham
Professor from Practice and Co-Director of the Center for Immigration Law and Policy (CILP), UCLA School of Law

Anil Kalhan
Professor of Law, Drexel University

11:05 a.m.–12:00 p.m.

Panel 3: The Role of Federal Courts in Shaping Asylum Law:
A Comparative Analysis

Dree Collopy, Moderator
Author, AILA's Asylum Primer; Partner, Benach Collopy LLP

Rebecca Sharpless
Editorial Board Member, AILA Law Journal; Associate Dean for Experiential Learning, University of Miami School of Law; Professor of Law and Director, Immigration Clinic, University of Miami School of Law

Sabrineh Ardalan
Clinical Professor of Law, Harvard Law School; Director, Harvard Immigration and Refugee Clinic

12:05 pm – 1:00 pm

Individual Presentations

Thomas Ragland, Moderator
Editorial Board Member, AILA Law Journal; Member, Clark Hill PLC

Correcting Course on Matter of Lozada through the Federal Courts and Executive Action
Rekha Sharma-Crawford (*Partner, Sharma-Crawford Attorneys at Law*), Sui Chung (*Attorney, Immigration Law & Litigation Group*), Sarah Owings (*Attorney, Owings MacNorlin, LLC*), Susan Roy (*Immigration Attorney, Law Office of Susan G. Roy, LLC*)

"Circumvention of Lawful Pathways" or Circumvention of the Law?
Jenna L. Ebersbacher
Associate, Brown Immigration Law

Legislative History of the APA as a Tool to Minimize Government Use of the Foreign Affairs Exception
Jean Binkovitz (*Attorney at Law, Law Office of Jean Binkovitz, LLC*) and Eric Eisner (*JD, Yale Law School; PhD student in the Johns Hopkins University Department of History*)

Agency-Initiated Policy Changes in Response to Increased Immigration Litigation
Kathryn Brady (*Department Head*) and Franchel Daniel (*Senior Staff Attorney*)
Immigration Litigation Department, Legal Division, Muslim Legal Fund of America

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